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A Short Note on the Looming Land Restitution Crisis

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In recent months the issue of expropriation without compensation has hogged the headlines. But this debate has pushed other critical dimensions of land reform into the background. One of the most important is the looming deadline for decisions on land restitution.¹ Ten years ago CDE recommended that the resolution of the restitution backlog should be the first priority for successful land reform because it lay at the root of so many other problems in virtually all regions of the country.² Sadly this advice and the offer of support from the business community were not accepted by government. Since then the situation has deteriorated considerably.³

The original deadline for lodging claims for land restitution was 1998. The Land Restitution Act stipulated that claims must be for loss of land after 1913 as a result of past racially discriminatory laws or practices.⁴ It was envisaged that the process would primarily provide redress for the so called “black spot” removals that took place under Apartheid, and that it would be completed within five years. Once this goal was achieved land redistribution was to be the central focus of land reform. Five, then ten and finally twenty year deadlines have passed without this goal being achieved:

- The 2017 High Level Panel report to parliament chaired by former president Kgalema Motlanthe claimed that there are still more than 7,000 unsettled, and more than 19,000 un-finalised, ‘old order’ claims (claims lodged before the initial cut-off date of 1998).⁵ It estimates that at the current rate of progress it will take 43 years before the backlog is cleared.
- In 2014 the Zuma administration, seeking to shore up its rural support base and consolidate its alliance with traditional leaders, reopened the land claims process via the Restitution of Land Rights Amendment Act, 2014. It took this step, despite many thousands of claims for restitution lodged in or before 1998 remaining unresolved.
- In the 12 months after this Act came into effect, approximately 160,000 new claims were lodged, which is double the number in the first round. The Act was challenged by many communities deeply concerned that their decades’ long wait for a resolution of their claims would be further drawn out by the demands of the new policy.
- In 2015 the Constitutional Court declared the Restitution of Land Rights Amendment Act 15 of 2014 to be invalid and stipulated that land claims lodged by 1998 be finalised before a re-enactment of the 2014 Act. The Constitutional Court recognised the

validity of the new claims, but it prohibited any further processing of them until all the old order claims had been completely finalised.⁶

- Parliament was given 24 months to introduce new legislation. Failing that, the Chief Land Claims Commissioner had to apply to Court for an order on the processing of the claims lodged after 1 July 2014.
- In 2018 Treasury modelling has estimated that the new claims already lodged will take 200 years to conclude at a cost of approximately R600 billion.⁷
- If the process of lodging new claims is re-opened, the High Level Panel estimates that a total of 397,000 new claims will be made and could take 709 years to finalise.

Even if these alarming figures are somewhat exaggerated, it will certainly take many decades and vast amounts of money for land restitution to be complete.

Why has restitution been so slow?

The claims process was reopened in 2014 without any clear strategy to overcome the obstacles that had impeded the rate of progress until then. The Land Commission was not resourced to effectively deal with the first round of restitution and was therefore overwhelmed by the claims that were lodged. The large number of claims partly resulted from mobilization by politicians, officials, and activists who conflated the goals of restitution with those of redistribution.

The challenge was compounded by the fact that many Land Commission staff lacked the necessary knowledge as well as the legal and historical skills to do their jobs. Effective and secure filing systems and databases were not established at the outset and rapid staff turnover contributed to poor institutional memory. Some claims were lost, stolen or destroyed.⁸

In 1999, an administrative route was established that bypassed the Court in response to the slow pace of the Commission and of the equally under-resourced Land Claims Court (LCC). This decision had unforeseen consequences. The quality of work deteriorated due to a lack of effective oversight. Thousands of claims were gazetted and even settled on the basis of entirely inadequate research. Administrative settlement allowed the process to become interest driven, ad hoc, and vulnerable to corruption. In defiance of the law, claims were “bunched” together and artificial Communal Property Associations were created that often became dysfunctional. Intended as a short cut, these large consolidated claims have instead proved to be a massive impediment to progress. They have also, in some instances, been captured by individuals primarily interested in pursuing their own interests.

To make matters worse many claims that have been finalised have flouted the law and may have to be reversed. The existence of large numbers of unresolved, overlapping and directly competing claims has also contributed to mounting ethnic and ‘tribal’ tensions, as well as xenophobic sentiments. As a result, large areas of the country resemble tinder boxes at risk of igniting with the next spark.

Currently, tension has been simmering in the Lowveld between the Sotho and Tsonga over which group has primary rights to the land. The language of this conflict is dangerously enflamed with some groups being described as ‘invader harvester termites’ consuming other people’s land. A recent history in this region of outbreaks of violence over boundaries gives added cause for concern.⁹

A brake on economic growth

The cumbersome and compromised restitution process has restricted the potential for economic growth in key areas of the country. Unresolved claims that have dragged on for decades discourage farmers from investing in the land and pursuing new economic opportunities. Instead, many adopt a survivalist strategy extracting what they can from the land with minimum inputs while laying off all but the most essential workers. We do not have records to provide accurate estimates of the economic effects, but it seems highly likely that the result has been escalating levels of unemployment in rural areas and low levels of productivity on many farms. The damage is deepened because many of the most bitterly contested and seemingly insoluble claims are in regions - such as the Lowveld - that have great potential for expanding production for growing international markets.

