

## CHAPTER 3

### RIGHT TO LAND

#### 1. INTRODUCTION

The government has developed policies and passed several pieces of legislation with a view to redress inequalities in land distribution resulting from the unjust laws of the colonial and apartheid governments. In 1994, the government adopted the Reconstruction and Development Programme (RDP) which provided for the redistribution of 30 per cent of agricultural land over five years<sup>1</sup> as one of its aims. In 1997, the government adopted the White Paper on South African Land Policy to inform land reform in this country.<sup>2</sup>

In order to meet these objectives, the White Paper had three guiding tenets, namely, Land Redistribution, Land Restitution, and Land Tenure Reform. Land redistribution seeks to facilitate the right of access to land for residential and farming purposes; land restitution seeks to compensate and restore land to those who lost land because of colonial and apartheid laws; and secure land tenure programme is directed towards people without land tenure security. For the government, tackling the land question would enhance poverty reduction.

Thus, the right to gain access to land is based on the idea that there are people who need land and those who are not secure on the land they live on. It entails satisfying that need for the landless to acquire land and have resources to sustain a livelihood.

#### Constitutional Provisions

The Constitution of the Republic of South Africa guarantees equal access to land for all the citizens. According to section 25(5) of the Constitution the government ‘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’.<sup>3</sup> Land rights are viewed in the context of property rights that are protected under the Constitution. Section 25 (7) states that a person or a community that lost property post-1913 due to discriminatory laws is entitled to restitution or redress.<sup>4</sup>

Property rights, particularly land rights, are closely connected to the problem of housing. It has been estimated that over a billion people in the world lack adequate housing, whereas another million do not have a home.<sup>5</sup>

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<sup>1</sup> *The Reconstruction and Development Programme: A Policy Framework* (1994). At <http://www.polity.org.za/govdocs/rdp/> visited 31 May 2002.

<sup>2</sup> White Paper on South African Land Policy, (April 1997). According to the White Paper, the land policy was pronounced with four objectives, namely: to correct past injustices; to engender reconciliation and stability; to promote economic growth; and to improve lives through the alleviation of poverty.

<sup>3</sup> Section 25 (5) of the Constitution.

<sup>4</sup> Section 25 (7) of the Constitution. Thus, a person or community that lost property because of the Land Act of 1913 ‘is entitled, to the extent provided by an Act of Parliament, either to restitution or equitable redress’.

<sup>5</sup> *Global Strategy for Shelter to the Year 2000*, UN doc. A/43/8/Add.1.

The Constitution is in agreement with international standards set by the United Nations on ensuring equal rights to property. For instance, 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.”<sup>6</sup>

The idea of gender equality in acquiring land for agrarian reform and land resettlement schemes is advanced by the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).<sup>7</sup> The CEDAW position emanates from the fact that women have been treated unfairly where tenure reform is concerned. It is from this departure that we also look into the problem of land tenure in relation to women.

The Constitutional Court in the *Grootboom* case recognised access to land as a socio-economic right. The Court concluded that economic and social rights provisions in the Constitution ‘entrench the right to land, to adequate housing and health care, food, water and social security. They protect the rights of the child and the right to education.’<sup>8</sup> This means that the State may use its resources to secure, redistribute or purchase land, actions which, by implication, would constitute reasonableness.<sup>9</sup> *Grootboom* views implementation as constituting the supreme act in the fulfilment of the constitutional obligation of the State. Reasonableness is measured by meeting the goals for which the policies and programmes were conceived.<sup>10</sup>

Therefore, reasonableness in this sense will comprise satisfying the desire by the landless to have access to the right to shelter and land.

Section 25 (1) of the Constitution is explicit in providing that no person ‘may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.’ *Grootboom* made a link between the right of access to land and the right of access to adequate housing.<sup>11</sup>

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<sup>6</sup> See SAHRC 2001. 3<sup>rd</sup> *Economic & Social Rights Report 1999/2000*. South African Human Rights Commission, 2001, p. 279. Several articles of the Convention Concerning Tribal and Indigenous Peoples in Independent Countries, 7 (1), 13, 14, 15, 16, 17, 18 and 19 (1991), give detailed account on the provisions for the said groups of people. The SAHRC’s 3<sup>rd</sup> Economic and Social Rights Report also refers to the Peasant Charter of the United Nations Food and Agricultural Organisation and the Convention Concerning Indigenous and Tribal People in Independent Countries, which require tenure reform and redistribution for the landless and emerging farmers, and indigenous people, respectively.

<sup>7</sup> Article 14(2)(h) of the Convention on the Elimination of all Forms of Discrimination Against Women (1979).

<sup>8</sup> *Government of the Republic of South Africa v Grootboom and others 2000* (11) BCLR 1169, para 19. Emphasis was on section 25(5) of the Constitution, which places responsibility on the State to create conditions enabling ‘... citizens to gain access to land on an equitable basis.’

<sup>9</sup> In defining reasonableness, the *Grootboom* judgment goes beyond mere passage of legislation and conception of policies and programmes, which are viewed as the initial steps in fulfilling the obligation of the State.

<sup>10</sup> These policies and programmes must be reasonable both in their conception and their implementation. The formulation of programmes is only the first stage in meeting the state’s obligations... An otherwise reasonable programme that is not reasonably implemented will not constitute compliance with the state’s obligation. *Grootboom*, para 42.

<sup>11</sup> Thus effectively recognising a linkage to section 26 of the Constitution, that provides that the State has an obligation to take reasonable measures to ensure the “progressive realisation of the right to adequate housing.” That right can only be realised when the right of access to land is itself realised.

This chapter seeks to examine the progress made between 2000 and 2002 by the Department of Land Affairs, provincial and local authorities with regard to land reform as provided for in section 25(5) of the Constitution.

## **2. POLICY, PROGRAMMES AND PROJECTS**

### **National Sphere**

Several policy developments took place during the reporting period that related to land restitution, redistribution and tenure reform programmes. The National Department of Land Affairs (DLA) reported the following policies instituted during the reporting period:

#### Land Restitution Policy

##### *Standard Settlement Offer Policy*

The Standard Settlement Offer Policy, which was developed during the reporting period, seeks to determine alternatives for restitution packages in respect of urban claimants. The main objective of this policy was to establish which options to consider for urban restitution claims. The report from the Department of Land Affairs revealed that this policy, which benefits urban restitution claimants, was introduced to facilitate negotiation for speedy settlement of a large number of claims. A number of goals were attained. For instance, through this policy, settlements were negotiated, the settlement process speeded, and more claims resolved.

##### *Policy on Betterment of Claims*

The DLA also adopted the Policy on Betterment of Claims, which seeks to determine guidelines and options regarding claims lodged on land rights lost under the apartheid government. The policy, which enhanced the processes of negotiating claim settlements, benefits mostly rural communities.

There was during the reporting period the implementation of the Policy on Labour Tenancy and submission of claims to the Minister for Approval in terms of section 42D of the Restitution of Land Rights Act, 1994. This policy seeks to benefit labour tenants and their families by recommending settlement and the restoration of the dispossessed land, alternative land or redress. According to the DLA, land was given back to labour tenants in several areas through this policy. In some instances, labour tenants received more land than was originally lost.

#### Redistribution Policy

In 2000, the Department of Land Affairs refined the Municipal Commonage Policy to include other agricultural activities as part of the programme. This policy addressed itself to land owned and controlled by municipalities and was supposed to be made available for grazing purposes for those people who lived near towns. The department did not supply further information on this issue.

### *Land Redistribution for Agricultural Development (LRAD)*

In August 2001, the Department of Land Affairs introduced the Land Redistribution for Agricultural Development (LRAD): a sub-programme of the Land Redistribution Programme (LRP). The DLA introduced this policy to stimulate development and to encourage commercial farming by African farmers.

