

A critical assessment of land redistribution policy in the light of the *Grootboom* judgment

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## 1 INTRODUCTION

Dispossession and forced removal of people under colonialism and apartheid resulted not only in the physical separation of people along racial lines, but also in extreme land shortages and insecurity of tenure for much of the population. With the transition to democracy, expectations were high that a democratic government would effect a fundamental transformation of property rights that would address the history of dispossession and lay the foundations for the social and economic upliftment of the rural and urban poor. South Africa's 1996 Constitution,<sup>1</sup> through the 'property clause' (section 25), provides the basis for a comprehensive reform of property relations, albeit within a liberal democratic framework that upholds the rights of all property holders.

Seven years into the transition, however, the underlying problems of landlessness and insecure land rights of the previously disadvantaged remain largely unresolved. In line with its neo-liberal macroeconomic policy, the approach to land reform taken by the African National Congress-led government has been based on the use of free market mechanisms, tightly controlled public spending and minimal intervention in the economy – the so-called market-based, demand-led approach – which, to date, has made little impact on the racially-skewed distribution of land in South Africa. Today, over 13 million people, the majority of them poverty-stricken, remain crowded into the former homelands, where rights to land are often unclear or contested and the system of land administration is in disarray. On private farms, millions of workers, former workers and their families face continued tenure insecurity and lack of basic facilities, despite the passage of new laws designed to protect them. In the cities and rural towns informal settlements continue to expand, beset by poverty, crime and a lack of basic services.

A deepening social and economic crisis in the rural areas – fuelled by falling formal sector employment, the ravages of HIV/AIDS, ongoing evictions from farms and the collapse of agricultural support services in the former homelands – is accelerating the movement of people from 'deep' rural areas to towns and cities throughout the country, while tens of thousands of retrenched urban workers make the journey the other way. The result is a highly diverse pattern of demand for land for a variety of purposes and numerous hot spots of acute land hunger in both urban and rural areas. While it is not possible to quantify with any precision the extent of landlessness and land hunger in the country, the combination of overcrowding, poverty and unemployment in the former homelands, on commercial farms and in

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<sup>1</sup>All references to the 1996 Constitution in this paper, or to its sections, are to the Constitution of the Republic of South Africa, Act 108 of 1996.

the peri-urban townships combine to create a vast problem and a growing challenge to government land policies.

This paper examines one aspect of the state's land reform policy, namely, redistribution, in the light of section 25(5) of the Constitution and the *Grootboom* judgment.<sup>2</sup> It examines the constitutional and legal basis of the programme, the mechanisms for implementation that have been put in place and the programme's performance to date. Particular attention is paid to its effectiveness in addressing the needs of the rural poor and landless.

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## 2 THE CONSTITUTIONAL FRAMEWORK

### 2.1 Introduction to the property clause

There was considerable controversy about the inclusion of a property clause in the interim Constitution.<sup>3, 4</sup> Van der Walt points out that there were "fears that the property clause would either entrench existing property rights too strongly or that it would undermine existing property rights for the sake of land reform". However, the contending parties at the multiparty negotiations finally agreed to a property clause protecting existing rights while allowing the state to expropriate private property subject to the payment of compensation. The provision was retained and expanded in the final Constitution.

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Section 25, the provision on property in the final Constitution, can be regarded as comprising two parts. The first part, subsections 1–3, aims to protect existing property rights and delimit the scope of that protection. The second part, subsections 4–9, deals largely with land reform. The interim Constitution's section 28 did not have any specific provision for land reform, although the authority to carry out land reform could be implied from its provision for expropriation.<sup>5</sup> Section 25 of the 1996 Constitution can therefore be seen as an improvement on section 28 of the interim Constitution in that it introduced specific powers and duties on the state to implement land reform. Section 25 strikes a balance between the interests of property holders and the general public interest, empowering the state to redress the injustices of the past through redistribution of land and other natural resources to the advantage of the previously deprived. As Ackermann J recently put it in the *First National Bank (FNB)* case:

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The purpose of section 25 has to be seen as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited there to, and also as striking a proportionate balance between these two functions.<sup>6</sup>

Referring to the context in which section 25 must be interpreted, Ackermann states:

One should never lose sight of the historical context in which the property

<sup>2</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*).

<sup>3</sup> See Chaskalson 1995: 222.

<sup>4</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>5</sup> Van der Walt 1997: 7–8.

<sup>6</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and another; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (CC), para. 50 (hereafter *FNB*).

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clause came into existence. The background is one of conquest as a consequence of which there was a taking of land in circumstances [that] to this day are a source of pain and tension.<sup>7</sup>

Section 25(1) provides that “No-one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivations.”<sup>8</sup> Deprivation implies interference with use, enjoyment or exploitation of property in respect of the person having title or right to or in the property.<sup>9</sup> This protects property against arbitrary action by the state and introduces the requirement of legality and due process in dealing with private property. The provision means that a limitation on property rights must be both procedurally fair and not arbitrary in its substance.<sup>10</sup> At the same time it clarifies that the right to property is not absolute. Property may not only be subject to restriction or regulation by the state but may even be expropriated. Section 25(2) provides that:

Property may be expropriated only in terms of law of general application – (a) for a public purpose or in the public interest, and (b) subject to compensation, the amount, timing, and manner of payment of which must be agreed, or decided or approved by a court.

This provision has not been subjected to interpretation by the courts.

Under the interim Constitution, expropriation could only be carried out for public purpose. There were arguments as to whether this included land reform. In the 1996 Constitution the phrase used was “public purpose or public interest.” The latter had been interpreted in international law to include land reform. Section 25(4)(a) is an interpretation clause, which puts it beyond doubt that expropriation for purposes of land reform, which benefits individuals and communities rather than the state itself or the general public, can be justified in terms of section 25(2). It states that:

Public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources.

Section 25(3) introduces possible limitations on the right to compensation where property has been expropriated. It states:

The amount, timing, and manner of payment of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant

<sup>7</sup> Ibid. [para. 64](#).

<sup>8</sup> During the certification of the 1996 Constitution, it was argued that s 25 did not sufficiently protect property in that it was not worded positively. The positive guarantee in the interim Constitution that “everyone shall have the right to acquire and hold rights in property and to the extent that the nature of the rights permit, to dispose of such rights” (s 28(1)), was omitted from s 25 of the 1996 Constitution. However, the Constitutional Court held that protection of property was implicitly guaranteed in s 25. It said there was no need to include a positive guarantee. There was no standard, universally accepted formulation for a property clause and a number of democracies had a negative property clause with similar wording to that used in s 25. *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) paras. 71–72 (hereafter *Certification*).

<sup>9</sup> *FNB*, *supra* note [6](#), [para. 57](#).

<sup>10</sup> De Waal et al 2001: 420–421. The authors argue that s 25 is more protective of individual property rights against the state’s power to regulate property than its predecessor. Whereas s 28(1) only required a deprivation to be “in accordance with the law,” s 25(1) in addition requires that “no law may permit arbitrary deprivation of property,” which introduces the element of substantive due process.

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factors, including:

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvements of the property and
- (e) the purpose of the expropriation.

Although the list of factors to be considered is not exhaustive, it is clear that the amount to be paid as compensation for expropriated property could be considerably less than the market value of the property. This is in contrast to foreign case law suggesting that market value is the standard for determining 'just and equitable' compensation.<sup>11</sup> In response to an objection to section 25(3) during the certification hearing, however, the Constitutional Court decided that there was no evidence that market value was the accepted standard of compensation for expropriation.<sup>12</sup> In *Former Highlands residents, in re Ash v Department of Land Affairs*,<sup>13</sup> the Land Claims Court held that in matters of compensation for expropriation, market value was only the starting point. The factors referred to in section 25(3) could reduce or increase the actual compensation. In *Khumalo and Others v Potgieter and Others*,<sup>14</sup> labour tenants applied for the award to them of First Respondent's farm. Subsequently, Applicants and First Respondent entered into an agreement for the purchase of the farm at R1.2 million. The agreement was subject to approval by the Director-General of Land Affairs as the purchase was to be partly financed through a subsidy under section 16 of the Land Reform (Labour Tenants) Act.<sup>15</sup> The Director-General declined approval on the ground that the price was not just and equitable and referred the matter to court. The Land Claims Court (per Meer J) decided that as the agreement had not been approved by the Director-General, the Court had to determine just and equitable compensation for the acquisition of the land and had to apply section 25(3). The Court stated that compensation for expropriation had to be determined in two stages. First, the market value had to be determined on a factual basis guided by certain principles used in such determinations, as well as comparable sales. Second, the Court had to consider whether the market value as determined needed to be adjusted in the light of the other factors listed in section 25(3) of the Constitution.<sup>16</sup> Having determined the market value to be R500 000, the Court considered the various factors and decided that it was just and equitable to reduce the amount of compensation to R400 000. The reduction was largely on the basis of the history of acquisition.<sup>17</sup> The owner had bought the land in a depressed market precipitated by the passing of the Land Reform (Labour Tenants) Act and at a time when owners were selling land to avoid

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<sup>11</sup> Eisenberg 1993: 412.

<sup>12</sup> *Certification*, supra note 8, para. 73.

<sup>13</sup> *Former Highlands residents, in re Ash v Department of Land Affairs* 2000 (2) All SA 26

(LCC).

<sup>14</sup> *Khumalo and Others v Potgieter and Others* 2000 (2) All SA 456 (LCC) (*Khumalo*).

<sup>15</sup> Land Reform (Labour Tenants) Act 3 of 1996.

<sup>16</sup> *Khumalo*, supra note 14, para. 23.

<sup>17</sup> Meer J said: "I know that he bought (the farms) for well below the R500000 market value determined by me. If in the circumstances I was to compensate him at market value he would be getting an extraordinarily large windfall, regard being had to the price he paid for the properties. This would be unfair to the fiscus and would certainly not reflect an equitable balance between the public interest and the interest of those affected." *Khumalo*, supra note 14, paras. 95–96.

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being burdened with labour tenants under the new Act.

Given the racist policy of the apartheid government, which explicitly favoured the interests of white over black citizens, perhaps the most critical factors in section 25(3) that are to be considered in terms of land reform expropriations are the history of the acquisition and use of the property, as well as the extent of direct state investment and subsidy in the acquisition and capital improvement of the property. Taking account of these factors in calculating compensation should avoid windfalls for landowners and make land more affordable for purposes of redistribution. Nevertheless, this provision has not been exploited by the state with regard to redistribution. Rather, the 'willing buyer, willing seller' approach, leading to negotiated, market-related prices, has been preferred.

Section 25(6) requires the state to pass a law that ensures security of tenure to those whose tenure is insecure due to past racially discriminatory laws. Section 26(7) is concerned with restitution of land to those dispossessed of land after 1913 as a result of such laws. This paper does not deal directly with these aspects of land reform. The focus is on the state's duty to foster conditions that enable citizens to gain access to land on an equitable basis, that is, the redistribution leg of land reform, rather than the various rights that people exercise over such land.

## 2.2 Access to land as a socio-economic right: Analysis of section 25(5)

Section 25(5) of the Constitution states:

The state must take reasonable legislative and other measures, within its available resources, to foster conditions [that] enable citizens to gain access to land on an equitable basis.