These economic costs might be a price worth paying if the recipients of restituted land received significant material benefits. The existing data does not give a comprehensive answer, but a wide range of case studies suggest that little if any economic benefit has accrued to the overwhelming majority of recipients. The High Level Panel concludes that the ‘economic and developmental outcomes of restitution have been very poor’.¹⁰

An additional drawback is that workers and tenants who reside on restituted land have suffered losses of jobs and security. In some instances, black beneficiaries of land reform have discovered that the land they have been given is also under claim. Some of them have had to abandon farming as a result. More broadly, the existence of vast areas of land embroiled in legal disputes is an obstacle to securing farms for redistribution and the inability to conclude restitution has distracted from driving redistribution on a larger scale, at a more rapid rate.

Concluding remarks

The country faces some critical choices. The looming Constitutional Court process, which must take place in July this year will help chart a route forward in relation to new order claims. However, this will not change the fact that 19,000 old order claims remain which will take decades to clear. Neither will it wish away the 160,000 new order claims that could jeopardize the security and viability of rural producers for decades.

Some commentators have suggested that because the new claims are primarily for cash compensation they can be dealt with relatively easily. But this ignores the time consuming procedure of adjudicating the validity of claims which was central to the slow progress of the initial claims. Matters will be further complicated because many of the new claims overlap with each other as some are on land that is already under claim. Others include farms on which old order claims have already been finalized and new communities and farmers have moved onto the land. The economic potential of large areas of commercial farm land will be further undermined as the present morass of unresolved, overlapping, and conflicting claims worsens.

Some hold the view that expropriation without compensation will provide a panacea for these problems. They are profoundly wrong.

Aside from its deleterious impact on the wider economy, it will not solve the lack of administrative capacity. Neither will it clear the multitude of conflicting and overlapping claims that remain unresolved. Some commentators have gone so far as to suggest that the government should compensate all claimants irrespective of the merits of their cases! In the unlikely event that government heeds this advice, public finances will be placed under intolerable strain.

Should land restitution be allowed to continue at its current glacial pace? With 160,000 new land claims in the system and the possibility that the number will expand exponentially, what prospects do claimants have of a settlement in their lifetimes?

The President has identified agriculture as an engine of growth but this vision will not be fully realized if vast areas of productive land are frozen by legal wrangling.

Land reform is a national priority and no one should underestimate how hard it is to do well in any country. South Africa is no exception. An urgent discussion is needed on how to treat the new claims and how to provide adequate levels of funding, capacity building, and legal

support to finalize old claims. It is hard to see how the state can overcome the current impasse and put restitution on a positive trajectory without a determined partnership with private and civil society actors.

A fragmented discussion on how to deal with the issue is currently under way in parliamentary committees and other forums in which business has limited influence. It is vital that business organisations make their presence felt in these debates. The agricultural sector standing alone has limited clout. Recent developments in relation to land expropriation have shown that the destructive potential of populist policies in relation to land is not limited by sectoral boundaries. Business needs a common approach and must develop a plausible land reform strategy, which has to include, as a high priority, the resolution of the restitution backlog.

Until significant progress is achieved on this front, the considerable potential for black and white farmers to boost job creation and economic growth will not be fully realized.

CDE acknowledges the contribution to this piece made by Professor Peter Delius, Emeritus Professor of History at the University of the Witwatersrand.

NOTES

¹ Land Reform has three subdivisions: Land Restitution, which was intended to redress the loss of land by black communities and individuals since 1913; Land Redistribution, which had the objective of changing the skewed pattern of land ownership through the state transferring land to black South Africans; and tenure reform, which was meant to strengthen the forms of tenure in the previously black designated areas. Thus far no legislation has been introduced in relation to tenure that has survived scrutiny by the courts.

² CDE, *Land reform in South Africa: Getting back on track*. 7 May 2008; <http://www.cde.org.za/land-reform-in-south-africa-getting-back-on-track/>; (Executivesummary) <http://www.cde.org.za/wp-content/uploads/2013/02/>

³ For an overview, see W Beinart, P Delius and M Hay, *Rights to Land; A Guide to Tenure Upgrading and Restitution in South Africa*. Jacana, 2017.

⁴ Restitution of Land Rights Act 22 OF 1994

⁵ Report and Appendices of the *High Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change* (2017) (<https://www.parliament.gov.za/high-level-panel>). Claims are considered settled when the Commission makes an award and are reported as finalised once that decision has been implemented by payment of compensation or the transfer of land available at <https://www.parliament.gov.za/high-level-panel>.

⁶ [Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others \(CCT40/15\) \[2016\] ZACC 22; 2016 \(5\) SA 635 \(CC\); 2016 \(10\) BCLR 1277 \(CC\) \(28 July 2016\)](#)

⁷ O Willcox, 'Land Restitution Financing', *National Treasury*. 5 March 2018.

⁸ See Beinart, Delius and Hay, *Rights to Land*, for a detailed account of the restitution process and its outcomes.

⁹ The public hearings of the High Level Panel in Limpopo and Mpumalanga also provide evidence of this issue.

¹⁰ For example, a study conducted by the Community Agency for Social Enquiry (CASE) found that the majority of the 179 land restitution projects they assessed were not meeting their developmental objectives. Where agriculture was the main objective, 83% of projects underperformed; where settlement was the main aim, 75% of projects underperformed, and where ecotourism was the main aim, 88% of projects underperformed, HLP Report p,234.