This policy, according to the DLA, has two parts. One part has to do with the transfer of agricultural land to individuals and groups; the other part has to do with commonage projects to improve access to municipal and tribal land mainly for grazing purposes. Other beneficiaries of this sub-programme include historically disadvantaged rural people, particularly women and young people who live in rural areas. In December 2001, the programme had made available 60 ha of land to 2 681 applicants.

### Tenure Reform Policy

The Minister of Agriculture and Land Affairs approved a document on entitlements of people who were protected by the Interim Protection of Informal Land Rights Act (IPILRA), 31 of 1996 and the Extension of Security of Tenure Act (ESTA), 62 of 1997 with regard to the Disposal of State Land Act. Also, provision of grants for purposes of acquiring land for upgrading tenure security for previously disadvantaged groups. The IPILRA is aimed at disposing State land to people who actually own but have limited rights to the land and at transferring the right to land to long-term communal tribal or traditional areas. IPILRA is an interim measure instituted to protect the position of people with untitled land rights.

The department also instituted the Tenure Security Grant, which benefits labour tenants. This programme has four objectives, namely:

- to acquire land or rights in land for people who are protected under ESTA and the Labour Tenants Act;
- to provide tenure redress in terms of the Draft Communal Land Rights Act (2002);
- to acquire land for commonage in traditional areas; and
- to take charge of the process of land rights inquiry so as to determine the nature of certain rights and their rightful holders.

The draft proposal for this grant is still under review by provincial offices and the national office is still awaiting comments and inputs.

### *Benefits Policy*

The *Benefits Policy* provides for leasing of land in mostly communal areas to private users on behalf of various communities, commuting limited rights in State land to full ownership, and extending benefits of land to everyone in the community. However, no conclusion has been reached yet as discussions are in progress.

## **Provincial Sphere<sup>12</sup>**

### **Policy Measures**

#### *Formalisation and Upgrading and Development Programme*

Mpumalanga Province has put in place programmes that consider numerous categories of vulnerable groups. For example, the Formalisation and Upgrading and Development Programme which has two objectives: the promotion and transfer of land ownership rights to targeted and prioritised communities, and drafting of a Communal Land Rights Register. These programmes are directed towards beneficiaries in twelve existing rural communities (R188 villages) that have 48 000 households and the urban communities (R293 townships) and adjacent informal settlements that have informal settlements.

#### *Tenure Rights Dispute and Mediation Programme*

Tenure Rights Dispute and Mediation Programme, which is part of the provisions of the Interim Protection of Informal Land Rights Act, 1996 and the evolving reform legislation, was instituted to resolve disputes through development of viable settlement options. So far, six cases are at different stages of resolution, and involve 3306 households. Four of these cases have been resolved and formal tenure rights acquisition processes are at different levels.

The department has also instituted the resolution of farm worker and labour tenants eviction cases, under ESTA and LTA provisions. Thirteen cases are at different resolution and settlement stages, involving about 3 000 individuals. Eight cases have been resolved and a combination of on-farm and off-farm settlement development planning is underway. In addition, there are cases that are under investigation for purposes of identifying settlement compatible to state land for resolution.

The Eastern Cape's response bore no relevance to the report,<sup>13</sup> while Gauteng did not respond at all to this issue.

#### *Obligation to respect*

According to the Mpumalanga Land Reform Office, the targeted and prioritised communities are fully involved and participate in the tenure rights acquisition process, which is concerned with processes of signing community resolutions.

#### *Obligation to Protect*

The Mpumalanga Land Reform Office reported that the affected communities in the evictions/labour tenant cases are informed on their rights through workshops and information sessions, and there exists a task team to investigate the cases.

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<sup>12</sup> Only three provinces – Gauteng, Mpumalanga and the Eastern Cape have submitted their reports. Even so, the protocols were responded to scantily, as these provinces simply state that most of the questions can be sufficiently answered by the national Department of Land Affairs.

<sup>13</sup> The response to the protocol was mainly on agricultural issues, and not land reform.

### *Obligation to Promote and Fulfil*

The land reform programme, as driven by the Department of Housing and Land Administration, and jointly with the Department of Land Affairs and Department of Agriculture, Conservation and Environment, ensures that the tenure rights acquisition programme is strengthened for these affected communities.

The *Gauteng Farmer Settlement Programme* provides access to land ownership for the historically disadvantaged persons, thereby contributing to redressing race and gender imbalances to gaining access to land ownership patterns.

The department states that the integrated land eviction strategy deals with land eviction matters in a proactive, systematic and preventive manner. Through education on the Extension of Security of Tenure Act, landowners and occupiers can exercise their right of access to land in a formal and systematic way.

### *Vulnerable and Marginalised Groups*

According to the Mpumalanga department, all the categories of vulnerable groups are considered and addressed in all the policy programmes. According to the Gauteng Province Department of Land Affairs and Department of Agriculture, Conservation and Environment, the measures consider all people listed as marginalised, through workshops on relevant matters relating to land. These workshops are conducted in areas where the problems are occurring.

Each of the instituted measures create space and enabling conditions in which stakeholders on land issues, including categories of vulnerable groups, can relate in a sustainable and progressive way. The department has noted, however, that the effectiveness of the measures has yet to be assessed.

## **3. LEGISLATIVE MEASURES**

### **National Sphere**

The DLA reported that most of the legislation enacted in the previous reporting periods has not changed. However, few amendments were effected during the 2000/2002 reporting period:

- The Land Affairs General Amendment Act 11 (2000) amended section 2 of the Provision of Land and Assistance Act 126 of 1993. The amendment seeks to speed up land reform.
- Section 13 (1A) of the Land Reform (Labour Tenants Act) amended section 33 (1) to the effect that few labour tenants would gain tenure security on land.<sup>14</sup>

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<sup>14</sup> Other amendments were made to the Extension of Security Tenure Act 62 of 1997, but were minor and had no effect on policy direction.

*Obligations to respect, protect, promote and fulfil the right of access to land*

The DLA reports that its policies are intended to give effect to constitutional provisions pertaining to land rights. To meet constitutional specifications, policy development and implementation respect the realisation of the right to gain access to land. The implementation of land reform protects the right to gain access to land without unfair discrimination. The policies and their implementation target mostly vulnerable (particularly previously disadvantaged) groups.

Accordingly, the Department meets its obligation towards fulfilment of the right to access to land by constantly monitoring legislation.

*Provision of Land and Assistance Act, 126 of 1993*

The DLA reports that amendments to this Act allow the Minister to delegate power to designate land, and to approve the release of funds for development of managers. The amendments form part of the measures to increase the pace of land reform.

*Labour Tenants Act*

The Land Reform (Labour Tenants) Act ensures that labour tenants gain secure tenure on land, which makes them less vulnerable to abuse as well as arbitrary and illegal evictions. The guidelines developed by the DLA promote the efficient acquisition of this security. The amendments to the act were minor and do not have significant bearing on the policy direction and legislation.

*Extension of Security of Tenure Act (62 of 1997)*

As with Labour Tenants Act, the DLA reported that the amendments to the act were minor and do not have significant bearing on the policy direction.

*Vulnerable Groups*

According to the DLA, amendments stated above did not affect vulnerable groups, because these groups are already catered for in the original legislation.

**Provincial Sphere**

The provinces that have submitted reports indicated that legislative measures are the preserve of the DLA.

#### 4. BUDGETARY MEASURES

The tables below are a representation of the budgets as submitted by the DLA and provincial departments that deal with land issues.

**Table 1 DLA Budget Allocation**

Year	Total allocation in Rand(s)	Allocation as a % of GDP	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure (in millions of Rand)	Actual expenditure (in millions of Rand)
2000/2001	920 655 000	0.101	-	-	768 200 000
2001/2002	1 039 671 000	0.105	-	986 655 000	976 612 043

Source: Department of Land Affairs Protocol Submission

Note: The dash (-) in all the tables denotes that the information requested was not made available to the Commission.