Access to land is recognised as one of a cluster of socio-economic rights enshrined in the Constitution. As stated by the Constitutional Court in *Grootboom*, these socio-economic provisions "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>18</sup> More recently in the *Treatment Action Campaign (TAC)* case the Constitutional Court stated:

Besides the pandemic, the state faces huge demands in relation to access to education, land, housing, health care, food, water and social security. These are the socio-economic rights entrenched in the Constitution and the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them.<sup>19</sup>

Land is thus treated as a socio-economic right, despite the fact that the relevant provision (section 25(5)) does not use the explicit language of a right as used in relation to housing, health and other rights in sections 26, 27, and 28. Nowhere in the property clause is it stated that everyone has the right to land, or the right to have access to land. Section 25(5) merely puts an obligation on the state to "take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable

<sup>18</sup> *Grootboom*, *supra* note 2, [para. 19](#).

<sup>19</sup> *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) (hereafter *TAC*) [para. 94](#).

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basis.”<sup>20</sup> Thus it would appear that no individual person may demand access to land. However, this is not greatly different to the situation with regard to the right to housing. The duty of the state in both cases is to pass legislation and design and implement a programme that is reasonable within its available resources.

Does it matter that section 25(5) does not contain a positive right similar to that in section 26(1) and 27(1)? The issue was raised by the first and second *amici curiae* in the *TAC* case in the context of arguments concerning minimum core obligations. It was argued that section 26(1) (“everyone has the right to have access to adequate housing”) and section 27(1) (“everyone has the right to have access to health care, sufficient food and water, social security”) give rise to self-standing and independent rights apart from the obligations on the state in sections 26(2) and section 27(2). This, according to the *amici*, was in contrast to section 25(5), which did not contain a right of everyone to access to land although it imposed an obligation on the state to take measures to foster access to land.<sup>21</sup> The Court did not make any pronouncement regarding this apparent distinction. It did not make any finding as to whether the rights under section 25(5), on one hand, and section 26(1) and 27(1), on the other, are different in nature or indeed whether there is a right to land at all. However, it concluded that the Constitution does not give rise to a self-standing and independent positive right in section 27(1) which is enforceable irrespective of the considerations mentioned in sections 27(2).<sup>22</sup> It would appear that no undue emphasis should be put on the apparent distinction between the positive rights in section 26 and 27 and the absence of an explicit right in 25(5). What is significant is that the Constitutional Court stated that the state “must also foster conditions to enable citizen to gain access to land on an equitable basis. *Those in need have a corresponding right to demand that this be done*”<sup>23</sup> (emphasis added). It is therefore contended that poor people with no access to land or whose access is inadequate or precarious may demand that the state implement a programme which makes secure access to land possible.

Section 25(5) has both a passive and a positive aspect to it. The passive aspect potentially allows it to be used as a defence by the state when challenged by opponents to its land redistribution programme. It has been argued that:

Any constitutional challenge to social reform legislation or action will be met, at least in part, by reliance on the social and economic rights in the Constitution. The land rights in section 25 are a very important counterweight to the constitutional entrenchment, in that section, of existing property rights. Social and economic rights can therefore provide constitutional authority or constitutional protection for legislation or administrative action.<sup>24</sup>

The positive aspect is that it may be used under certain circumstances to compel the state to comply with the obligation to “foster conditions [that] enable citizens to gain access to land on an equitable basis”. Budlender and others predicted that it is:

...conceivable that under appropriate circumstances, a court could be

<sup>20</sup> It would appear that the intention of not using the broad terminology of a universal right was to limit claims to land and to allow the state sufficient flexibility to fashion its land policy.

<sup>21</sup> *TAC*, *supra* note 19, para. 28.

<sup>22</sup> *Ibid.* para. 39.

<sup>23</sup> *Grootboom*, *supra* note 2, para. 93.

<sup>24</sup> Budlender et al 1998: 1–69.

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persuaded to issue a declaratory order that the state was in breach of its constitutional obligations. This would no doubt have a powerful political impact.<sup>25</sup>

This is what happened in *Grootboom* in respect to the right of access to housing contained in section 26. Both declaratory and mandatory orders were made in the *TAC* case in relation to the right of access to health care services in section 27.

The question may be asked: what is meant by access to land on an equitable basis? Access does not necessarily imply, although it includes, ownership. It may mean availability of land on joint ownership, leases or other secure use rights, which would protect occupiers from arbitrary dispossession. For instance, one of these forms of access is the joint ownership of land through an association under the Communal Property Associations Act.<sup>26</sup> Access may also be secured through legislative measures designed to secure rights to land already occupied under insecure forms of tenure, such as that experienced by many farm workers on privately owned land.<sup>27</sup>

The state is required to put in place legislative and other measures that foster conditions enabling citizens to gain access to land on an equitable basis. This implies that the state may redistribute state land or purchase or expropriate land for redistribution, but may also make it possible for people to purchase private land by means of subsidies and through facilitating access to credit on favourable terms.<sup>28</sup>

The reference to “on an equitable basis” seems to be aimed at a land redistribution programme that attempts to redress the historical gross imbalance of ownership of land between the minority white population, which owns more than 80% of the land, and the black majority, which owns less than 20%. Thus, the inclusion of people who are not necessarily poor in the redistribution programme, in order to open up commercial farming to black entrepreneurs, is *prima facie* justifiable in terms of section 25(5). Nevertheless, as will be argued below, adequate consideration needs to be given to meeting the needs of the poor (or “those in need”, according to *Grootboom*) in order for the programme to meet the test of reasonableness.

### 2.3 Reasonable legislative and other measures

Section 25(5) requires the state to “take reasonable legislative and other measures...”. This phrase is employed in respect of other socio-economic rights and was extensively discussed in *Grootboom*. In interpreting this phrase, the Court held that the state has discretion in determining the nature of the policies to be adopted, the legislation to be enacted, and their implementation. In other words, the state may

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<sup>25</sup> *Ibid.*

<sup>26</sup> Communal Property Associations Act 28 of 1996.

<sup>27</sup> The requirement on the Minister of Agriculture and Land Affairs in s 4 of the Extension of Security of Tenure Act 62 of 1997 (ESTA) to grant subsidies “to enable occupiers, former occupiers and other persons who need long-term security of tenure to acquire rights in land” is clearly intended as a redistribution mechanism.

<sup>28</sup> The responsibility to provide land is not only on the state. As was said of housing in *Grootboom*: “A right of access to housing also suggests that it is not only the state who is responsible for the provision of houses but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures” (*Grootboom*, *supra* note 2, para. 35). Enabling private individuals to develop land and make it available to the public is one of the purposes of the Development Facilitation Act 67 of 1995.

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choose the means of fulfilling its obligations.<sup>29</sup> However, this does not mean that the state can do whatever it wants. The measures taken must be capable, from an objective standpoint, of achieving the purpose intended by the constitutional provision:

The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must however, ensure that the measures are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.<sup>30</sup>

Reasonableness not only relates to the design of legislation, policies and programmes, but also applies to their implementation. In *Grootboom* it was said:

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.<sup>31</sup>

Thus, in assessing whether the state has met its obligation in relation to section 25(5), the pace and extent of the implementation of the land redistribution programme need to be examined.

Assessing reasonableness will take account of the social, economic and historical context.<sup>32</sup> With respect to land, this means that the historical deprivation of black people under colonialism and apartheid must be considered. In order to be reasonable a land redistribution programme must give adequate consideration to the landless and to those whose access to land is least secure. In the context of the right of access to housing, the Court stated:

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving the realisation of the right. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.<sup>33</sup>

The Court concluded that the state's measures regarding housing fell short of the Constitutional requirement of reasonableness as they failed to cater for those in desperate need. Equally, in the *TAC* case the state's measures regarding access to health failed the test of reasonableness in that they failed to provide access to

<sup>29</sup> *Grootboom*, supra note 2, para. 41. Also see de Vos (1997: 96) and the sources quoted therein.

<sup>30</sup> *Grootboom*, supra note 2 para. 41.

<sup>31</sup> *Ibid.* para. 42.

<sup>32</sup> *Ibid.* para. 43.

<sup>33</sup> *Ibid.* para. 44.

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Nevirapine for HIV positive pregnant women throughout the public health sector.<sup>34</sup> The Court held that the state's restrictive policy had a particularly harsh impact on the poor who did not have access to the research and training sites where Nevirapine was available.<sup>35</sup> HIV positive pregnant women and their newborn babies were a particularly vulnerable group in need of state assistance to make health care services available to them.<sup>36</sup>

The capacity of institutions to implement land reform programmes must also be taken into account in determining the reasonableness of the legislative and other measures. In the context of the right of access to housing, the Court held that what constitutes reasonable legislative and other measures must be determined in light of the fact that the Constitution creates different spheres of government: national, provincial and local. The Court went on to say:

A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.<sup>37</sup>

Whereas national and provincial governments share the function of housing, land matters are within the functional area of the national government.<sup>38</sup> In either case, the national or provincial government may assign the implementation of a function under part A of schedule 4 or 5 of the Constitution to the local sphere of government.<sup>39</sup> Although land is within the exclusive function of the national government, implementation of land policy may be most effectively administered by sharing the responsibility among the various spheres of government. The Court's statement that "a coordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chapter 3 of the Constitution"<sup>40</sup> is relevant to the management of the redistribution programme. Provincial and local governments need not have their own programmes but should be in a position to contribute to the administration of national programmes under assignment or delegation from the national government.<sup>41</sup>

## 2.4 Resources

Section 25(5) of the Constitution, in common with other socio-economic rights, contains an internal limitation in that the obligation of the state to ensure progressive realisation of the right is subject to the availability of resources at its disposal. The

<sup>34</sup> *TAC*, *supra* note 19, paras. 80–81.

<sup>35</sup> *Ibid.*, para. 68.

<sup>36</sup> *Ibid.*, para. 79.

<sup>37</sup> *Grootboom*, *supra* note 2, para. 39.

<sup>38</sup> Housing is listed in schedule 4 of the Constitution as an area of concurrent competence.

Land is not listed either in schedule 4 or 5 and therefore is within the residual competence of the national government.

<sup>39</sup> Section 156(4) states that: "The national government and provincial governments must assign to a municipality by agreement and subject to any conditions, the administration of a matter listed in part A of Schedule 4 or part A of schedule 5 which necessarily relates to local government, if (a) the matter would most effectively be administered locally; and (b) the municipality has the capacity to administer it."

<sup>40</sup> *Grootboom*, *supra* note 2, para. 40.

<sup>41</sup> The Court emphasised that the national government bears an important responsibility in relation to the allocation of national revenue to the province and local government on an equitable basis in terms of s 214 of the Constitution (*Grootboom*, *supra* note 2, para. 40). This point applies equally in respect of land redistribution.

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state clearly does not have unlimited resources and is therefore allowed considerable discretion to determine how national resources are spent. Failure on the part of the state to fulfil a socio-economic right due to lack of adequate resources is not, in itself, a violation of that right. This point was made by the Constitutional Court in *Soobramoney*,<sup>42</sup> in which the Court held that the refusal to provide dialysis treatment to a man experiencing chronic renal failure did not constitute a violation of his right to health. The Court found that the spending decisions made by the Department of Health were not irrational given the limited budget within which it was operating. The Court said:

What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them...an unqualified obligation to meet these needs would not presently be capable of being fulfilled.<sup>43</sup>

It is reasonable to say these remarks are equally applicable to the duty to make land accessible on an equitable basis, since the same wording is used in section 25(5). In *Grootboom*, in referring to the housing clause, the Court clearly set out the implications of the phrase “within its available resources” in terms that can equally be applied to land (25(5)):

The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the State to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the State than is achievable within its available resources.<sup>44</sup>

However, it is important to point out that, in terms of international law, the state cannot simply plead lack of resources in order to evade its responsibilities to take steps towards the realisation of socio-economic rights. The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) requires that states parties must satisfy at least a “minimum core obligation” to ensure essential levels of the socio-economic rights. The state has the burden to show that every effort has been made “to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”<sup>45</sup> It must “strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.”<sup>46</sup> The duty to monitor the realisation of socio-economic rights and to devise strategies and programmes applies regardless of resource constraints.<sup>47</sup>

As argued below, the state has repeatedly failed to spend the budget allocated for land reform and therefore could not plead it lacked resources to provide

<sup>42</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

<sup>43</sup> *Ibid.* para. 11.

