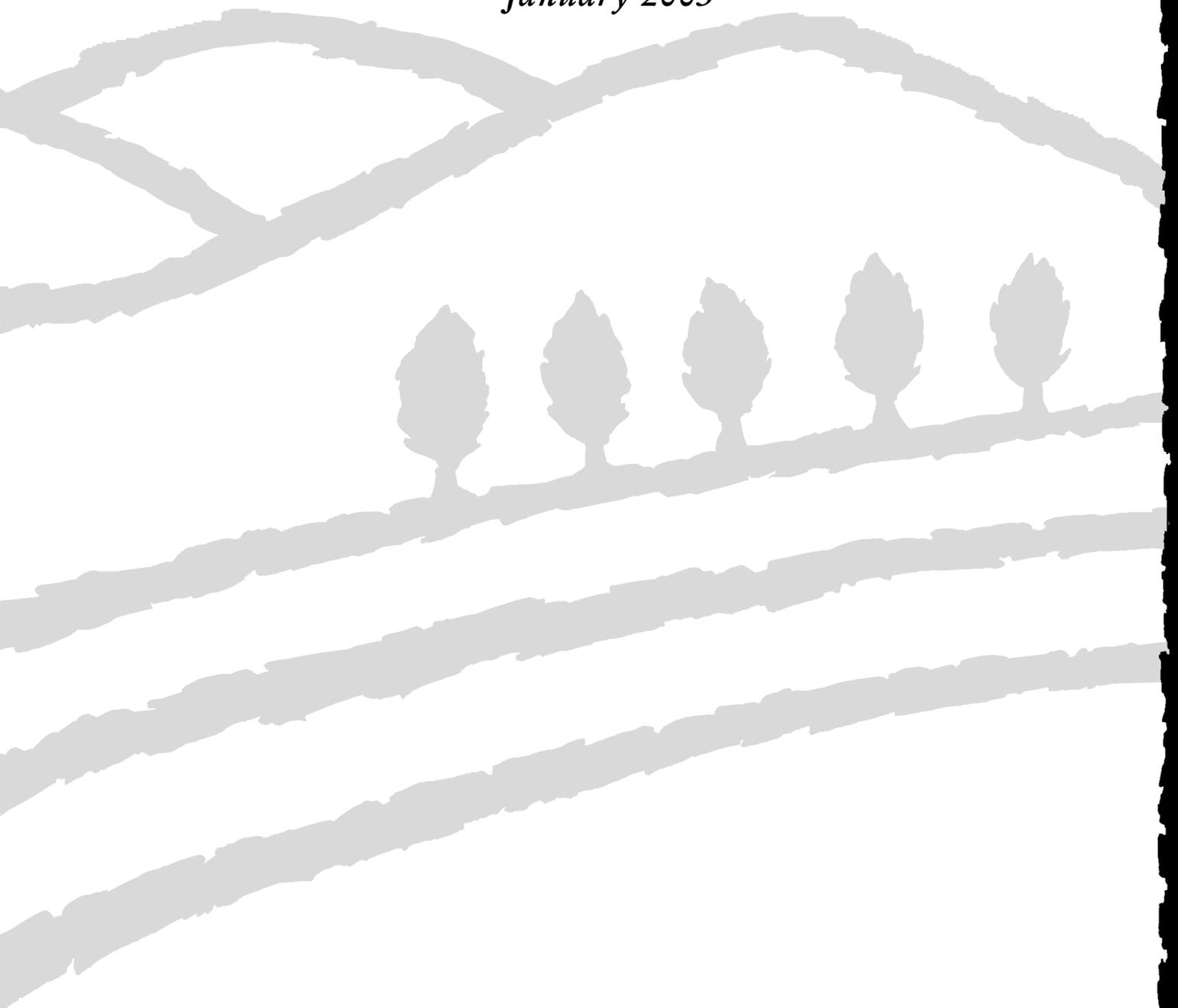




*Briefing paper:
Expropriating land
for redistribution*

January 2003



Introduction

This briefing paper looks at the South African government's current policies and legislation on the expropriation of white-owned farmland for redistribution. The paper poses four broad questions:

- ♦ What laws regulate the expropriation of white-owned farmland for redistribution?
- ♦ What is government policy on land expropriation for redistribution?
- ♦ Who benefits from current policies?
- ♦ How can we advance land reform within the current legal framework?

In answering these questions, this paper introduces the Department of Land Affairs' expropriations policy document and explains the relationship between the policy, the Constitution and other legislation. In conclusion, this briefing paper raises some questions landless people and the NGO's working on their behalf may have about the effectiveness of the policy and its implementation.

WHAT IS EXPROPRIATION? When the State takes away private property in order to put it to use in the public interest or for a public purpose, the property has been expropriated. Usually, expropriation involves payment of compensation.

What laws regulate the expropriation of white-owned farmland for redistribution?

Introduction

The land reform programme of the Department of Land Affairs (DLA) is made up of three sub-programmes: restitution, redistribution and tenure security. Land expropriation has most often been talked about in connection with restitution claims to particular properties. For

example, Willem Pretorius, the first land owner to be served with a notice of expropriation (later withdrawn), was served on the basis of a restitution claim in Feb. 2001. But expropriation for redistribution and tenure security is also possible and can potentially benefit more people.