The budget (for redistribution and tenure reform), according to the department, has generally been adequate, except for the deficit of R16 million on the title deeds trading account for the 1999/2000 and 2001/2002 financial years. This means that the DLA over-spent during these financial years. For the 2000/2001 financial year, there was under-spending of R152 855 000, and there was an estimated R26 million surplus for the 2001/2002 financial year.

Table 2 below gives a representation of the budget allocations in question.

**Table 2 Land Redistribution and Tenure (Land) Reform**

Year	Total allocation in Rand(s)	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure	Actual expenditure
2000/2001	349 270 000	-	-	252 600 000
2001/2002	455 772 000		415 643 000	444 200 000

Source: Department of Land Affairs Protocol Submission, Ref. ME5/2/2

Over R43 million that was not spent in the 1999/2000 financial year, while R87 million was unspent in the 2000/2001 financial year. The 2001/2002 financial year, with more money allocated than the previous year, reflects an under-spending of over a R11 million. The statistics show that whereas there has been under-spending over consecutive financial years from 1999 to 2002, the budget allocation for redistribution and land reform has increased.

**Table 3 Budget for Land Restitution Programme**

Year	Total allocation in Rand(s)	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure	Actual expenditure
2000/2001	265 138 000	-	-	265 331 000
2001/2002	309 242 000	-	291 622 000	291 622 000

Source: Department of Land Affairs Protocol Submission

The DLA reports that the restitution budget for the years 2000/2001 and 2001/2002 was not adequate. However, in order to meet other costs, funds were shifted from other programmes within the department. The department also indicated that there was under-spending in the restitution programme due to similar reasons as in the redistribution and land tenure programmes. However, there was over-spending related to transfer payments, for which funds were diverted from other programmes to make up for the extra expenditure. This resulted in the increase in the number of settled claims.

#### *Variance(s) in Budget Allocation*

The DLA reported that there was budget inflation due to the roll over of funds, which was allowed in the previous years, that is, 1999/2000, 2000/2001 and 2001/2002, which accounted for variance in the department's budget.

#### *Vulnerable and Marginalised Groups*

##### Redistribution

The DLA has reported that all categories of the vulnerable groups were catered for in a comprehensive planning approach. Female-headed households, according to the protocol report, are given preferential treatment. The land distribution programme has until 2001 focused on low income households that earned below R1 500. All expenditure utilised was directed to this category of beneficiaries. 30 per cent of the budget of all land reform programmes was put aside for acquisition of land for settlement or residential purposes.

However, according to the DLA, the homeless do not appear to be a special category of beneficiaries.<sup>15</sup>

##### Restitution

As with the redistribution programme, the restitution programme also considers all categories of the marginalized groups in its approach. Restitution, according to the DLA, is a rights-based programme, which prioritises all claimants, rich or poor. For that matter, there are efforts being made to increase the number of rural claims to be settled. Also, the DLA has reported that there was no audit conducted to determine which category of the vulnerable groups do the 35 litigation cases fall under.

#### **Provincial Budgets**

Only Mpumalanga Province provided information on this section. However, the information provided is not complete.

The Mpumalanga Department of Housing and Land Administration indicates that for the past two financial periods, from 2000/2001 to 2001/2002, the amount allocated for tenure reform and land redistribution was far less compared to the budgeted amount for these two periods. For example, of the more than R200 million budgeted for the

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<sup>15</sup> This, of course, contradicts the *Grootboom* ruling.

period 2000/2001, only R8 610 250 was spent for tenure reform, for the 2001/2002 period only R4 127 369 was spent for tenure reform.

The table below represents the land reform budget of Mpumalanga Province.

**Table 4 Total Budget Allocation Measures for Mpumalanga Department of Housing and Land Administration.**

<b>Year</b>	<b>Total Revenue in Rand(s)</b>	<b>Total Allocation in Rand(s)</b>	<b>Allocation as a % of GDP</b>	<b>Per capita allocation in Rand(s) after inflation adjustment</b>	<b>Projected expenditure</b>	<b>Actual expenditure</b>
2000/2001	212 350 000	-	-	-	-	-
2001/2002	218 927 000	-	-	-	-	-

The programme, according to the department, needed R400 million to upgrade tenure reform, but the money “is not readily available....” The department recommends a phased approach to be applied over a ten-year period after more funding had been allocated. So far, the department has applied for more funds of which the National Treasury Department approved R17 million.

The department spent only R96 million toward the redistribution programme. However, it does not state how the allocated amount was spent. The fact that so much money had to revert to treasury shows lack of planning by the provincial department.

*Variance (s) in budget allocation*

The variance, according to the Department of Housing and Land Administration, is a result of treasury’s yearly allocation.

**Table 5 Mpumalanga Land Redistribution Budget**

<b>Year</b>	<b>Total Revenue in Rand(s)</b>	<b>Total allocation in Rand(s)</b>	<b>Allocation as a % of GDP</b>	<b>Per capita allocation in Rand(s) after inflation adjustment</b>	<b>Projected expenditure</b>	<b>Actual expenditure</b>
2000/2001	-	-	-	-	-	-
2001/2002	-	96 000 000	-	-	96 000 000 for 24 community resolutions	48 000 000 for the 12 resolutions signed up to 31 March 2002

Source: Mpumalanga Department of Housing and Land Administration

The Mpumalanga Department of Housing and Land Administration reported that the land redistribution budget is the responsibility of the national DLA office, and therefore cannot provide much information regarding that. However, the Department of Housing and Land Administration indicated that the DLA has approved 5 out of 19 projects under redistribution for settlement planning and housing development. The Housing and Land Administration office, which reported that the redistribution budget

was adequate, did not account for variance for the same reason that it is the national office's responsibility.

However, the Department of Housing and Land Administration disclosed that the tenure reform programme covers all the categories of the vulnerable groups. In 2002, the department started a program to draft a Communal Land Register for the 15 rural communities in the R188 Villages and neighbouring informal settlements, and reported that they could present a comprehensive statistical analysis on the above beneficiary category and specifics, as soon as it has compiled a comprehensive database.

*Measures instituted for budget inadequacy*

To address budget inadequacy, the Mpumalanga office prioritised the Tenure Reform programme to look into the dimensions of different alternative tenure models and systems targeted for rural development.

**Table 6 Mpumalanga Tenure Reform Budget**

Year	Total allocation in Rand(s)	Allocation as a % of GDP	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure	Actual expenditure
2000/2001	8 610 250	-	-	-	8 610 250
2001/2002	4 127 369	-	-	-	4 127 369

Source: Mpumalanga Department of Housing and Land Administration

*Variance*

Variance in the allocation is a result of the yearly allocation made to the department by the National Treasury in accordance with the Medium-Term Expenditure Framework (MTEF).

*Vulnerable and Marginalised Groups*

According to the Mpumalanga Department, tenure upgrading refers to the upgrading of deeds of grant, and permission to occupy and informal land rights in Proclamation R293 towns and informal settlements. Existing land rights as protected by legislation are upgraded into full ownership. In terms of the departmental tenure up-grading program, it relates to:

- Women
- Female headed households
- Persons living in rural areas
- Persons living in informal settlements
- Low income groups
- Racial groups disadvantaged by past discrimination
- Persons with disabilities

The department reported that the budget was adequate. In fact, the amount needed for tenure reform was in excess of R4 million. This funding is not readily available and,

therefore, a phased approach staggered over a 10-year period will follow. Through this approach, additional funding will have to be acquired and partnerships secured with relevant role players in order to ensure that all areas in need of upgrading are addressed.

*Measures taken to address budget inadequacy*

The Mpumalanga department has submitted an application to the DLA for additional funds. As a result, an amount of R17 million has been approved to co-fund the departmental tenure upgrading.

No information was received from other provinces on this subject.

## **5. INDICATORS**

The indicators<sup>16</sup> for the realisation of access to land, according to the DLA, centre around numerous factors including the number of people involved; the racial composition of the beneficiaries; grants for land redistribution; size of land; availability of land; and other criteria.