<sup>44</sup> *Grootboom*, *supra* note 2, para. 46.

<sup>45</sup> General Comment No. 3 (Fifth session, 1990) *The nature of States parties obligations (art 2(1) of the Covenant)* UN doc. E/1991/23, para. 10.

<sup>46</sup> *Ibid.* para. 11.

<sup>47</sup> *Ibid.*

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a minimum core of land to the poor. Indeed, government has never suggested that land reform is hampered by an absolute lack of resources. In *Grootboom*, the Court declined to determine the minimum core obligation with respect to the right of access to housing on the ground that it did not have sufficient information available regarding the needs and opportunities for the enjoyment of the right to enable it to make such a determination. The Court said that these “varied according to factors such as income, employment, availability of land and poverty.”<sup>48</sup> However, it did not reject the idea of a minimum core obligation altogether. It acknowledged that “there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable.”<sup>49</sup>

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In the *TAC* case, the Court seemed to go further in its reluctance to apply the minimum core obligation. The Court said the Constitution “should not be construed as entitling everyone to demand that the minimum core be provided to them”,<sup>50</sup> and went on: “...it is impossible to give everyone access to a ‘core’ service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights...on a progressive basis.”<sup>51</sup> The court was thus at pains to emphasise that it did not interpret section 26 to confer an independent right on any individual to claim access to a core service from the state. Minimum core obligations are thus “possibly” only relevant to the reasonableness enquiry.<sup>52</sup> It seems unfortunate that the Court refuses to apply the minimum core obligation concept. As Liebenberg has argued, this would assist the poor to access at least the basic level of services and government would not easily evade this obligation by hiding behind resource constraints.<sup>53</sup> It would be easier for poor people to prove that these rights have been violated. With specific reference to land, the minimum core obligation should ensure that poor people have a piece of land for their housing and, where appropriate, for subsistence agriculture, and that their tenure on such land is secure. The Court in *Grootboom*, however, adopted the view that it did not have sufficient evidence on various issues to determine the minimum core.

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The reluctance to employ the minimum core concept seems to be based on the Court’s deference to the executive in matters of policy and budget allocation. The Court in the *TAC* case stated:

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The courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards...should be, nor for deciding how public revenues should most effectively be spent...Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet constitutional obligations and to subject the reasonableness of such measure to evaluation. Such determinations may in fact have budgetary implication but are not

<sup>48</sup> *Grootboom*, *supra* note 2, para. 32.

<sup>49</sup> *Ibid.* para. 33.

<sup>50</sup> *TAC*, *supra* note 19, para. 34.

<sup>51</sup> *Ibid.* para. 35.

<sup>52</sup> *Ibid.* para. 34.

<sup>53</sup> See Liebenberg in this volume.

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themselves directed at rearranging budgets.<sup>54</sup>

However, the Court is willing to make orders against the state, which may include budgetary implications, where its measures are not reasonable and fail the constitutional standard. This was demonstrated in the *TAC* case where the Court ordered the government to make Nevirapine available to HIV positive pregnant women and their newborn babies at public hospitals and clinics, where recommended by the attending medical practitioner. What remains to be seen is whether the courts will be willing to issue similar orders for the government to put in place and implement a comprehensive programme of land redistribution that prioritises the needs of the poor.

### 3 LAND REFORM POLICY AND THE REDISTRIBUTION PROGRAMME

#### 3.1 Background

Pressure on the apartheid regime, not least from propertyless people themselves, brought the partial dismantling of the laws and other repressive measures that restricted the property rights of the majority prior to 1994.<sup>55</sup> Early measures to improve the land rights of black people and their access to land included the Upgrading of Land Tenure Rights Act,<sup>56</sup> which allowed for the conversion of certain permits to title deeds, and the Provision of Certain Land for Settlement Act,<sup>57</sup> which provided for grants to persons wishing to purchase land from the state or private owners. A Commission on Land Allocation was also established to facilitate the return of certain state land to its former owners, with limited results.

Since the transition to democracy, land reform in South Africa has been pursued under three broad headings:

- *restitution*, which provides relief for certain categories of victims of forced dispossession;
- *redistribution*, a system of discretionary grants that assists certain categories of people to purchase or otherwise acquire land; and
- *tenure reform*, intended to secure and extend the land tenure rights of the victims of past discriminatory practices.

The framework for land reform policy is set out in the White Paper on South African Land Policy (the White Paper on Land), released in April 1997 and based on an extensive consultative process.<sup>58</sup> Despite major changes in land reform

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<sup>54</sup> *TAC*, *supra* note 19, paras. 37–38.

<sup>55</sup> Key milestones in the retreat from grand apartheid were the repeal of the pass laws and the promulgation of the Abolition of Racially Based Land Measures Act 108 of 1991, which repealed the Land Acts of 1913 and 1936 and the Groups Areas Act of 1966.

<sup>56</sup> Upgrading of Land Tenure Rights Act 112 of 1991.

<sup>57</sup> Provision of Certain Land for Settlement Act 126 of 1993.

<sup>58</sup> In May 1995, the Department of Land Affairs (DLA) issued a *Framework Document on Land Policy* for public consultation. This led to a *Draft Statement of Land Policy and Principles*, presented to a national Land Policy Conference held in August–September 1995, which led in turn to the Department's *Green Paper on South African Land Policy*, published in February 1996. Following further consultation, the proposals contained in the *Green Paper* were modified and formed the basis of the White Paper on South African Land Policy. DLA 1997 White Paper on South African Land Policy Pretoria: Department of Land Affairs (hereafter White Paper on Land).

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programmes, considerable turnover of senior personnel in the Department of Land Affairs (DLA), and a new Minister for Agriculture and Land Affairs from June 1999, the White Paper on Land has not been revised or superseded since its publication, and thus remains the official statement of government policy on land.

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All three aspects of the land reform programme – restitution, redistribution and tenure reform – are ultimately derived from the Constitution (see above). It is the redistribution programme, however, which is widely seen as giving effect to section 25(5). The purpose of the redistribution programme is set out clearly in the White Paper on Land:

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The purpose of the land redistribution programme is to provide the poor with access to land for residential and productive uses, in order to improve their income and quality of life. The programme aims to assist the poor, labour tenants, farm workers, women, as well as emergent farmers. Redistributive land reform will be largely based on willing-buyer willing-seller arrangements. Government will assist in the purchase of land, but will in general not be the buyer or owner. Rather, it will make land acquisition grants available and will support and finance the required planning process. In many cases, communities are expected to pool their resources to negotiate, buy and jointly hold land under a formal title deed. Opportunities are also offered for individuals to access the grant for land acquisition.<sup>59</sup>

In this statement, and throughout the White Paper on Land, the aims of the programme, the intended beneficiaries and the envisaged benefits are clearly spelled out and are broadly in line with section 25(5). The principal beneficiaries are to be 'the poor' (including labour tenants, farm workers and women), and emergent farmers. While these are not necessarily distinct categories, the intention remains clear – to provide access to land for previously disadvantaged groups and individuals.<sup>60</sup> Such affirmative measures can be seen as promoting the constitutional imperative of equity. The application of the willing buyer, willing seller principle has meant assisting previously excluded groups to enter the existing land market, alongside other actors, without diminishing either the rights of those who have historically enjoyed favourable access to the land market or the rights of existing land owners.

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The intended beneficiaries of the land redistribution programme are to be provided with access to land for either residential or productive use, or both, in order to improve their income and quality of life. While section 25(5) does not specify any particular land use, the reference to residential and productive uses in the White Paper on Land is appropriately broad and serves to clarify that no single or narrow definition of land use is envisaged by the policy.

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### 3.2 Urban land

Throughout the White Paper on Land (and more explicitly, throughout the implementation of redistribution policy, as argued below) a distinction is made between urban and rural land. This is largely based on the anticipated use of the land for agricultural (productive) or housing (settlement) purposes. While the White

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<sup>59</sup> ibid. 38.

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<sup>60</sup> Note that while specific subgroups are mentioned, the large and amorphous category of 'the poor' is effectively treated as one throughout the White Paper on Land, without further differentiation.

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*Paper on Land* does include the aim of providing access to land for residential purposes as part of the redistribution programme, as a whole it has a strong rural focus, as have related policy documents. Insofar as land for residential purposes is addressed, both in the *White Paper on Land* and in land reform policy more generally, it largely refers to non-agricultural housing schemes in small rural towns rather than to land in urban areas.

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Specific measures are envisaged to make land available for housing development in urban areas, but these do not extend to the implementation of specific programmes in urban areas by the DLA:

The DLA appreciates the pressing and serious nature of urban landlessness. However, its role has to be played within the context of a multi-sectoral urban development programme and it is necessarily confined to the delivery of land and secure tenure through the development of an appropriate enabling policy and legislative framework.<sup>61</sup>

An important part of this legislative framework is the Development Facilitation Act (DFA) which provides for the rapid release of land for development, particularly housing, especially in cases of pressing socio-economic need. As stated in the *White Paper on Land*:

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The Development Facilitation Act introduces measures to facilitate and expedite land development projects. It aims to overcome bottlenecks in existing regulations to accelerate land development, especially the delivery of serviced land for low-income housing.<sup>62</sup>

The DFA strengthens the hand of state agencies wishing to acquire land through the market, but responsibility for acquiring land for housing continues to rest largely with local municipalities, often working with private developers. Land is typically acquired using a municipality's own resources, or with funds from provincial or national housing departments.

Other measures that were developed to expedite access to land for housing in urban areas prior to the December 2000 reorganisation of local government structures included the Mayibuye rapid land release programme in Gauteng and the Accelerated Managed Land Supply Programme in the Cape Town Metropolitan Area. Such programmes have, however, largely been the initiative of provincial or local government, and are shaped by local, provincial and national housing policies. While programmes such as these can certainly increase access to land for those in need, they are not under the control of the DLA and do not form an integral part of the redistribution programme. Nonetheless, they can be seen as contributing to the achievement of the objectives set out in section 25(5) by increasing the availability of land for housing purposes.

Since 1999 there has been a distinct shift in land reform policy away from land for settlement and towards land for agricultural purposes. This has meant, in practice, that the objectives of the land reform programme are being pursued largely in the rural areas, while a separate process under the banner of housing policy determines the provision of land in urban areas. While it may be reasonable to have distinct policies for rural and urban areas, it is not clear to what extent, if any, the responsible departments (effectively the provincial and national Departments of

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<sup>61</sup> *White Paper on Land*, *supra* note 58, 45.

<sup>62</sup> *Ibid.* 81.