State expropriation of private property on behalf of land reform beneficiaries is allowed for in the Constitution of the Republic of South Africa. Legislation passed since the Constitution came into force confirms the power of the Minister of Agriculture and Land Affairs to expropriate land for all land reform purposes. Both the Extension of Security of Tenure Act of 1997 (ESTA) and the Provision of Certain Land for Settlement Act (Act 126) authorise the Minister to expropriate land for redistribution and tenure reform. Procedures and guidelines for expropriations in terms of ESTA and Act 126 are contained in a Department of Land Affairs document entitled, "Policy and Procedures for Expropriation of Land in Terms of Act 126 and ESTA." The Policy document was signed by the Minister on 22 March, 1999.

Expropriation and the Constitution

Property rights are protected by Section 25 of the Constitution of the Republic of South Africa, Act 108 of 1996.

- ♦ Section 25(1) gives South Africans the right not to be deprived of property "except in terms of **law of general application.**"

WHAT IS A LAW OF GENERAL APPLICATION? Any legislation passed by Parliament counts as a law of general application, including ESTA, Act 126 and the Expropriation Act of 1975. The Constitution is also a law of general application.

Property rights can be expropriated in terms of Sections 25(2) and (3):

- ♦ Section 25(2) says that the state may only

expropriate property in terms of law of general application “for a public purpose or in the **public interest**.” The state must pay the expropriated owner compensation for the property. Compensation is to be agreed upon or, if not agreed upon, approved by a court.

LAND REFORM IS IN THE PUBLIC INTEREST.

Section 25(4)(a) of the Constitution provides that “the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to South Africa’s natural resources.”

Expropriations on behalf of land reform beneficiaries are justifiable under the Constitution and are explicitly provided for:

- ♦ Section 25(5) obliges the state to “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;” and
- ♦ Section 25(8) says that no provision of section 25 of the Constitution can prevent the state from achieving “land, water and related reform, in order to redress the results of past racial discrimination.” If the state chooses to pursue resource redistribution in a manner that violates any provision of section 25, however, it must do so in accordance with **section 36(1)**.

SECTION 36(1) IS THE LIMITATIONS CLAUSE IN THE BILL OF RIGHTS.

It states that rights in the Bill of Rights may be limited in terms of law of general application “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...” This means that the state can refuse to honor Constitutional property rights in some circumstances. Expropriations

ordinarily will not contradict the right to property because they are written into the right in section 25 itself. As long as expropriations are compensated in accordance with Section 25(3) (which you can read on page 5), the property right has not been limited and there is no need to go to the limitations clause and ask whether the expropriation is reasonable and justifiable in an open and democratic society. If the state expropriates property without compensation or with very little compensation, the limitations clause becomes relevant.

Laws of general application: Act 126 and ESTA authorize expropriation

The Constitution authorises expropriations for land redistribution as long as those expropriations take place in terms of law of general application. The Extension of Security of Tenure Act of 1997 (ESTA) and the Provision of Certain Land for Settlement Act (Act 126) as amended in 1998 provide the necessary legal framework for expropriations to take place. Section 12 of Act 126 and section 26 of ESTA are identical. These sections provide that:

- ♦ The Minister of Agriculture and Land Affairs may, for the purposes of Act 126 and ESTA, exercise expropriation powers equivalent to those the Minister of Public Works exercises under the Expropriation Act of 1975. (Before Parliament enacted these provisions, people thought only the Minister of Public Works could expropriate property.)
- ♦ Before land can be expropriated in terms of Act 126 or ESTA, the land owner must be given a hearing.
- ♦ Compensation for expropriations will be valued as prescribed by the Constitution, with due regard for the provisions of **12(3), (4), and (5) of the Expropriation Act of 1975.**

SECTIONS 12(3), (4), AND (5) OF THE EXPROPRIATION ACT contain rules a) relating to the calculation of interest on compensation not yet fully paid out and b) relating to the determination of compensation. Among other things, the consent of the owner is not a factor in determining compensation. Where illegal activities artificially increase the market value of the property, the landowner will not receive higher compensation, etc.

What is government policy on the expropriation of land for redistribution?

The policy document: Policy and Procedures for Expropriation of Land in Terms of Act 126 and ESTA

Policy

Procedural guidelines concerning the expropriation of land on behalf of land reform beneficiaries were approved by the Minister in March of 1999. The policy document, "Policy and Procedures for Expropriation of Land in Terms of Act 126 and ESTA," states that "it is...accepted policy of the Department to engage in expropriation of land to the benefit of land reform beneficiaries" (section 1.1). Expropriation is to be considered when:

- ♦ there is no reasonable alternative land available to facilitate a land reform project approved under section 4 of ESTA or section 2 or 10 of Act 126; and
- ♦ the owner either will not sell or will not negotiate a fair price with the Department.

If expropriation is to take place on behalf of unidentified beneficiaries (i.e. there is no pending project approved under ESTA or Act 126), the procedures outlined in the policy are to be altered accordingly.