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<sup>16</sup> Maria Green indicates that the human rights community uses the term ‘indicators’ in two different ways. One where ‘indicators’ refers to ‘statistics’, and the other where the term “covers any information relevant to the observance or enjoyment of a specific right.” See for instance, Maria Green, “What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement,” *Human Rights Quarterly* Vol. 23 (2001) 1077.

Below are tabular representations from the Department of Land Affairs.

**Table 7 Indicators for Access to Land 2000-2002**

	<b>Total</b>	<b>Rural</b>	<b>Home-less</b>	<b>Farm labour-ers</b>	<b>African<sup>17</sup></b>	<b>Coloured</b>	<b>Indians</b>
Area of land needed per family	-	-	-	-	-	-	-
Size of land made available to those who were previously denied access to land	1 098 008 ha	768 605 ha	17 812	50 000 ha	-	-	-
Size of land made available to those who were dispossessed of land	406 120 ha	325 000 ha	-	-	406 120	-	-
Number of land redistribution grants awarded	98 958	80 000	-	29 687	-	-	-
Number of compensation awards awarded	R938 268 710	Restitution compensation awards were made mainly to people in urban areas					
Number of families that have acquired land tenure security	50 792	40 633	-	15 238	-	-	-

Source: Department of Land Affairs Protocol Submission

<sup>17</sup> According to the DLA, the collected information does not provide for racial categories as requested by the SAHRC. Rather, the classification is limited only to Black and White. Thus, the beneficiaries of land reform would be “black” people, comprising Africans, Indians and Coloureds.

The system used by the DLA does not provide for information breakdown as required by the SAHRC's protocol. According to the DLA, the information provided in the table for rural areas is based on percentage estimates. For land redistribution, the DLA reports that it is working on a ratio of 80:20 in favour of rural areas. More than 80 per cent of the total allocated land, grants released and families that benefited are from rural areas.

For restitution, although the total claims reflect 80:20 in favour of urban areas the total number of people tends to be higher in the rural areas since one community claim may involve more than 100 claims, whereas urban claims each individual is recorded as an independent claimant. In terms of land allocation, most of the restored land tends to be for rural claimants.

Not a single province submitted a table for indicators, and none provided reasons.

## **6. NATIONAL PLAN**

Like the indicators above, the National Plan seeks to statistically show how far the Department of Land Affairs has gone in effort to meet its objectives. Table 8 below represents the number of households and people that benefited from the programmes of the DLA, and how much land was redistributed for tenure reform. Other factors include cases that were in court because of evictions, land invasions and recorded land claims.

**Table 8 National Action Plan**

	<b>Total</b>	<b>Rural</b>	<b>Urban</b>
Number of rural households without access to land for farming	No audit conducted	-	-
Number of households who were removed from land since 1913 who have not been compensated	Information not yet available. Subject to completion of the validation process.		
Size of state owned land that is not in use	48 675.80 ha	40 000 ha	-
Number of people who do not have security of land tenure or secure ownership	No audit conducted	-	-
Number of unlawful invasion incidents for purposes of establishing informal settlements	No audit conducted	-	-
Number of lawful eviction cases	6 in terms of ESTA (that the department is aware of)	5	1
Number of unlawful eviction cases	-	-	-
Number of land restitution court cases	35 before court	30	5
Number of land restitution court cases prolonged due to administrative problems	All cases attended to	-	-
Number of farm workers evicted legally	Information available is on number of cases	-	-
Number of farm workers evicted illegally	No audit conducted	-	-
Number of persons seeking access to land redistribution without legal assistance	The programme does not require legal assistance. None of the applicants use the option		
Number of persons seeking access to land restitution without legal assistance	95% of restitution cases are resolved using administrative measures		
Number of rural women denied access to land redistribution programmes due to customary law	None	None	None
	-	-	-
Number of rural women denied access to land restitution programmes due to customary law	-	-	-
Number of rural women denied access to land tenure programmes due to customary law	-	-	-
Number of persons/communities that have lodged land claims	Subject to finalisation of the validation process to be completed in June 2002		
Total number of claims instituted before the cut-off date	68 878	19 140	48 852
Total number of claims awarded up to the year under review	29 421	23 400	5884
Total number of claims this reporting period	26 000	23 400	2 600
Total number of claims dismissed	328 (as at 03/01)	-	-
Total number of claims in litigation	35	No audit conducted	No audit conducted
Total number of claims pending	35	No audit conducted	No audit conducted

Source: Department of Land Affairs Protocol Submission

The DLA disclosed that the statistics on evictions are limited on the number of cases it has received. These cases include those that happened without the knowledge of the DLA. Most of the cases handled by the department have to do with threats of eviction that are mostly resolved by the DLA intervention and through the use of alternative

mechanisms of dispute resolution. Of the 4 860 evictions and threat of eviction cases entered during the 2000/2002 period, only 450 were resolved through mediation, mostly by DLA officials whilst only 2 cases still have to appear before court, a process which takes time to finalise.

### *Measures Pertaining to Indicators*

At the time of putting this report together, the DLA was in the process of gathering statistics of eviction cases reported at various institutions.<sup>18</sup> The department is also redesigning its system to provide further breakdown of information to address issues concerning projects that are established in rural areas, and improving information on beneficiary profiles to allow for classifications such as whether people are homeless or not.

Some of the indicators require information that can be acquired through detailed research. According to its submission, the DLA will commission some of the research through the Monitoring and Evaluation Directorate over a reasonable period of time and within available resources.

## **7. CRITIQUE**

This part of the document seeks to determine whether the respective departments dealing with delivery of land have met their constitutional obligations.

### **Constitutional Obligations**

#### *Obligation to respect the right of access to land*

The Land Redistribution for Agricultural Development programme (LRAD) is demand-driven and is designed to provide grants to black people who wish to access land specifically for agricultural development. According to the DLA, LRAD meets the constitutional responsibility in terms of section 25 (5), wherein “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.”

LRAD is implemented in terms of legislation and takes into account the Provision of Land and Assistance Act, 126 of 1993 that calls for the provision and protection of the rights to land.

#### *Obligation to protect the right to gain access to land*

A policy on the entitlements of people protected by the Interim Protection of Informal Land Rights Act (IPILRA) 31 of 1996 and the Extension of Security of Tenure Act, 62 of 1997, provides protection, and recognises the rights of people who have occupied state land for prolonged periods.

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<sup>18</sup> By so doing the department would, supposedly, be in a position to provide a comprehensive report in this regard in the next protocols.

*Obligation to promote and fulfil the right to gain access to land*

The DLA reports that the policies mentioned above do promote and fulfil the rights of vulnerable groups. For example, LRAD considers farm workers and their families who wish to acquire land and improve their tenure conditions. This helps farm workers who previously could not have rights on the land they worked and lived on. Among other considerations, LRAD, according to the DLA, looks at the interests of the landless people who have limited access to land, particularly women and youth who now have a right to land which they previously could not have access to.

The DLA reports that the Policy of Labour Tenancy and submission of claims to the Minister for Approval in terms of section 42D of the Restitution Act, fulfils the right of labour tenants who made applications through the Restitution Act to gain access to land.

**Vulnerable and Marginalised Groups**

The Department of Land Affairs contends that the policy measures it has put in place do not unfairly discriminate against any group of people, and thus have considered the wishes of farm workers and their families to have access to land and to improve their tenure conditions. In addition, there are considerations for the interests of the landless people, especially women who have limited access to land they want for productive purposes.

*Provision for vulnerable groups per policy measure*

Land Redistribution

The DLA has set aside a limited amount of land under LRAD for women, youth, people with disabilities, farm workers and labour tenants. At the national level, the LRAD caters for everyone, but women have first priority in accessing land for agricultural development.

To that effect, the DLA emphasises that its policies do not discriminate against anyone, although the only group of people that can benefit from this programme are those that were disadvantaged by past discriminatory laws in terms of access to land. The department did not specify whether this particular group referred only to Africans or if other racial groups were also included.