Housing, together with the Department of Local Government), see themselves as responsible for meeting the obligation contained in section 25(5) of the Constitution, or if they have appropriate policies and programmes in place to bring this about. In a recent article, Geoff Budlender, former Director-General of the DLA, speaks of a large gap in both the housing and land redistribution programmes with regard to the provision of land in urban areas:

Neither Housing nor Land Affairs sees the provision of undeveloped land for settlement as part of its core business. This is therefore simply not happening on any significant scale.<sup>63</sup>

There is no obvious reason why urban land should be excluded from land reform, or from the purview of section 25(5), and the *White Paper on Land* explicitly includes land for residential purposes under redistribution. The deliberate emphasis on rural, agricultural land by the DLA, coupled with the fact that no other branch of government has yet been given clear responsibility for implementing land reform in urban areas, appears to be an unwarranted curtailment of the state's responsibility to promote access to land in line with the Constitution.<sup>64</sup>

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### 3.3 Rural land

The methods chosen by the state to bring about redistribution are largely, although not entirely, based on the operation of the existing land market through various assisted purchase measures. Programme beneficiaries are not generally provided with land by the state. Rather, the state assists people who might otherwise be unable to enter the land market to purchase property of their own – the so-called willing buyers. This strategy presupposes that the existing land market can deal effectively with what might be expected to be a very substantial transfer of land, and that the intended beneficiaries, even with state assistance, will be able to engage effectively in the market to their ultimate benefit. The programme is heavily dependent on the voluntary sale of land by current owners – the so-called willing sellers – who cannot be assumed to be motivated by the spirit of the Constitution.<sup>65</sup> This imposes a potential obstacle to the effective implementation of policy by the state and a potential limitation on the rights of intended beneficiaries. It is important to note, however, that other measures, such as expropriation, are available to the state, but have not been widely used to date.<sup>66</sup>

Up to late 1999, the redistribution programme was based largely on the provision of the settlement/land acquisition grant (SLAG), a grant of R16 000 paid to qualifying households. Most projects under this programme involved groups of applicants pooling their grants to buy formerly white-owned farms for commercial agricultural purposes. Less commonly, groups of farm workers have used the grant to purchase equity shares in existing farming enterprises. A separate grant for the acquisition of municipal commonage has been made available to municipalities

<sup>63</sup> Budlender 2001.

<sup>64</sup> DLA's "Strategic Plan 2001–2002" does, however, make reference to an "urban renewal programme" and to a "land policy on land redistribution for settlement." DLA 2001 "Strategic plan 2001–2002" [http://land.pwv.gov.za/documents&publications/documents/strategic plan.html](http://land.pwv.gov.za/documents&publications/documents/strategic%20plan.html)> Accessed 2 April 2002 (hereafter *Strategic Plan*).

<sup>65</sup> There is little evidence of consultation with, or agreement by, existing landowners prior to formulation of this policy, and the commitment of current owners to the programme is questionable.

<sup>66</sup> "Expropriation will be used as an instrument of last resort where urgent land needs cannot be met, for various reasons, through voluntary market transactions." *White Paper on Land*, *supra* note 58, 39.

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wishing to provide communal land for use (typically grazing) by inhabitants of smaller rural towns. Various other grants and services have also been made available to participants in the redistribution programme. These included the *settlement planning grant*, intended to enlist the services of planners and other professionals to assist SLAG applicants in preparing projects and settlement plans; a *facilitation service*, to provide applicants with access to appropriate services; and *training and capacity building services*, intended to equip grant applicants and service providers to participate more effectively in the programme.<sup>67</sup>

The Provision of Certain Land for Settlement Act<sup>68</sup> provides the legal basis for redistribution. This law was amended in 1998, in terms of the Provision of Certain Land for Settlement Amendment Act,<sup>69</sup> and is now entitled the Provision of Land and Assistance Act.<sup>70</sup> Both the SLAG and the recent Land Redistribution for Agricultural Development (LRAD) programme draw their legal authority from this legislation. While many of the changes introduced by the 1998 amendment were of a minor technical nature, the amended Act introduced an important change to the definition of persons that qualify for assistance. Whereas the original Act allowed for the granting of an advance or subsidy “to any person”, the 1998 amendment specified the categories of persons that could be assisted. These included “persons who have no land or who have limited access to land, and who wish to gain access to land or to additional land”, persons wishing to upgrade their land tenure, or persons who have been dispossessed of their right in land but do not have a right to restitution under the Restitution of Land Rights Act.<sup>71</sup>

Following the general election of 1999, the new Minister of Agriculture and Land Affairs announced a sweeping review of land reform policy and programmes, including a moratorium on new redistribution projects. In February 2000, the Minister released a policy statement concerning strategic directions on land issues (hereafter the *DLA Policy statement*).<sup>72</sup> While the *DLA Policy statement* did not unveil any finalised new programmes, it did identify some of the problems being faced by government implementing land reform and outlined the general policy direction that would be followed in future. Particular attention was given to redistribution policy. According to the Minister:

Several problems have been identified regarding the nature and application of the Settlement Land Acquisition Grant and other redistribution products.<sup>73</sup>

The *DLA Policy statement* lists a number of “severe limitations” in the structure and implementation of SLAG, including over-reliance on market forces, payment of inflated prices for marginal land, lack of any significant contribution to the development of semi-commercial and commercial black farmers, and little impact on rural employment or transformation of agricultural land holdings.

To address these and other problems, the Minister proposed a revised redistribution programme that would include grants for aspiring commercial farmers,

<sup>67</sup> Ibid.

<sup>68</sup> Provision of Certain Land for Settlement Act 126 of 1993.

<sup>69</sup> Provision of Certain Land for Settlement Amendment Act 26 of 1998.

<sup>70</sup> Provision of Land and Assistance Act 126 of 1993.

<sup>71</sup> Restitution of Land Rights Act 22 of 1994.

<sup>72</sup> *DLA 2000 Policy statement by the Minister for Agriculture and Land Affairs for strategic directions on land issues* Pretoria: Ministry for Agriculture and Land Affairs (hereafter *Policy Statement*).

<sup>73</sup> Ibid.

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food safety net grants for the rural poor, settlement grants for urban and rural poor to access land for settlement and a revised commonage grant that would be available both to municipalities and for the extension of communal land. The *DLA Policy statement* also lifted the moratorium on new redistribution projects that had been imposed six months before.

The *DLA Policy statement* was followed by a lengthy period of policy review and debate, but it was not until June 2001 that a definitive new redistribution policy was unveiled, entitled “Land redistribution for agricultural development: A sub-programme of the land redistribution programme.” The official launch of the new programme (generally referred to as LRAD) took place in August 2001.

According to the DLA’s LRAD policy document,<sup>74</sup> the redistribution programme has three different components, or “sub-programmes”:

- *agricultural development* – to make land available to people for agricultural purposes;
- *settlement* – to provide land for settlement purposes; and
- *non-agricultural enterprises* – to provide land for non-agricultural enterprises, such as ecotourism projects.

The central mechanism offered by LRAD is a single, unified grant system that beneficiaries can access along a sliding scale from R20 000 to R100 000. All beneficiaries must make a contribution, in cash or in kind, the size of which will determine the value of the grant for which they qualify. The minimum contribution is R5 000, with which an applicant can obtain a grant worth R20 000, and the maximum is R400 000, with which an applicant can obtain a grant worth R100 000.

In addition to the increase in the value of the grant and the requirement of a contribution by beneficiaries, LRAD differs from the previous SLAG in a number of ways. Of particular importance is the decentralisation of the approval and implementation of projects to provincial and district level, respectively, and closer cooperation between various government departments and spheres of government, with an enhanced role for district municipalities. Moreover LRAD provides for the substitution of *ex post* audits and monitoring for a lengthy *ex ante* approval process.

The range of project types that may be supported includes commercial agriculture, food safety net projects for very poor households, purchase of share equity in agricultural enterprises and productive investment in infrastructure or land improvements in communal areas. Nevertheless, considerable continuities with past policies are also evident. The programme continues to be described as demand directed, meaning that beneficiaries themselves must define the type of project in which they wish to engage and, with appropriate assistance, identify available land. Acquisition of land, from either private or public sources, continues to be on the basis of willing seller, willing buyer.

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<sup>74</sup> Ministry for Agriculture and Land Affairs 2001 *Land Redistribution for Agricultural Development: A sub-programme of the Land Redistribution Programme* Pretoria: Ministry for Agriculture and Land Affairs (hereafter LRAD).

## 4 IS THE LAND REDISTRIBUTION PROGRAMME REASONABLE?

### 4.1 Policy formulation

In *Grootboom*, the Court elaborated at length on the question of reasonableness.<sup>75</sup> Few would doubt that the state has made considerable progress in devising and implementing programmes of land reform since 1994. Important new legislation has been introduced dealing with the restitution of land rights to the historically dispossessed and the protection of the land rights of occupiers of privately owned farms and communal areas. New institutions have been established, such as the DLA itself, the Land Claims Court and the Commission for Restitution of Land Rights. A variety of measures have been put in place to assist the landless and the historically disadvantaged to access land.

This section will not look in any detail at the restitution and tenure reform components of the land reform programme, but rather concentrates on those areas of policy that “enable citizens to gain access to land on an equitable basis”.<sup>76</sup>

The most detailed expression of redistribution policy is to be found in the 1997 *White Paper on Land*, but even this is largely at the level of principles or policy options, rather than an implementation strategy. Since then, the only substantial policy document widely circulated by the DLA has been the June 2001 LRAD policy document, which deals with a limited section of the redistribution programme and again is notably brief at the level of concrete strategies. These formal statements of policy have been supplemented by a variety of internal policy documents, implementation manuals, pamphlets and statements by the Minister and senior officials. While these add some further information on particular issues or broad policy directions, they do not provide a coherent, comprehensive and accessible statement of redistribution policy in such a way that allows for its objective evaluation against the obligations set out in section 25(5).

A number of areas can be identified where policy remains less than clear.

#### 4.1.1 Commonage

Municipal commonage refers to land owned or controlled by local municipalities and made available to town dwellers, usually for grazing purposes. Over the years, the need for such land declined in many small towns, especially with the forced removal of poor black residents. Much municipal commonage thus lost its original ‘welfare’ function and was used for recreational or housing purposes, or leased on long leases to commercial (usually white) farmers.

Official policy on municipal commonage was formulated in terms of a DLA policy document in 1997,<sup>77</sup> and approved by the Minister in June of that year. The *White Paper on Land* of the same year treats what it calls “local government commonage” as part of the redistribution programme and financial assistance has

<sup>75</sup> See Liebenberg in this volume, at section 4.2.3.

<sup>76</sup> Both restitution and tenure reform may also provide access to land, or to enhanced land rights, and these areas of land reform clearly overlap with redistribution. Nonetheless, the intention of this paper is to deal with the obligations imposed on the state in terms of s 25(5) to provide equitable access to land. Rights to restitution and tenure reform are independently protected under the Constitution and by distinct bodies of legislation and policy, which go beyond the provisions of s 25(5).

<sup>77</sup> DLA 1997 *Municipal commonage: policy and procedures* Pretoria: DLA.

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since been provided to local municipalities in the form of grants for the acquisition of land for municipal commonage. This is in recognition of the potential for commonage to provide access to land for very poor people who may not be in a position to acquire land of their own. As such, commonage, especially the creation of new commonages, has an important place within redistribution policy, and a key role in meeting the obligations imposed by section 25(5) of the Constitution.

The manner in which commonage policy has been elaborated and implemented, however, raises questions about the Department's commitment to such a programme. Between 1997 and 1999, the commonage programme was actively implemented by some DLA provincial offices, notably the Northern Cape and the Free State, but was completely neglected in areas such as the Northern Province, Gauteng and KwaZulu-Natal.<sup>78</sup> The Minister's policy statement of February 2000 made a number of critical comments regarding commonage policy, which suggested it did not enjoy ministerial support:

Although commonages remain a useful instrument in the attainment of broader land reform objectives, it must be clearly reasserted that it cannot take budgetary priority over...the redistribution of land to the landless poor.<sup>79</sup>

By June 2001, commonage was still being referred to in official documents as part of the redistribution programme, and more particularly, as part of LRAD:

The Land Redistribution for Agricultural Development sub-programme has two distinct parts. First, there is the part that deals with transfer of agricultural land to specific individuals or groups. Second, there is the part dealing with commonage projects, which aim to improve people's access to municipal and tribal land primarily for grazing purposes.<sup>80</sup>

Since the launch of LRAD, however, commonage appears to have dropped from the agenda once again. The strong implication is that commonage policy is being neglected – while the government is seemingly not willing to drop this aspect of policy entirely, neither is it taking active steps to clarify its policy position.<sup>81</sup>

The central issue here is that commonage is being implemented only in certain provinces, apparently where there is a history of commonage and where provincial offices of the DLA have pushed the matter. Little effort has been made by the DLA nationally to promote the policy in recent years. The DLA and the Minister have made statements that the commonage programme will be extended to tribes wishing to extend their grazing lands, but no progress towards this is evident. The implied links between commonage policy and LRAD are also difficult to discern.

Evidence from the Northern Cape suggests that municipal commonage has many advantages for the rural poor, as beneficiaries do not have to form a legal entity, apply for a grant or take ownership of the land, as the municipality handles all of this.<sup>82</sup> It is particularly suitable for the very poor as town dwellers with even one or two animals can gain access to grazing land for a small fee, and can move in or out

<sup>78</sup> See DLA 1999; also Lahiff 2000: 105.

<sup>79</sup> *Policy Statement*, *supra* note 72.

<sup>80</sup> LRAD, *supra* note 74.

<sup>81</sup> For example, DLA's *Strategic Plan*, *supra* note 64, makes no reference at all to commonage. DLA's *Annual report 2000–2001* makes only passing reference to "refined policies and procedures," as well as a "draft policy framework" for tribal commonage, but gives no indication of the status of the programme or the rate of implementation. DLA 2001a: 124.

<sup>82</sup> Surplus People Project 1996.

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of the project as their circumstances change. Management of the commonage is the responsibility of the municipality, usually in partnership with users and other stakeholders such as provincial Departments of Agriculture. Where civil society or community structures are weak, local government can provide vital institutional strength to hold and manage property in partnership with poor townspeople who might otherwise have no access to land. While commonage projects have undoubtedly suffered from infighting and abuse, like all other forms of group projects within land reform, they certainly have potential benefits for poor people that do not appear to be fully appreciated by the DLA nationally.

#### 4.1.2 Settlement/land acquisition grant

The SLAG pre-dates the 1997 *White Paper on Land*, and up to 1999 was the principal mechanism for implementing redistribution policy. In the *DLA Policy statement* of February 2000, the Minister listed several limitations concerning the structure and implementation of SLAG and stressed the need for the policy to be reviewed. Considerable mention was also made of a new programme of redistribution:

The current grant system will continue, but will be subject to a number of changes. The objective of the new programme is to gradually change the structure of the South African agriculture by opening opportunities thereby creating a significant number of black commercial farmers operating on medium- and large-scale.<sup>83</sup>

The new programme materialised the following year in the form of LRAD. The LRAD policy document, however, makes no mention of SLAG, or of how the two programmes relate. It appears to replace the former grant programme with a new one. Yet, in a speech to the National Assembly in May 2001, the Minister stressed that LRAD has been added to the existing programmes: “We have added this sub-programme to our various land redistribution products”.<sup>84</sup> Thus, while SLAG continues to form part of official policy and is still being applied by some provincial offices of DLA, it receives no mention in the only definitive document of redistribution policy that has appeared since 1999.<sup>85</sup>

Interviews with provincial officials of DLA suggest that SLAG is now being used for certain small-scale projects, particularly those with a settlement component. This suggests a significant shift in the function of SLAG, away from the main redistribution grant towards a grant used to supplement the agricultural settlement programme (LRAD). Its residual function seems to be to cater for non-agricultural settlement, and for the very poor who do not require the minimum grant of R20 000 provided under LRAD. Nowhere, however, has this new direction been clearly and publicly stated. It would thus appear that while the main function of SLAG in the 1997–1999 period has been eclipsed by LRAD, the programme lives on at the margins of policy. This is particularly significant in that while SLAG was clearly targeted at the poor, LRAD is not. The effective replacement of one programme by the other raises questions about the intentions of policy, which can only be

<sup>83</sup> *Policy Statement*, supra note 72.

<sup>84</sup> Ministry of Agriculture and Land Affairs 2001b.

<sup>85</sup> For example, DLA’s *Strategic Plan*, supra note 64, shows 70% of land transfers in terms of the redistribution programme under “LRAD” and 30% under “settlement”, with no reference to SLAG. DLA’s *Annual report 2000-2001* makes no reference to SLAG when discussing the land reform programme (DLA 2001a: 123–130), whereas extensive reference is made to LRAD.

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exacerbated by the lack of clarity around the current status of SLAG and its relationship to other programmes (or sub-programmes).<sup>86</sup>

### 4.1.3 Targets

The Reconstruction and Development Programme (RDP) of 1994 set a very specific target for redistribution: 30% of agricultural land within five years.<sup>87</sup> This was generally interpreted to mean that 30% of agricultural land outside the former homelands would be transferred to black ownership by 1999. Since then, implementation has fallen far short of this target, yet this and similar targets have persisted within official policy without any critical debate or discussion around why past targets have been missed, how new targets will be met or, indeed, how such targets are set in the first place. Thus, for example, the *DLA Policy statement* of February 2000 introduced, without preamble, a variation on the RDP target: “The new programme is designed with the intention to distribute at least 15% of farmland in five years”.<sup>88</sup> This effectively cut the RDP target in half, but makes no mention of the time that has passed or the amount of land actually transferred since 1994. In November the same year, *Business Day*<sup>89</sup> quoted the Minister as saying 15 million hectares (as opposed to 15% of land) would be redistributed through the revised programme (LRAD) within five years.<sup>90</sup>

By June 2001, and the release of the final version of the LRAD policy, the official target reverted to the 30% figure contained in the RDP, again without explanation, but with the timescale now trebled: “The collective aim of land reform is to ensure the transfer of 30% of all agricultural land over a period of 15 years.”<sup>91</sup> The phrase “collective aim of land reform” is a newcomer to the discourse, implying that targets may now include both redistribution *and* restitution programmes, a potentially important shift from previous positions. The fifteen-year timescale is equally new and unexplained and goes well beyond the effective planning frameworks used by government departments. In a press release on the occasion of the official launch of the LRAD programme in August 2001, the Minister was more precise, stating that the “collective aim of LRAD is to transfer 30% of all agricultural land over a period of 15 years”.<sup>92</sup>

The detailed implications of these (moving) targets – in terms of cost and land area – do not appear to have been explored by anyone to date.<sup>93</sup> The land area implied by some of the targets set by government in recent years are set out in the following table, along with the average annual rate of transfer that would be required in order to reach the target.

**Table 1. Official land redistribution targets<sup>94</sup>**

<sup>86</sup> It is noteworthy that the Constitutional Court added the criteria of “transparency” and “proper communication” by government as features of a reasonable government programme to give effect to socio-economic rights. See *TAC*, *supra* note 19, para. 123.

<sup>87</sup> African National Congress 1994.

<sup>88</sup> *Policy Statement*, *supra* note 72.

<sup>89</sup> *Business* 2000 9 October.

<sup>90</sup> 15 million hectares amounts to approximately 18.2% of privately owned agricultural land.

<sup>91</sup> *LRAD*, *supra* note 74.

<sup>92</sup> DLA 2001d.

<sup>93</sup> For further examples of moving targets, see Hlatshwayo 2000.

<sup>94</sup> The total land area of South Africa is approximately 122 million hectares (1.2 million square kilometres). According to the Department of Agriculture (2001a), the total amount of land in the

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Target	Total ha (million)	Ha per annum (million)
30% of agricultural land over 15 years	24.7	1.64
15% of agricultural land over 5 years	12.4	2.48

As shown below, all of these targets far exceed anything that has been achieved by DLA to date, and achieving them through the open market would consume more than the Department's entire annual budget.

Since the outset of land reform in 1994, targets have been introduced and replaced on a regular basis, with little or no reference to past targets and no direct linking of the target to the implementation mechanisms being proposed. The casual use of targets – the vague timescales, the shifting percentages, the subtle changes in terminology and the lack of reference to previous targets – raises concerns about the value of these targets, the state's commitment to meeting them and the accountability of those responsible for setting and achieving them.

## 4.2 Comprehensive legislation

Land reform is not framed by a single overarching piece of legislation.<sup>95</sup> Restitution, a key element of the property clause (section 25(7)), is implemented in terms of the Restitution of Land Rights Act,<sup>96</sup> which establishes statutory bodies such as the Land Claims Court and the Commission for Restitution of Land Rights, and sets out detailed procedures for the processing of land claims. Tenure reform (section 25(6)) has, at least in part, been legislated for in terms of the Interim Protection of Informal Land Rights Act (IPILRA),<sup>97</sup> the ESTA,<sup>98</sup> and the Land Reform (Labour Tenants) Act.<sup>99</sup> <sup>100</sup> Section 25(5), on which redistribution is based, however, has not specifically been legislated for. Rather, the state has relied on the Provision of Land and Assistance Act,<sup>101</sup> as amended, as the legal basis for its redistribution programme.<sup>102</sup>

The existence of a comprehensive and definitive law governing a major policy area has many advantages. First, the promulgation of such a law generally requires

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commercial farming sector (outside the former homelands) in 2000 was 82 209 571 hectares, divided into 60 938 farming units. These figures do not include state-owned agricultural land outside the former homelands, but such land amounts to less than 1% of privately owned commercial farmland.

<sup>95</sup> Legislation such as the Housing Act 107 of 1997 and the National Water Act 36 of 1998 come close to achieving this. Neither is fully comprehensive, however, and both are supported by further national and provincial legislation.

<sup>96</sup> Restitution of Land Rights Act 22 of 1994.

<sup>97</sup> Interim Protection of Informal Land Rights Act (IPILRA) 31 of 1996.

<sup>98</sup> *Supra* note 27.

<sup>99</sup> *Supra* note 15.

<sup>100</sup> A notable omission in the area of tenure reform is any substantial legislation dealing with the reform of communal tenure in the former homelands. In this respect, the state has to date clearly failed to meet its constitutional obligation to legislate that is set out in 25(9): "Parliament must enact the legislation referred to in subsection (6)."

<sup>101</sup> *Supra* note 70.

<sup>102</sup> It should also be noted here that the Development Facilitation Act does make certain provisions in this regard, but its use (and its intention) is largely limited to facilitating the development of housing projects in urban areas. It is not generally considered to improve access to land for general purposes, particularly in rural areas.

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a substantial process of public consultation accompanied by a degree of public debate and mass-media exposure prior to being framed as a Bill. The passage of a Bill through the houses of Parliament, including the relevant portfolio committees, is again an opportunity for rigorous scrutiny and debate. Second, a comprehensive law of this kind would generally clearly state the aims and objectives of policy and make provision for all aspects of implementation. It can be expected that particular attention will be paid to the roles of different spheres of government and to the rights and obligations of citizens under the Act. Third, such an Act would be binding on all concerned, including political office holders, state officials and the general public. Departures from the spirit or the letter of the Act could be challenged in Parliament or through the courts. Major changes in policy would require amendments to the law, again subjecting it to scrutiny and debate at various levels. Fourth, a comprehensive law could be expected to provide a high degree of certainty around policy matters, both among officials and the general public, and could therefore be expected to provide a basis for the policy's rational and consistent implementation. Finally, such a law could contribute towards the integration of land reform policy, by setting out the relationship between restitution, redistribution and tenure reform.