Farm workers, labour tenants, homeless people and people in informal settlements benefit from the Tenure Security Grant which provides such vulnerable people with grants to upgrade or acquire land to improve their living conditions on farms, including housing and other amenities. IPILRA and ESTA, in accordance with the Disposal of State Land Act, provide for State land to be apportioned to farm workers, labour tenants and people living in informal settlements on state-owned land.

Tenure Reform

The DLA emphasised that the Tenure Security Grant is targeted at people without secure tenure including farm workers, labour tenants and people living in communal

areas (including women). Although there is no specific mention of the homeless and people living in informal settlements, the DLA contends that this category of the vulnerable groups is also eligible to benefit from this programme. The policy provides for this group of people to receive grants for upgrading or acquiring land to improve their tenure security.

The DLA contends that the Policy of 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, in respect of the Disposal of State Land, makes specific provision for farm workers, labour tenants, and people living in informal settlements (on state-owned land).

The DLA does not indicate, however, how and whether these measures have been put into practice.

### **Reasonableness of Measures**

The Constitutional Court, in interpreting reasonableness, explained in *Grootboom* that the State must take measures which are “capable of facilitating the realisation of the right...” Below is the examination of how reasonable the land reform programmes and policies have been.

#### Restitution

The measures instituted during the reporting period have proved to be reasonable. For example, the number of claims processed by the DLA has escalated within a short space of time, after a backlog was reported. For instance, whereas there were about 8000 claims settled in 2000, the number escalated to 12 094 settled claims by March 2001.<sup>19</sup> In February 2002, the Institute for Democracy in South Africa (Idasa) reported that there were 32 389 settled claims, with about 80 per cent accounting for urban cases, while approximately 20 per cent accounting for rural ones.<sup>20</sup>

This, as the DLA accounts, is mainly the effect of changing restitution approaches in settling cases or disputes from judicial to administrative. For instance, the report states that 95 per cent of restitution cases were resolved through administrative measures. All of the 35 restitution cases before the court were attended to, although their resolution is still pending.

The number of settled claims attests to the fact that the adoption of the measures, and the resultant improved relationship between the DLA and the Restitution Commission translated into speeded delivery.

Meanwhile, interim arrangements are in place to deal with pending cases before the long-term strategy was finalised and adopted.<sup>21</sup>

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<sup>19</sup> Department of Land Affairs. *Annual Report 2000-2001*.

<sup>20</sup> Mingo, C. “The 2002 Land Affairs Budget: Is Land Reform on Track?” *Budget Brief* No. 89 (February 2002), at <http://idasa.org.za/bis/> visited 21/02/02.

<sup>21</sup> The DLA has indicated in their submission the audit would be available in June 2002. However, that has not been forthcoming.

## Redistribution

The land redistribution programme slowed delivery following the 1999 elections. By the year 2001, the DLA had redistributed only 2 per cent of the land. The SAHRC 3<sup>rd</sup> Economic and Social Report shows that this was the case in 2000. A report by the Department of Land Affairs Director-General, Dr. G.P. Mayende, revealed that 1 006 135 ha (0.81 per cent or less than 1 per cent) of the total land area had been transferred between 1994 and 2001.<sup>22</sup> Hence, most of (agricultural) land is still in the hands of white owners.

One of the significant redistribution measures instituted during the reporting period is the Land Redistribution for Agricultural Development (LRAD). It took only three months since its adoption for the DLA to redistribute 60 000 ha of land to 2681 applicants through the LRAD programme. It would seem that this programme has done much in a short space of time. However, this programme got stalled because only few people could afford the R5 000 in kind contribution to access the R20 000 to R100 000 grant from the DLA.

This should not have happened as, according to *Grootboom*, the State must guarantee equal opportunity for all citizens to gain access to land. The Court ruling put it thus: “The State must also foster conditions to enable citizens to gain access to land on an equitable basis...”<sup>23</sup> The Court further emphasised that those poor citizens who cannot afford the in-kind contribution have an obligation to demand the State to create those conditions that would make it possible for them to gain access to land.

The number of people who cannot access land shows that the majority are still left without land. Only those people with savings will be able to access the grant, thus gain access to land. Lahiff and Rugege argue that the reason LRAD, (the only policy since the 1997 White Paper on Land) could not deliver effectively is that it lacked elaborate land redistribution strategies.<sup>24</sup> To this effect, the LRAD as a measure is not fulfilling the constitutional obligation to create conditions for accessing land.

In the manner in which the redistribution programme is conceived and implemented, land may only be accessed through a “willing-seller, willing-buyer” notion. This programme fails those people who do not have funds, irrespective of whether they get money from other sources, for instance, the Land Bank.

## Tenure Reform

The DLA is gradually improving tenure reform. Presently, the department is in the process of drafting amendments to both Extension of Security of Tenure Act and the Labour Tenants Act. At the time of reporting, legislation dealing with tenure issues within the communal areas was being finalised.<sup>25</sup> According to the DLA, there are

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<sup>22</sup> Dr. G.P. Mayende, *Media Briefing*, DLA, 2001 at <http://land.pwv.gov.za>.

<sup>23</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), para 93.

<sup>24</sup> Edward Lahiff and Sam Rugege, “A Critical Assessment of State Land Redistribution Policy in the Light of the *Grootboom* Judgement,” (Draft), 18<sup>th</sup> February 2002.

<sup>25</sup> Communal Land Rights Bill, 2002 was gazetted on August 14, 2002, and would go through several review workshops, the first having been in Pretoria on October 14, 2002.

ongoing training programmes aimed at empowering farm workers on land rights issues. The DLA also reported that there was a special fund being established to support farm occupiers in litigation. This fund is a joint effort between the Department of Land Affairs and the Department of Justice.

Even so, the report shows that despite the plethora of legislative and other measures, little has changed in the direction of tenure reform.

### **Availability of Resources**

According to Article 2(1) of the Covenant on Economic, Social and Cultural Rights (ICESCR), the State must take necessary measures “to the maximum of its available resources” in order to satisfy access or enjoyment of a particular right. The CESCRs insists that a State must successfully demonstrate that its failure to meet its obligations is attributable to lack of available resources. Therefore, the success or failure of the programmes and measures implemented by the DLA, thus far, should determine whether resources (both personnel and financial) were available, or even adequate.

### **Restitution**

The budget for land reform shows that the money allocated for restitution for the years 2000/2001 was not enough. However, after some funds were shifted from other programmes, the programme showed over-spending of R193 000 000 after actual expenditure. This was largely because of more claims being processed during that period. For the year 2001/2002, R309 242 000 was allocated. However, spending fell again over R128m. This over-spending is a result of speeded delivery in settlement of restitution claims.<sup>26</sup>

The DLA reported that it has spent close to a billion Rand (R938 268 710) so far, on restitution, mainly to urban claimants; however there is no indication how much was awarded to rural claimants.

It is inexcusable that the DLA could not spend just over R128 million, when there are still many people whose claims have not been settled.

### **Redistribution<sup>27</sup>**

The DLA has stated that there was lack of personnel qualified for distributing land. However, it is not clear what these people were supposed to be tasked with. This shortage of personnel was mentioned even during the last reporting period. It is not clear why the DLA should allow itself to continue to work while it fails to deploy qualified personnel for land redistribution.

The budget for the redistribution programme indicates that it was adequate for the three financial years beginning in 1999/2000 financial year. For all these years, there

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<sup>26</sup> Whereas there were 12 094 claims settled by year 2000/2001, it was projected that there would be 20 295 settled claims at the end of financial year 2001/2002. See for instance, Chris Mingo, “The 2002 Land Affairs Budget: Is Land Reform on Track,” *Budget Brief* No. 89, Idasa (February 2002).

<sup>27</sup> This accounts for both the redistribution and tenure reform as the budget was a combined one for the two programmes.

were funds that were not spent. For example, of the R319 405 000m allocated for the 1999/2000 financial year, more than R50m was unspent. More than R80m was not spent for the 2000/2001, while R40 129 000 accounted for funds under-spent during the 2001/2002 financial. It is for this reason that the land reform programme has been slow.

The reasons given for under-spending by the DLA relate to the following:

- shortage in skilled or qualified personnel, transfer payments, and professional and special services;
- delay in developing a policy framework that would enable or facilitate handling of tenure cases;
- funding agreements between the DLA and local or district structure have not been forthcoming; and
- implementation difficulties due to massive service delivery.

Vacant posts were not filled as part of the transformation and decentralisation process of the DLA. Lack of capacity has been reported by the DLA in the 3<sup>rd</sup> economic and social rights report of the South African Human Rights Commission. Why these vacancies have not been filled is beyond reason.

### **Progressive Realisation**

As explained in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, realisation of economic, social and cultural rights can only be attained progressively,<sup>28</sup> that is, in an incremental manner and over time.

### **Restitution**

With regard to the restitution programme, more claims were settled within a short period during the reporting period compared to other financial years. Restitution is generally viewed as the slowest of the land reform programme. It was only in June 2001 since the 1998 implementation of the Restitution Review that the pace of restitution was increased, with 12 314 claims lodged.<sup>29</sup> However, by financial year 2001/2002, there were only 12 150 claims settled, most of which the Minister said were from the rural areas.<sup>30</sup>

As at 10 January 2002 the figure of 63 455 lodged claims<sup>31</sup> was put at 68 878 lodged claims, owing to adjustment after the completion of the validation process.<sup>32</sup> Of the total number of the lodged claims, 191, 940 accounted for rural claims, while 48, 852

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<sup>28</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht (22-26 January 1997.)

<sup>29</sup> Lahiff, E. (2001). *Land reform in South Africa: Is it meeting the challenges?* Programme for Land and Agrarian Studies (PLAAS), UWC, Policy Brief No. 1, (September 2001). <http://www.uwc.ac.za/plaas/> (Accessed 20/03/02).

<sup>30</sup> Department of Land Affairs, *GCIS: South Africa Yearbook 2001/2002*, 403. See also DLA, "Restitution Statistics", Department of Land Affairs, January 2002, at <http://land.pwv.gov.za/restitution/new%5Fstats%5Frest%5Fgraph.htm>, visited 18 March 2002, and Minister Thoko Didiza, "Land Affairs Budget Speech, 2001/2002" National Assembly, 15 May 2001.

<sup>31</sup> *GCIS: South Africa Yearbook 2001/2002*, p. 403.

<sup>32</sup> *Ibid.* This number represents the number of claims lodged by the cut off date in 1998.

were urban. However, more claims were awarded during the period under review. The present reporting period shows that the 191, 940 rural claims far exceeded the 20 rural claims reflected in the previous SAHRC economic and social report.

The statistics above show that there were more claims settled during the 2001/2002 financial year than the previous years. There was a steady increment of settled claims in 2001, compared to the previous year. For instance, by March 2000, there were 3,916 claims settled, accumulating to 6,525 settled claims at the end of September 2000.<sup>33</sup>

Even so, there still are many cases that have to be dealt with. Restitution cases in rural areas far outnumber those from urban areas. But more settlements are in urban areas. This is an anomaly that has to be corrected, especially that one case in the rural areas may involve many individual families. The DLA report has stated that there are only 35 (30 rural and 5 urban) restitution cases before the courts due for settlement.

While the DLA was requested to fill a survey about statistics concerning racial groups affected by land loss, Whites, Indians and Coloureds were left out. This gives an impression that only Africans in this country had claims compensation for loss of land. For example, in a recent research project by Potchefstroom University (PU) and the University of the North West (UNW) on behalf of the North West provincial government and the Department of Land Affairs, it was found that white farmers and Indians have lodged claims.

According to the project manager, Professor Willie van Wyk,

some of the claims are submitted by white farmers, and many are also submitted by Indians, who primarily lost their businesses in urban areas. The perception that land claims are being made by black people only, is therefore not always true.<sup>34</sup>

The project is assessing 922 land claims by Whites and Indians, and has already submitted 238 to the Land Claims Commission for further assessment.

### Redistribution

By the year 2000, there was a clear decrease in land transfers, compared to other periods since the beginning of the programme. In October 2000, it was reported that only 0.81 per cent of land had been transferred.<sup>35</sup> The 1994 objective of the government to redistribute 30 per cent of land within 5 years was thus not realised.

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<sup>33</sup> DLA, "Restitution Statistics", Department of Land Affairs, January 2002, at <http://land.pwv.gov.za/restitution/new%5Fstats%5Frest%5Fgraph.htm>, visited 18 March 2002.

<sup>34</sup> Frikkie Kotÿe, "White farmers claim land," Marketing and Public Relations Department, Potchefstroom University, 25 February 2002, at <http://www.puk.ac.za/nuus/eng/news26.html> accessed 21 October 2002.

<sup>35</sup> Dr. GP Mayende, "Less than 1% of farmland redistributed", *Media Briefing*, Department of Land Affairs, 2001, at <http://land.pwv.gov.za> accessed 14 February, 2002. See also *Business Day* 9 October 2000 and Lahiff and Rugege, p. 46.

This slow pace in delivery resulted in policy shifts. Having realised its failure to meet its initial objective, the DLA set yet another date for delivery, where 15 million hectares should be redistributed by the year 2005, and a further 30 per cent of rural land within the next coming fifteen years.<sup>36</sup> So far, the DLA has just stated its intention to extend its land disposal.

It is commendable, however, that within three months of the launch of LRAD in August 2001 the DLA, was able to deliver 60 000 ha of land to 2681 applicants. This was done through grants of between R20 000 to R100 000, which the DLA has made available to all beneficiaries who in turn contributed a minimum of R5 000.

The idea that the DLA depends on the willingness of the landowners to sell their land, without regulation, is troublesome. This delays the process unnecessarily, especially that expropriation is a tool that can reduce the time for land redistribution process and thus avoid what the *New African* called “a ticking time bomb.”<sup>37</sup>

On 11 February 2000 Minister Thoko Didiza, publicised her first statement on land policies since the suspension of the Land Rights Bill, 1999. The Minister also recommended a freeze on new projects. However, this moratorium was lifted when a new redistribution programme was introduced in August 2000. This affected the introduction of other land redistribution projects. Thus, in the 2000/2001 financial year, there were only 72 implemented projects, a glaring decrease compared to the 140 projects which were approved in the 1997/1998 financial year.<sup>38</sup>

Programmes that have been operative include the Settlement/Land Acquisition Grant (SLAG) and the Grant for the Acquisition of Municipal Commonage.<sup>39</sup> SLAG’s contribution, in excess of R16 000, was meant for qualifying beneficiaries who sought to acquire land and other farming implements. On the other hand, the DLA had aimed to use the Grant for the Acquisition of Municipal Commonage to help beneficiaries of commonage to refine their farming ventures by using their grants for extensive agriculture.

The Minister’s 11 February 2000 statement was unclear about commonages. It said that municipal commonages were still “a useful instrument in the attainment of broader land reform objectives’ while at the same time sounding a warning that ‘it must be clearly reasserted that it cannot take budgetary priority over the objectives over the redistribution of land to the poor.’”<sup>40</sup>

During the same month, the DLA organised a commonage workshop that recommended the revision of the commonage policy to “allow for both ‘subsistence’

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<sup>36</sup> Ministry of Land Affairs and Agriculture, “The Minister and the Land Affairs Programme: Briefing,” Minutes of the Agriculture and Land Affairs Portfolio Committee, June 20, 2000. See also Human Rights Watch. *Unequal Protection: The State Response to Crime on South African Farms*. Washington, D.C. 2001, p. 38.

<sup>37</sup> Pusch Commey. “Land: A ticking time bomb” *New African* (November 2002).

<sup>38</sup> Mingo, C. “The 2002 Land Affairs Budget: Is Land Reform on Track?” Budget Brief No. 89 (February 2002), at <http://idasa.org.za/bis/> visited 21/02/02.