The absence of comprehensive legislation has the opposite effect, and this is clearly the case with regard to redistribution policy. While the 1997 *White Paper on Land* was the result of a lengthy process of public consultation and was approved by parliament, the details of redistribution policy have not been subjected to the same scrutiny. Major shifts in policy have been made with minimal consultation or debate, the leading examples of which are the imposition of a moratorium on redistribution projects in 1999 and the introduction of LRAD in 2001. Until the advent of LRAD, the role in land reform of provincial government departments, local government structures and national government departments such as the Departments of Public Works, and Water Affairs and Forestry (both holders of large areas of land), was far from clear. Under LRAD, major new responsibilities have been allocated to the provincial Departments of Agriculture, without any specific budgetary provision and a lack of preparedness in many provincial offices to take on such tasks.

While the Provision of Land and Assistance Act provides various powers to the Minister of Land Affairs and to ministerial delegates, it does not clearly set out how redistribution is to be effected, the roles of the different spheres of government and the rights and obligations of stakeholders. The discretionary powers granted by the Act do not place any obligation on the state to meet particular needs. Thus, while the Act may assist the state in meeting its constitutional obligation, it creates no mechanisms whereby the state can be held to account in terms of its fulfilment of that obligation. There would appear to be a strong case for a comprehensive land redistribution law that sets out the main elements of the redistribution programme, clarifies the obligations of relevant state institutions and elaborates the rights of citizens wishing to gain access to land. This would give full legislative weight to section 25(5) of the Constitution.

### 4.3 Implementation of redistribution policy

As the *Grootboom* judgment clarified, state policy should be assessed by considering both the policy itself and the manner in which it is implemented. While it is important to emphasise the positive achievements of the redistribution programme since 1994, many weaknesses and failings are also evident. Some have been addressed by shifts in policy, not all of them successfully, but others continue to be

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problematic. This section discusses a number of critical and persistent weaknesses in the implementation of redistribution policy. In so doing, it is important to recognise that no clear line can be drawn between policy formulation and policy implementation. Many of the problems identified here have their roots in the original policy formulation, while others arise largely in the process of implementation. Such a distinction is rarely absolute. It should also be noted that implementation varies substantially from province to province and that the quality of data available from the DLA does not allow for detailed analysis of all aspects of the redistribution programme.

The redistribution programme, and the land reform programme more generally, have been the subject of considerable debate and various shifts in policy over the years. However, one area where there is little disagreement is around the painfully slow pace of delivery. A DLA publication from late 1999 shows that by then a total of 301 SLAG projects, 20 farm equity projects and 77 municipal commonage projects had been implemented countrywide and others were in the pipeline.<sup>103</sup> Shortly after taking office in 1999, the new Minister for Agriculture and Land Affairs announced a sweeping review of land reform policy, including a moratorium on new redistribution projects, causing a major disruption in the pace of delivery.<sup>104</sup>

Over the last two years, the supply of detailed information on implementation of the various aspects of the redistribution programme has largely dried up. Apart from gross figures for expenditure and the total number of projects, little or no detail is provided on matters such as commonage projects, farm equity schemes, SLAG grants and ESTA settlements, in sources such as the *Annual reports* of the DLA, the DLA website or public briefings by the Minister or Director-General. In a telling indication of performance, the Minister was quoted in *Business Day* in October 2000 as saying that only 0.81% of farmland had been redistributed since 1994.<sup>105</sup>

By the end of 2001, a briefing by the Director-General of the DLA revealed considerable progress. Between 1994 and the end of 2001 the total number of redistribution projects (presumably of all types) approved by the Minister was 834, involving 1 006 135 hectares of land and 96 063 households.<sup>106</sup>

Current planning by the DLA – in terms of the medium-term expenditure estimates – provides spending targets for only three years at a time. The DLA's strategic plan for 2001–2002 shows that it planned to deliver 305 000 hectares of farm land under the redistribution programme over the course of the year, at a direct cost of R305 million (i.e. R1 000 per hectare).<sup>107</sup> In addition, the Department planned to dispose of 669 000 hectares of state-owned agricultural land.<sup>108</sup> This amounts to 974 000 hectares in all, or 1.2% of the total commercial farming land outside the former homelands. At this rate, 18% of agricultural land could, theoretically, be transferred over a 15-year period, but a number of factors make this unlikely. First,

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<sup>103</sup> DLA1999. No comparable statistics have been published by the DLA since 1999. Bongani Majola, writing in the *Mail & Guardian* (2002) reported similar problems obtaining detailed information from DLA: "The department would not provide details of what was achieved under the controversial land redistribution programme where delivery fell sharply during the 18 months after the 1999 elections."

<sup>104</sup> *Business Day* 2001 4 January.

<sup>105</sup> *Business Day* 2000 9 October.

<sup>106</sup> DLA2001 "2001 Media Briefing Dr GP Mayende" <[http://land.pwv.gov.za/news/2000 media briefing.html](http://land.pwv.gov.za/news/2000%20media%20briefing.html)> Accessed 2 April 2002.

<sup>107</sup> *Strategic Plan*, supra note 64.

<sup>108</sup> *Business Day* 2001 7 May.

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the supply of suitable state-owned agricultural land is limited (probably not greatly exceeding the 669 000 hectares earmarked for disposal in the first year), and is therefore not going to be available beyond the first year. Second, the remaining target of 305 000 hectares exceeds the highest annual transfer made by DLA to date by at least 20%, and will itself present a considerable challenge.

A number of reasons can be put forward for the generally slow rate of implementation of land redistribution, among them the reliance on market mechanisms to acquire land, complex and often inappropriate planning procedures and staffing problems in certain DLA offices.<sup>109</sup> In many instances individual projects have taken upwards of two years to plan and implement. In a speech in August 2001, the Minister provided this explanation for the slow rate of redistribution:

When a review of the land reform programme was done, it was clearly found out that the lengthy project cycle and approval process as well as the size of the grant [R16 000] were the major factors that might have accounted for the slow land delivery as well as the poor performance of certain redistribution projects for agricultural production purposes during the past seven years of land reform process.<sup>110</sup>

The following examples highlight some of the problems that have hampered the land redistribution policy.

#### **4.3.1 Land acquisition**

The model of redistribution developed around the SLAG programme, and largely carried over into the implementation of LRAD, centres around individual projects. Each group or individual wishing to acquire land is required to identify land available for purchase and negotiate with the landowner. While this might be expected to be a lengthy and difficult process, it is greatly complicated by the fact that buyers and sellers negotiate in advance of funding being approved for the project. Agreement in principle between the parties is followed by project planning procedures that involve feasibility studies and the preparation of business plans, verification of beneficiaries, valuation of the land (typically conducted more than once) and vetting by various government officials. Up until recently, this process alone would typically take between one and two years, during which time buyers and sellers could not finalise the transfer of land. This has created uncertainty for property owners and, in cases where projects are not approved, can result in the transaction being abandoned, with no recourse for the disappointed seller. The long duration and uncertainty surrounding the purchase of land has undoubtedly led to many property owners withdrawing from the process and deterred others from becoming involved.

Grants for the purchase of land are released only towards the end of the lengthy project planning cycle, which itself is tied to a specific property. This means that would-be buyers cannot, in practice, acquire land through auctions or opportunistic purchases as farms come on the market. It also means that planning is abandoned should the price eventually offered by the DLA be rejected by the landowner, thus obliging the applicants (and the DLA) to abandon the project or to start the entire planning process over again for another property.

Reliance on the open market to provide land for redistribution also imposes great difficulties in integrating projects with other rural development processes.

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<sup>109</sup> *Natal Witness* 2001 9 October.

<sup>110</sup> DLA 2001c.

Because the location of projects is determined by uncoordinated and unpredictable negotiations between numerous buyers and sellers, it has not been possible for municipalities and other government departments to plan effectively for the provision of services such as agricultural extension, water, schools and clinics to resettled communities.<sup>111</sup> This has resulted in land reform beneficiaries going without vital services for lengthy periods. To make matters worse, because beneficiaries are obliged to choose from whatever land is on offer, they often end up far from their former homes, where they generally had some access to such services and benefited from close reciprocal relations with their wider community.

In March 2000 the Minister highlighted some of the problems facing redistribution projects in Parliament. Quoting from the DLA's *Quality of life survey*, the Minister said it showed projects being assembled and transferred by the Department that left beneficiaries without access to basic services, and little likelihood of any improvement in their economic circumstances:

The report identifies the key problem facing the land reform programme as the way in which it fails to integrate properly with local planning and other development processes. It also suggests that decisions about land use are made by a select few. The general institutional framework was identified as weak. The report points to the fact that in many cases, projects are placed out of the reach of services provided by the Department of Agriculture. Generally, the contribution of agriculture to projects is seen as minimal and the need to boost this area has been identified.<sup>112</sup>

The origins of many of these problems can be traced to the willing seller, willing buyer model, which gives rise to a patchwork of unconnected projects, poorly integrated with state and other support services. The limited debate around this model to date has focussed mainly on the political or moral implications (paying market prices for land that may originally have been acquired by force or at a very low price) rather than on the practical merits of the policy. This reliance on the market – which is set to continue virtually unchanged under LRAD – has shown itself to be slow and cumbersome, and is not meeting the needs of either sellers, buyers or the state.<sup>113</sup> An alternative would be a planned programme of land acquisition by the state that deals fairly and efficiently with current land owners but also delivers land of the scale, quality and location best suited to the intended beneficiaries and allows for the delivery of support services in a planned and coordinated manner.

### 4.3.2 Project planning

Many of the problems associated with redistribution projects to date have centred around a mismatch between the initial requirements of grant applicants and the projects they end up with. This is evident both in the size of projects – in terms of land parcel and number of members – and in the nature of the agricultural activities carried out. The needs of people applying for assistance under the redistribution programme – as well as the levels of resources and experience they bring to the projects – are undoubtedly varied. Some want no more than a small patch of land on

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<sup>111</sup> A notable exception is the land reform and settlement plan currently being implemented jointly by Amatole District Municipality and the DLA in the Eastern Cape.

<sup>112</sup> Minister Didiza, quoted in *Mail & Guardian* 2000 17 March.

<sup>113</sup> See Riedinger et al (2000) for a discussion of international experiences of market-based land reform.

which to grow food for household consumption, or land on which to graze existing livestock, while others have the desire and the resources to engage in much larger scales of production for the market. Some have years of experience working their own land or as employees on commercial farms, while others have no direct experience of agriculture. Yet, officials of the DLA and the consultants appointed by it have, on the whole, attempted to fit applicants to existing agricultural enterprises rather than the other way around. This has added to the complexity of project planning and goes a long way to explaining the slow pace of implementation. It has also had undesirable consequences for applicants who have made it through the lengthy implementation cycle to the point of land transfer, with a number of project failures being reported.<sup>114</sup>

Agricultural land in South Africa tends to come on the market in the form of entire farms.<sup>115</sup> This is related in part to the long-standing legal prohibitions on the subdivision of agricultural land, but also to a well-founded belief by landowners that piecemeal sales are both costly and time consuming. Thus, project planning typically begins with the offer of a whole farm for sale. In many cases, the size of land available is not well matched to the needs of would-be beneficiaries or is beyond their price range. This has typically meant reducing or expanding the size of applicant groups so that the combined value of the grant matches the asking price of the farm, with little or no regard to the potential of the land to support that number of people. This has led in some cases to the formation of large and unwieldy groups with little internal cohesion (the so-called rent-a-crowd phenomenon), but also to cases where relatively coherent groups are split, with some receiving land and others not.