<sup>39</sup> A commonage is a municipality-owned land which is made available to town dwellers for grazing purposes.

<sup>40</sup> Turner, S & H Ibsen. *Land agrarian reform in South Africa: A status report*. Agricultural University of Norway (November 2000), p. 44.

and emergent farmers.” By March 2000, approved commonage projects constituted about 23 per cent of all approved commonages.<sup>41</sup>

At this point, the DLA had two objectives in the revised approach to redistribution. First, it sought to hand over settlement projects to the Department of Housing, so that the DLA could be able to concentrate on agricultural production; secondly, it sought to move from a demand-driven approach to a supply-driven one that focused on district level planning.<sup>42</sup>

### Tenure Reform

It has been determined that although no statistics are readily available, more people in the former homelands and the former South African Development Trust (SADT) regions do not have secure tenure. It was for this reason that the DLA wanted to satisfy the needs of between 10 per cent and 15 per cent of these people (between 600 000-900 000 households) within 10 years.<sup>43</sup>

Tenure reform has thus become an area of priority for the DLA. The government had aimed to engage both national and provincial offices to part with a sizable amount of land by the financial year 2001/2002. According to the Minister of Agriculture and Land Affairs, 669 000 hectares of state land would be disposed throughout the country between 2001 and 2002.<sup>44</sup> Very little progress has been made in this direction.

The fact that there are large tracts of available land, yet there are people who are without land raises concern. There is a total of 1 098 008 ha of available land. According to the DLA, 836 417 ha of this land is marked for all people who were previously denied access to land, while 406 120 ha is marked for dispossessed people. The SAHRC's 3<sup>rd</sup> report revealed that 696 346 ha was made available to people previously denied access to land, with 268 306 ha meant for redistribution programme.

While more land (140 071 ha) was made available to those denied access, there is no evidence that these people accessed the land. Availability and access are not well defined – availability does not necessarily mean accessibility; it could mean available to be accessed. In this case, it then becomes difficult to determine whether the DLA has not fulfilled its obligation to create grounds for access to land for the vulnerable

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<sup>41</sup> The commonage programme was 'extensive' in the formerly coloured areas of the Northern Cape. In the Free State there was progress in helping commonage projects develop into agricultural infrastructure. In other areas, it was concluded that the beneficiaries could not use their land rights in a productive, profitable and sustainable manner.

<sup>42</sup> Turner, S and H Ibsen. *Land agrarian reform in South Africa: A status report*. University of the Western Cape (November 2000), p.37.

<sup>43</sup> Ministry for Land Affairs. "Demand and Access to Land Amongst Black South Africans" at <http://land.pwv.gov.za/rep2%5F98.html> Visited 20-02-02.

<sup>44</sup> Minister of Agriculture and Land Affairs, "Budget Vote Speech by the Minister of Agriculture and Land Affairs," Ministry of Agriculture and Land Affairs, 5 April 2001, at <http://www.polity.org.za/govdocs/speeches/2001/sp0405a.html> accessed February 2002. Ministry of Agriculture and Land Affairs, "Budget Vote Speech 2002/2003 for Land Affairs by the Minister of Agriculture and Land Affairs, Ms. Thoko Didiza," National Assembly, 31 May 2002.

groups in question, for example, female-headed households, labour tenants and landless people.

So far, the number of families that have benefited from land reform is 507 792, comprising 40 633 rural families and 15 238 families who are landless. Again, it is not clear whether these statistics include people without land generally or people who do not have tenure security. It is not clear whether these are overall statistics since the beginning of the reform programme or they include those within the period under review.

By the time of the budget vote speech 2002/2003, only 47 978ha was disposed in terms of the Power of Attorney held by provincial Members of the Executive Council (MECs), with agricultural state land delivered in May 2001 only in Port St. Johns in the Eastern Cape. A historic handing over of 190 hectares of communal land that took place in April 2002 when Minister Didiza transferred the missionary village of Clarkson to six hundred Mfengu families.<sup>45</sup> The idea behind this land disposal was to make sure that successful (African) farmers gain title to acquired land. According to the information supplied by the DLA in the questionnaire, state land that is not in use equals 48 675.80 ha, with 40 000 ha available for rural habitation. However, there is no explanation why so much land lies idle when millions of people do not have for residential and farming land.

Despite some achievements, poor implementation still accounts for the slow delivery of land to the landless. To date the colonial and apartheid inequalities in land ownership remain almost the same, with whites owning more than 80 per cent whilst the remaining 20 per cent is shared between Africans and the government. The lack of access to land, therefore, affects between 13 million and 14 million people who are predominantly inhabitants of rural areas.<sup>46</sup>

Thus, despite all the strides made in land reform, there is growing concern that much time will pass before most of the landless people realise their right of access to residential and/or agricultural land.

There is a marked deterioration in the observance of land rights and land administration in the former homelands. In November 2001, the DLA admitted that they did not have a clear land ownership policy. Its Deputy Director, Mampho Malgas, said:

Government is still working on a land ownership policy. At the moment people in rural areas are still allocated land on a permission to occupy basis. We have to realise that people cannot secure loans from commercial banks as they do not have the relevant documents. However traditional leaders have been empowered to extend the land lease.<sup>47</sup>

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<sup>45</sup> The Moravian Church had decided in June 2001 to hand over 30 mission stations.

<sup>46</sup> Human Rights Watch revealed that 68 per cent of rural dwellers want to have their own farming land. See *Unequal Protection: The State Response to Crime on South African Farms*, p. 37.

<sup>47</sup> "Land tenure rights cause confusion," *SABC News*. 24 November 2001, at [http://www.sabcnews.com/south\\_africa/land\\_affairs/0,100924458,00.html](http://www.sabcnews.com/south_africa/land_affairs/0,100924458,00.html) visited 19-03-02.

According to the Minister, the DLA is consulting with the traditional leaders regarding the administration of communal land with the view of finding solution to “land use and development.”

Meanwhile, there is a Communal Land Rights Bill (which was gazetted in August 2002). The bill is viewed as the answer to “the role, powers and functions of traditional leaders and institution in local government.”<sup>48</sup> For that reason, the bill is an endorsement of the security of tenure for people in the former Bantustans and South African Development Trusts (SADTs).

At present, relocating landless African people is overcrowding them in the already dense 13 per cent of the land since allocated for Africans during colonial days. Such a move does not address the land issues effectively; hence, the population density in the urban areas. This is evidence of failure by the authorities to implement land tenure programmes effectively -- coupled with an inadequate allocation of resources to realise the right programme in question.

## **Provincial Sphere**

### **Mpumalanga Province**

The response from Mpumalanga Province shows that a rapid state land release programme was pursued during the reporting period. The main objective is to avail state land to those that need it. Such land will also serve to create tenure security, prevent illegal invasions and evictions, to improve utilisation of resources and government land release. State land was released to various municipalities to benefit about 5000 homeless people. According to the Mpumalanga report, such projects, some of which have not been approved, are done in collaboration with the DLA.

### **Gauteng Province**

Gauteng, on the other hand, revealed that the province disposed of state land through the Farmer Settlement Programme with an option to buy the land after three years. This land is also solely for agricultural purposes. It is not clear whether this option serves as a condition, but it would appear that it is restrictive to warrant it as such. For example, what happens if one does not buy the land after three years, does one evacuate the land or does one continue to rent the land?

## **Budget**

Data from the DLA shows that between 1999/2000 and 2001/2002, the budget for land redistribution and land tenure reform experienced nominal increment of funds.

The fluctuating nature of the land reform budget, as well as under-spending, has also contributed to the slow pace of delivery. The reason for the cutback in the 2002/2003 budget for land reform is that great amounts of money have been unspent.

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<sup>48</sup> “Contralesa calls on speeding up for legal transfer of communal land,” *SABC*, November 27, 2001, at [http://www.sabcnews.com/south\\_africa/land\\_affairs/0,1009,24290,00.html](http://www.sabcnews.com/south_africa/land_affairs/0,1009,24290,00.html) Accessed March 19, 2002. The discussion of the bill, gazetted on 14 August 2002, does not fall within the scope of this report.

On face value the DLA budget shows gradual increment for the years under review; and the projected estimates for 2002/2003 and 2003/2004 are sumptuous, put at R938 420 000 and R1 016 826 000, respectively. However, after adjustment for inflation, which Land Affairs does not highlight, the budget will indicate no increase.

Under-spending has generally undermined the pace of land reform programme. This, according to Idasa, occurred at the time that the DLA had targeted for meeting its objectives, only R162 million of the R327 million for the 2001/2002 budget having been spent by the end of 2001.<sup>49</sup> The DLA under-spending of funds allocated for land reform resulted in the reduction for the year 2002/2003 budget.<sup>50</sup> In fact, there has been a trend of under-spending of the land reform budget.

Idasa estimates that because of the shrunk restitution budget and “given the projected allocation and cost of restitution...” the outstanding claims would only be settled in 22 years.<sup>51</sup> The budget decrease greatly affected the implementation of programmes.

Thus, instead of more money being injected into the land reform programme, the DLA received minimal funding from the national budget. Idasa concludes that given these budget constraints, there is little chance that the restitution programme will bear fruit in the direction of land reform. The government’s budget allocation of 0.3 per cent for land reform is problematic in the sense that more and more people will be left without access to land. This fact is more visible in the budget allocated for the various land reform programmes.

### **Administrative Action and Maladministration and/or Corruption**

There have been other issues that hamper the progress of land redistribution. For instance, the DLA has reported gross mal-administration resulting from corruption by some officials. The DLA reported that there have been acts of sabotage by members of the DLA. A case is pending against the DLA where an employee is alleged to have deliberately destroyed records. Another case involves a staff member who “has sold posts to a member of the public.” This case, and others that involve nepotism and favouritism are rife and could be linked to acts of sabotage. For example, any person who wins an appointment in the manner just described is most likely to be unqualified for the job.

The DLA’s human resources directorate has undertaken every investigation into a case of fraud where an employee attempted to defraud a claimant. The department thought it best to dismiss the fraudster.

Such cases may be curbed should the department step up capacity building programmes. Indeed, the DLA has put some measures in place that reduced the number of cases involving mal-administration and corruption. For a start, the DLA has drawn policies and procedures on corruption and mal-administration that are

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<sup>49</sup> Mingo, C. “The 2002 Land Affairs Budget: Is Land Reform on Track?” *Budget Brief* No. 89 (February 2002), at <http://www.idasa.org.za/bis/> visited 21/02/02.

<sup>50</sup> Edward Lahiff and Sam Rugege, “A Critical Assessment of State Land Redistribution Policy in the Light of the *Grootboom* Judgement,” (Draft), 18<sup>th</sup> February 2002, p.46.

<sup>51</sup> Mingo C. 2002. “The 2002 Land Affairs Budget: Is Land Reform on Track?” *Budget Brief* No. 89, Idasa, Budget Information Service (February 2002) at <http://www.idasa.org.za/bis/> visited 21-02-02.

readily available in brochures throughout the department. Also, staff members, including managers, were trained to be sensitive to inappropriate behaviour.

Because of the Risk Assessment study that was conducted by the Department, it has become easier to deal with potential risks and, consequently, unbefitting acts could be arrested early. Managers can now deal with cases without asking for support from the Human Resource Management Directorate.

From an operational standpoint, this is a step in the right direction. Such mechanism to root out corruption, and to prevent maladministration shows that the DLA department appreciates the tasks entrusted to it. This indicates that in future the programmes adopted for land redistribution, tenure reform and restitution will be carried out as expected and expeditiously.

The provincial departments that submitted their protocols -- Eastern Cape, Gauteng and Mpumalanga -- did not report any mal-administration.

It is recommended that the DLA conduct serious investigations to stamp out corruption and fraud.

## **8. RECOMMENDATIONS**

The grey areas between programmes, for instance the LRAD and the commonage programs should be eliminated. There is confusion as to where one ends and where the other begins. The scope of programmes should be clear to prevent them from overlapping.

Some of the measures applied by the DLA to curb corruption and to improve awareness raising, should be equally applied to the provincial and local authorities. Programmes as well as policies addressing land redistribution for vulnerable and marginalised groups in the provinces must be clarified.

It is necessary for the government to acquire land and institute approaches that can efficiently redistribute it to the landless. Where ownership is doubtlessly legitimate, the government should compensate landowners for the acquired land.

The DLA should turn around its strategy of emphasising urban restitution and concentrate more on rural settlements, as this is where most people are in need.

The DLA, as well as the provincial departments, should organise its research unit so it could be able to provide sufficient information. The idea that no audit was available for certain required information in the indicators and National Action Plan for Human Rights sections creates difficulty for clearer assessment. More research has to be carried out so that the number of households and the racial composition of people deprived of land since 1913 is known. Doing so would help the DLA in determining and planning how land or monetary compensation could be dispatched over time.

It is important that the DLA devise a way to correct under-spending of budgetary allocations. The continued decline of the land reform budget would only imply less work toward effectively fulfilling and promoting the obligation of accessing the right to land.

The required amount of R5 000 for LRAD is serving as a stumbling block for landless people who cannot afford it. The DLA should reduce, or even abolish this sum if most of the landless people are to benefit from the programme.

The provinces should be given greater responsibility regarding land reform. The idea that they always refer to the DLA is also contributing to the slow pace in land reform.

## **9. CONCLUSION**

Land reform in South Africa continues to be a challenge. Programme implementation problems experienced in the past seven years are persistent. Problems relating to the slow pace of delivery and the capacity to see to the implementation of projects and programmes have not been meaningfully effected.

The fact that the DLA does not specify some of the measures it has put in place makes it difficult to assess effectively how these measures are implemented to fulfil the obligation of providing land to the landless.

Matters of policy are still posing as obstacles; this affects the progress of land reform. Given all this, the land reform budget has also suffered cutbacks over the years, particularly for the period under review. This tremendously affects any policy worth implementing.

Consequently, without effective implementation, measures instituted by the DLA in respecting, promoting, fulfilling, and protecting the rights of people to have access to land will be rendered ineffectual. This is evidenced by the fact that there are many landless people who are still dissatisfied by the pace of land reform.

While the DLA is striving to deliver land to the landless, it still does not do so in an efficient and opportune manner. The *Grootboom* judgement has shown that “reasonableness” and “progressive realisation” can be achieved only when measures are applied to attain a particular goal “expeditiously and effectively.” The slowness with which the DLA is directing land reform remains a cause for concern.

A mechanism must be established which must link the operations of the provinces and the DLA, since the provinces always refer to the DLA as the main body of dealing with land reform.

## **ABBREVIATIONS**

<b>CEDAW</b>	Convention on the Elimination of all Forms of Discrimination against Women
<b>ICESR</b>	International Covenant on Economic, Social and Cultural Rights
<b>CRLR</b>	Commission on Restitution of Land Rights
<b>DLA</b>	Department of Land Affairs
<b>IDASA</b>	Institute for Democracy in South Africa
<b>IDP</b>	Integrated Development Plan
<b>ESTA</b>	Extension of Security of Tenure Act
<b>IPIIRA</b>	Interim Protection of Informal Land Rights Act
<b>LRAD</b>	Land Redistribution for Agricultural Development
<b>LRP</b>	Land Redistribution Programme
<b>LTA</b>	Labour Tenants Act
<b>MECs</b>	Members of the Executive Council
<b>NAP</b>	National Action Plan
<b>PU</b>	Potchefstroom University
<b>RDP</b>	Reconstruction and Development Programme
<b>SADTs</b>	South African Development Trusts
<b>SAHRC</b>	South African Human Rights Commission
<b>SLAG</b>	Settlement/Land Acquisition Grant
<b>UNW</b>	University of the North West