One source of this problem has been the paltry size of the SLAG – last set at R16 000 – relative to the cost of agricultural land. This may be resolved through the larger grants available under LRAD. It also relates, however, to the failure to subdivide land where appropriate and to the insistence by officials and consultants on perpetuating the forms of agricultural activities carried out by the former owners. Redistribution beneficiaries can only select land from what is currently available on the market. If this happens to be an intensive dairy farm or a fruit farm, especially one with sizable fixed capital assets, it is these activities that will typically be reflected in the business plan drawn up by officials and DLA-appointed consultants, regardless of the original intention of the applicants. Because these intensive forms of agriculture require sizable amounts of working capital, which cannot be met from the DLA grant, such projects typically begin life with a substantial loan from the Land Bank or other lender, which borrowers often struggle to repay.

#### **4.4 Availability of resources**

The resources that have been made available for purposes of land reform can be seen from the size of the annual budget allocated to the DLA (Table 2). The DLA budget has fluctuated between 0.22% of the total national budget in 1997/98 and 0.38% in 2001/02. Future expenditure is projected at between 0.33% and 0.34% of the national budget.

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<sup>114</sup> *Mail & Guardian* 2001 12 October.

<sup>115</sup> The average size of a commercial farm in South Africa in 1988 was 1 355 ha. Statistics South Africa and National Department of Agriculture 2000: 22.

**Table 2. Budget of the Department of Land Affairs as a proportion of the national budget (R'000s)**

	Expenditure outcome			Revised estimate 2000/01	Medium-term expenditure estimates		
	1997/98 Audited	1998/99 Audited	1999/00 Preliminary outcome		2001/02	2002/03	2003/04
<b>Land Affairs</b>	417 250	722 518	684 905	894 523	851 487	932 480	1 016 826
<b>National total</b>	189 947 438	201 416 214	214 749 454	235 048 357	258 317 736	277 322 850	297 523 926
<b>%</b>	0.22%	0.36%	0.32%	0.38%	0.33%	0.34%	0.34%

Source: National Treasury 2001: Table 2.

The budget for the DLA has tended to increase over time, from R417 million in 1997/98 to a projected R1 016 million in 2003/04.<sup>116</sup> This pattern was, however, reversed in two years – 1999/00 and 2001/02 – when the budget fell below that of the preceding year. For 2001/2002, the drop was 5% in monetary terms. Once these monetary amounts have been adjusted for inflation, the budget for the DLA shows virtually no increase from 2000/01 to 2003/04.

Looking more closely at the portion of the DLA budget allocated specifically to all the land reform programmes, it may be seen that while expenditure on restitution is set to increase year on year, expenditure on the rest of land reform fluctuates considerably (Table 3). The highest budgeted amount for land reform<sup>117</sup> shown in the medium-term expenditure estimates is R421 million for the financial year 2001/02. After this, the land reform budget is set to fall by 8.9% (in monetary terms) in 2002/03, and by a further 11.6% in 2003/04. An analysis of the 2002 budget figures shows that the land reform component of the DLA budget is set to fall by 12% (in monetary terms) over four years (2001/02 to 2004/05), or 25% in real terms. It is the only area of DLA budget that is set to decline over this period.<sup>118</sup>

**Table 3. Land reform budget (R'000)**

	Expenditure outcome			Revised estimate 2000/01	Medium-term expenditure estimates		
	1997/98 Audited	1998/99 Audited	1999/00 Preliminary outcome		2001/02	20002/03	20003/04
<b>Land Affairs total budget</b>	417 250	722 518	684 905	894 523	851 487	932 480	1 016 826
<b>Restitution</b>	43 482	46 838	164 090	261 231	189 456	291 607	368 788
<b>Land reform (redistribution and tenure)</b>	199 358	433 605	276 203	355 220	421 855	384 133	339 478

Source: National Treasury 2001: Table 28.1.

<sup>116</sup> National Treasury 2001: table 28.1.

<sup>117</sup> The DLA budgets differentiate between "restitution" and "land reform," with the latter including both the redistribution and the tenure reform programmes.

<sup>118</sup> Mingo 2002: 3.

Despite the paltry share of the national budget allocated to the DLA, it has routinely failed to spend all the funds at its disposal. Over a four-year period (1995/1996 to 1998/1999) it under-spent by a total of R1.4 billion, spending less than half its allocated budget for the period.<sup>119</sup> The repeated failure of the DLA to spend its budget has meant the return of large sums to the national treasury and helps explain the substantial cuts in the land reform budget for the coming two years. The main reason given by the Minister and others for under-spending on this scale is a lack of human resources, including both a lack of appropriate skills among departmental staff and a high staff turnover.<sup>120</sup>

The total area of land transferred (or approved for transfer) under the redistribution programme for the period 1994–2001 was 1 006 135 hectares, or 0.81% of the total land area of South Africa.<sup>121</sup> As a proportion of the total ‘white commercial farmland’, however, the achievement looks somewhat better – approximately 1.3% was transferred by 2001. The most land transferred in any one year was 245 290 hectares, in 2000. As shown above, the current target set by the Minister – 30% of agricultural land over 15 years – requires an average transfer of 1.69 million hectares, over six times the previous record set in 2000.<sup>122</sup> A rough estimate of the cost of such a transfer confirms the impression of unrealistic targeting. The total asset value of land and fixed assets on South African farms was estimated at R51 576 million in 2000.<sup>123</sup> To purchase 30% of this would cost R15 473 million which, if spread over 15 years at constant prices, would cost R1 031 million (approximately R1 billion) per year, equivalent to the entire DLA budget for 2003/04, or three times the budget available for land reform.

The introduction of LRAD does little to close the gap between delivery targets and available resources. Although official statements shy away from costing the overall LRAD programme, an estimate is provided in the LRAD policy document:

For example, 250 000 applicants for a range of grant sizes would probably cost in the range of R16 to R22 billion, including both land grants and planning grants (but excluding the costs of agricultural support).<sup>124</sup>

Even the lower estimate quoted here (R16 billion), amounts to sixteen times the total budget for the DLA in 2003/04, or forty-seven times the budget for land reform. Given that the DLA is, according to its own statements, on the verge of launching a major programme of tenure reform, which will make demands on the same budget, it is likely that the timeframe will be even longer. All of this points to a lack of coherence between the targets quoted by government, the resources available in terms of the land reform budget and the capacity of the DLA to deliver on the required scale.

Against this background it is not possible to say that lack of monetary resources alone is a barrier to successful implementation of land reform programmes. Rather, a range of factors – including staffing problems, poorly-designed processes and unrealistic planning – has led to severe under-performance, which in turn imposes limits on the resources than can be demanded from the

<sup>119</sup> Streek 2000.

<sup>120</sup> *Mail & Guardian* 2000 15 August.

<sup>121</sup> *Strategic Plan*, *supra* note 64.

<sup>122</sup> This is effectively the lowest target set by government since 1994.

<sup>123</sup> DLA 2001a Table 84.

<sup>124</sup> LRAD, *supra* note 74.

national treasury. Nevertheless, the very limited resources allocated to the redistribution programme, and the failure of the programme to impact significantly on the distribution of land in the country, suggests that the state may not be fulfilling its obligations under section 25(5). Failure to spend the limited budgets that have been allocated adds weight to this argument.

## 5 PROVISION FOR PEOPLE IN DESPERATE NEED AND WHO ARE LIVING IN INTOLERABLE CONDITIONS

Section 25(5) of the Constitution requires the state to “take reasonable legislative and other measures...” (see above). In order for legislative and other measures to be reasonable, they should take account of the social, economic and historical context,<sup>125</sup> and particular attention must be paid to the poorest and most vulnerable members of society.<sup>126</sup>

In *Grootboom*, the Court emphasised that the socio-economic rights contained in the Bill of Rights are intertwined and mutually reinforcing. Referring to section 26 of the Constitution, the Court stated the following:

It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26.<sup>127</sup>

On this basis, it is not necessary that land redistribution policy should be responsible for meeting all the needs of the desperately poor and homeless if these can be met adequately by other means. The important thing is that some arm of the state takes this responsibility – if none does, then the state is clearly failing in its duty. The key question arising from *Grootboom*, however, is whether current land policy addresses the specific needs of people in desperate need and, if so, whether it is adequate in this regard.

First, it is worth exploring what the concept of ‘desperate need’ might mean with regard to land. A desperate need for land is unlikely to be found in isolation from other needs. A person without the means for survival, or without a place to lay their head, clearly has multiple needs – perhaps for shelter, for income, for food and for health care as well as for land. In such cases, land may not be the most immediate need, but may be an essential requirement in order to sustain life and live with dignity in the longer term. For those with little or nothing, access to land may mean the chance to build a house, to stay in one place long enough to find a job, to send children to school, to grow their own food crops. There can be little doubt that thousands, perhaps millions, of South Africans enjoy only the most tenuous grip on land. These include so-called squatters living illegally on the land of others, tenants in overcrowded backyards, farm dwellers facing actual or threatened eviction, and, at any one time, a sizable transient population, moving between one temporary refuge

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<sup>125</sup> *Grootboom*, *supra* note 2, para. 43.

<sup>126</sup> *Ibid.* para. 36.

<sup>127</sup> *Ibid.* para. 35.

and another. Clearly many of these people are in desperate need, bearing in mind that it is not necessary to be already absolutely without a place to stay in order to fit that description.

While land reform policy ostensibly seeks to address a range of social groups and focuses on the needs of the previously disadvantaged, it caters for some needs – and for some groups among the previously disadvantaged – better than it does for others. The need for land in South Africa clearly covers a wide spectrum. At one extreme are the utterly destitute, those without a place to lay their head and no immediate prospect of obtaining land on which to live, grow food or enjoy even a basic quality of life. At the other extreme are relatively well off people, whose immediate needs for land and livelihood are adequately met, but who have had their access to additional land restricted by past discrimination. In between these extremes lie a great number of South Africans who have suffered, and continue to suffer, varying degrees of deprivation, and who share a desire for improved access to land.

Catering for such a wide spectrum of needs is clearly a mammoth task, but it is a task to which the redistribution programme must address itself. The formulation and implementation of policy to deal with such needs will, inevitably, involve prioritisation and trade-offs, and one can envisage a great number of ways in which government might approach such a complex task. Clearly, the design of policies, and the tough decisions that accompany it, is the proper duty of government, and this is not a task that can be taken on by the courts. The *Grootboom* judgment, however, serves to remind us that whatever policy the government adopts must comply with the obligations imposed by the Constitution, and for this it can be held accountable by the courts.

Despite some rhetorical claims to the contrary, redistribution policy has not in practice made specific provision for people in desperate need. Indeed, the length of the project cycle – upwards of two years in many cases – and the ongoing reliance on private owners to make land available through the market are together sufficient to defeat any sense of urgency. Moreover, the onerous criteria that must be met in order to obtain project approval by the DLA – particularly the need to demonstrate ‘economic viability’ (i.e. profitability) – makes it clear that provision of grants is based on future intentions rather than current needs.<sup>128</sup> Provision of grants depends on meeting various technical requirements, particularly in terms of business planning, and not on current needs, desperate or otherwise.

The one (partial) exception to this was the requirement under SLAG that beneficiaries’ household income did not exceed R1 500. In practice, however, this was not rigorously enforced and the DLA generally applied the principle of average household income when dealing with groups of applicants. At the symbolic level, however, the existence of an income ceiling for applicants sent a clear message to officials and the general public alike that this programme was intended for ‘the poor’, or ‘the poorest of the poor’. In practice, however, little or no effort was made to differentiate between the ‘poor’ and the ‘poorest of the poor’, and no specific measures were put in place to address the needs of those in desperate conditions or urgent need.<sup>129</sup>

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<sup>128</sup> According to the Minister, “The approval of grants is based on the viability of the project, which takes into account total project costs and projected profitability” (DLA 2001b).

<sup>129</sup> This lack of clear emphasis on the poor and desperate within redistribution is exacerbated by similar weaknesses in other areas of land reform policy, notably restitution (which does not, in

With the transition from SLAG to LRAD the situation has changed significantly. In a direct reversal of previous policy, an upper limit has been replaced with a lower limit. Whereas under SLAG, applicants were required to demonstrate, at some level, that they were 'poor', under LRAD applicants must demonstrate that they are *not* poor, or that they can at least contribute R5 000-worth of their own resources. Even if, as many DLA officials suggest, the R5 000 contribution can be paid in kind (i.e. labour), or even disregarded, it still has major implications for the very poor.

First, and most obviously, R5 000 is not an insignificant amount, even if paid in kind. It is equivalent, or close to, a year's income for many of the working poor, especially in the agricultural and informal sectors. It is unreasonable to assume that the unemployed or the working poor, who typically engage in multiple time-consuming activities to meet their daily survival needs, have a year's worth of available time to donate to a new activity. Second, it sends a strong message to would-be applicants and officials alike that the programme is not aimed at the very poorest, potentially discouraging many applicants and making it unlikely that applications from the very poor will be prioritised. Finally, it reinforces the general thrust of LRAD that is apparent from policy documents and official statements. As the Minister for Agriculture and Land Affairs told the National Council of Provinces during the budget vote speech on 5 April 2001, "The LRAD is essentially a programme of farmer settlement".<sup>130</sup>

Inclusion of so-called food safety-net projects 'at the smallest end of the scale' (i.e. a R20 000 grant and R5 000 own contribution) within a so-called unified programme that primarily addresses the needs of emerging commercial farmers, is a recipe for effective exclusion of the poor and desperate.<sup>131</sup> It is surely not accidental that the project selected for the official launch of LRAD, at Nkomazi in Mpumalanga, consisted of 241 prospective sugar growers who each received the maximum available LRAD grant of R100 000, for which they were required to contribute between R400 000 and R450 000 each from their own resources.<sup>132</sup> A similar message was sent with the first handover of state-owned land by the Minister at Port St Johns in May 2001 when title deeds were given to farmers who had been renting the land from the state for up to 20 years. The DLA was quoted as saying that the transfer "would enable farmers to invest in their businesses with more confidence than before".<sup>133</sup> It is indicative of current state policy that attention is given to consolidating the position of existing farmers, themselves the recipients of considerable state support in the past, over and above addressing the needs of the landless. State agricultural land is a valuable and often well-located asset that could be used to benefit those most in need of land, especially those least capable of obtaining land through the open market, if the state was so inclined.

Prioritisation on the basis of need does not necessarily refer only to those in

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practice, prioritise claims on the basis of need), and the widespread failure by the state to use the power granted under Chapter II of ESTA to award land to those facing extreme insecurity of tenure.

<sup>130</sup> Ministry of Agriculture and Land Affairs 2001a.

<sup>131</sup> In November 2000, the Minister defended her proposed changes to redistribution policy and denied that the poor were being neglected: "The land reform packages [i.e. LRAD] are flexible and the poorest of the poor can benefit from other programmes like the commonage and food security programmes," the Minister was quoted as saying (*Business Day* 2000 7 November). No distinct food security programme has yet been announced.

<sup>132</sup> *Business Day* 2001 13 August.

<sup>133</sup> *Business Day* 2001 7 May.

desperate conditions. A household with no land and no income, for example, could be prioritised over one with an existing landholding and members in full-time employment. The criteria for prioritisation would have to be developed as part of broader land reform policy and suitable strategies developed to cater for different groups. Within redistribution policy, however, no such criteria have been developed and the manner of implementation of programmes such as LRAD and the disposal of state land suggest that no prioritisation on the basis of need is taking place.

A government programme that deliberately favours the better off, and those with farming experience, may play an important part within wider processes of land reform and the development of the agricultural sector. However, it is unlikely to meet the range of needs for land experienced by citizens of South Africa, especially the very poor. If this group are not to be accommodated within the main redistribution programme, it is important to ask what other supplementary programmes are in place. Unfortunately, there would appear to be very few. The commonage programme, as discussed above, is operating only in certain provinces, for reasons that remain obscure. The long-promised expansion of the programme to include tribal areas has not materialised. The food safety net programme, which was first announced by the Minister in February 2000, has now been incorporated into LRAD, in direct contradiction to its original purpose of targeting very poor households wishing to engage in subsistence agriculture. The SLAG programme is, according to Ministerial statements, still operational, particularly for purposes of resettling farm workers and labour tenants, but this receives no mention in current, publicly available redistribution policy documents.

Overall, land policy can be said to be entirely lacking in any concept of 'desperate need'. The DLA does not appear to have made any provisions for identifying categories of people in desperate or pressing need, or for dealing with them when they are brought to the DLA's attention.

## **6 CONCLUSION**

Since 1994, the South African government has put in place an ambitious and potentially far-reaching programme of land reform in order to meet the requirements of the Constitution and deal with the legacy of race-based dispossession and oppression. While some progress has been made, all aspects of the programme have suffered from major delays in delivering land and secure rights to the previously dispossessed. Taken together, they have had a minimal impact on the racially skewed distribution of land in the country. This raises serious questions about the design of the land reform programme, the resources allocated to it, the mechanism used and the ability of the state to implement it. This in turn raises questions about the commitment of the government and the wider society to land reform.

The principal policy instrument designed to meet the obligation imposed by section 25(5) of the Constitution ("to foster conditions which enable citizens to gain access to land on an equitable basis") is the redistribution programme, one of three 'legs' of the wider land reform programme. It must be acknowledged, however, that this obligation can also be met, at least in part, by other policy initiatives, such as the housing programme. Nevertheless, the redistribution programme is the one instrument specifically designed to impact upon the racial distribution of land and to provide access to land for the broad mass of the citizenry. Since its inception, the redistribution programme has undergone a number of shifts in direction and

considerable debate has ensued over the effectiveness of the policy and the manner in which it is being implemented. It is abundantly clear, however, that the programme has not come close to meeting the various targets set by the political leadership or the popular demand for a fundamental transfer of land from the historically privileged to the historically dispossessed. Some of the reasons for this poor performance have been outlined. They include limited human resources within the DLA, over-reliance on the existing land market, inappropriate project design and poor coordination between the national DLA and other role players at provincial and local level. Budget allocations by the national treasury have not been sufficient to implement a large-scale programme of land reform via the market, but given the many problems with the programme, and the recurring inability of the DLA to spend its budgets, financial resources cannot be seen as the main constraint to date.

The *Grootboom* judgment raises important questions for the land reform programme, such as whether the current redistribution programme can be said to give adequate effect to section 25(5). Key issues in this regard are whether state policy is reasonable in terms of legislation, programme design and programme implementation, and whether it meets the needs of diverse social groups, particularly those in desperate need. In attempting to answer these and other questions, this paper has emphasised the sometimes-elusive nature of the policy-making process and the lack of detailed information in the public domain both on policy itself and on progress with implementation. It has also identified policy areas that require urgent attention, particularly the determination of responsibility for provision of land for housing in urban areas and the need for closer integration between land reform, agricultural support services and rural development.

With regard to meeting the needs of diverse social groups, this paper has argued that land reform policy as a whole operates with an undifferentiated category of the 'historically oppressed', which blurs the very real socio-economic differences that exist within this category. As a result, redistribution policy lacks any effective system of prioritisation on the basis of need, or any 'fast track' for dealing with exceptionally urgent cases. The recent shift in policy towards a more explicit farmer settlement model, in the form of the LRAD programme, can be seen as a further de-prioritisation of the needs of the very poor and desperate. Support for so-called emergent commercial farmers, some of whom can independently mobilise up to R450 000 worth of resources, is now the flagship redistribution programme. The needs of the very poor, who require access to small areas of land for subsistence purposes, have been relegated to the margins of policy: the grey areas of commonage, food safety nets, ESTA settlement grants and SLAG. The current emphasis on the needs of the better off (albeit within the context of historical disadvantage), coupled with the ongoing lack of attention to the needs of the very poor and those in desperate need, can be seen as a retrogressive step. The declining budget for land reform over the medium-term is another.

Considerably more effort is needed if the state is to meet the obligations imposed by section 25(5). Such effort requires a detailed assessment of the need for land and associated development, something that has been absent from the policy process to date. Only on this basis can realistic, adequately funded programmes be devised to meet the range of needs that exist. This poses a direct challenge to the so-called demand-led approach to land reform adopted by the state up to now. If significant impact is to be made on current land-holding patterns within a reasonable timeframe, innovative ways will have to be found to facilitate the transfer of

substantial areas of land in places of highest demand and in parcels that meet the needs of a variety of land users. Such large-scale transfers will require much greater involvement than hitherto by a range of actors, including provincial and local government, land owners, non-governmental organisations and landless people themselves. It will, above all, require a more interventionist approach by the state, both in acquiring land and in designing viable land-use projects.

Such an interventionist approach could involve the state earmarking land in areas of greatest need and negotiating with local landowners for an orderly transfer of land, with appropriate compensation. This does not necessarily require expropriation, but the failure to consider the use of expropriation to further the ends of redistribution perpetuates the current piecemeal approach to land acquisition and rules out the coordinated approach to development and resettlement that is so urgently needed. Such an approach will undoubtedly increase the demands on the DLA and can only be brought about on the basis of a dramatic improvement in organisational performance. Whatever the direction of a revised land redistribution programme, it is unlikely to overcome the problems identified here unless it is implemented on the basis of a comprehensive land redistribution Act, which gives full legislative weight to the rights proclaimed in section 25(5).

In conclusion, it is worth considering the vital importance of increasing access to land in South Africa. Recent years have seen a profound economic crisis in the country, with the poorest sections of society, largely concentrated in the rural areas, struggling with deep and persistent poverty. Land-based livelihoods – livestock, cropping, gathering of wild materials – have provided a means of survival for many, but overcrowding, insecure land rights and lack of appropriate support services have limited the contribution of such activities to livelihoods. The displacement of the problems of chronic poverty and landlessness from the former homelands and commercial farms to the towns and cities has not provided a solution, but rather has created new and equally intractable problems in the urban areas.

Two key factors suggest that this already gloomy picture is likely to deteriorate further in the years ahead. One is the continuing fall in formal sector employment, itself a result of changes in the global economy and the economic policies pursued by government. The other is the scourge of HIV/AIDS that is devastating rural communities. As yet, it is difficult to predict what the impact of the pandemic will be on the demand for land, or on the ability of households to use land in order to obtain a livelihood. What is certain, however, is that rural poverty and vulnerability are set to increase greatly in the years ahead. This, in turn, will require an even greater effort by the state and other sectors if the rights proclaimed in the Constitution are to be translated into tangible benefits for all the people. Land reform alone cannot solve the deep-rooted problems of poverty and inequality, but is an essential component of any programme with these aims. The need to implement land redistribution efficiently and effectively is greater than ever.

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