Procedures¹

The decision to recommend expropriation must be made by the Provincial Office of the DLA and by the Provincial Director. The process is as follows:

1) The hearing: Prior to expropriation, the property owner must be given a hearing as required by section 12 of Act 126 and section 26 of ESTA. The hearing is given on paper in the form of a Notice of Recommendation of Expropriation and Compensation. The Provincial Office is responsible for preparing the Notice of Recommendation, which should include, among other things:

- ♦ notification that a recommendation will be made to the Minister of Agriculture and Land Affairs that he or she expropriate the identified property or right in property;
- ♦ notification as to the amount, time and manner of compensation recommended to the Minister; and
- ♦ notification that the property owner has 21 days both to make **representations** regarding the expropriation and to notify the DLA whether any other person has any right or interest in the property not disclosed on the title deed.

WHAT IF THE LANDOWNER MAKES REPRESENTATIONS? If the land owner requests more time to make representations or respond to the notice, a 21 day extension should ordinarily be granted. If the property owner requests an oral or public hearing, the Department must decide whether this is necessary. Such a hearing will generally be unnecessary. In exceptional circumstances, the Department may decide not to proceed with the expropriation on the basis of representations.

A memorandum justifying the expropriation and the amount of compensation must be attached to the Notice of Recommendation (Justification for Recommendation of

¹ Standard forms for all notices and memoranda referred to are included as appendices to the "Policy and Procedures for Expropriation of land in Terms of Act 126 and ESTA."

Expropriation and Compensation). The Notice and Memorandum are first submitted to the Director General and signed by him or her before being sent back to the Provincial Office and delivered to the property owner.

2) Notice of Expropriation and Compensation: After 21 days, the Notice of Expropriation and Compensation is submitted to the Minister of Agriculture and Land Affairs along with an accompanying Memorandum Recommending the Expropriation and Compensation. Important features of the Notice of Expropriation and Compensation include:

- ♦ notification of the effective date of expropriation (ordinarily 60 days after delivery of the Notice of Expropriation);
- ♦ notification that the property owner must deliver the title deed of the property to the Minister within 60 days;
- ♦ notification that section 9(1) of the Expropriation Act affords the landowner 60 days wherein to deliver a written statement to the Minister either accepting the compensation offered or claiming an alternative amount;² and
- ♦ notification in terms of section 10(5) of the Expropriation Act that, unless otherwise agreed, the owner is deemed to have accepted the offer of compensation contained in the Notice if he or she fails to approach a court as referred to in **section 14 of the Expropriation Act** for determination of compensation within 8 months of the Notice's receipt.

SECTION 14 OF THE EXPROPRIATION ACT provides that if there is no agreement between the Minister and the property owner regarding the amount of compensation, either party may make an application to a local division of the High Court for a determination of compensation.

After reviewing the Notice of Expropriation and Compensation and the accompanying Memorandum recommending the expropriation, the Minister is to sign the

Notice and return it to the Provincial Office for delivery to the property owner.

The legal effect of the Notice of Expropriation

On the date of expropriation stated in the Notice of Expropriation, the state becomes the owner of the property. The state should be released from all mortgage bonds but must still recognise other registered rights³ (like leases) unless these rights have also been expropriated in terms of the Expropriation Act. The state may take possession of the property 60 days from the date of the Notice of Expropriation, unless another date has been agreed to by the Minister and the property owner. When the state takes possession, the land reform beneficiaries may move onto the land and the property will be registered in their names.

Calculating compensation for expropriated land

Department policy on compensation takes the Constitutional formula as its starting point. Section 25(3) of the Constitution of the Republic of South Africa, Act 108 of 1996 provides a set of guidelines for determining compensation.

- ♦ Section 25(3) reads as follows:
“The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, 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 improvement of the property; and
(e) the purpose of the expropriation.”

Where the Constitutional guidelines for determining the value of compensation to be

² The landowner is notified that any claim for an alternative amount of compensation should be based on the guidelines in sections 12(1)(a)(i) & (ii)/12(1)(b) of the Expropriation Act. These guidelines, however, are based on the Expropriation Act's outdated method of determining compensation. Considering the comprehensive new compensation formula offered by the DLA, it is unlikely that a landowner's claims in terms of sections 12(1)(a)(i) & (ii)/12(1)(b) would be agreed to by the minister.

³ Unregistered rights such as leases for time periods of less than ten years are dealt with by section 13 of the Expropriation Act. They are ordinarily expropriated like registered rights, but if the Minister is not made aware of unregistered rights before expropriation of the property, he or she is no longer liable to pay compensation for them. Owners of unregistered rights that have been expropriated without compensation do have a cause of action for damages, however.

paid by the state are in conflict with **section 12 of the Expropriation Act, 1975**, it is the policy of the Department to work only with the Constitution.

index (cpi) and subtracts them at “present value,” which is what these subsidies would be worth today.

SECTION 12 OF THE EXPROPRIATION ACT, 1975 allows for a maximum compensation of market value plus actual financial losses caused by expropriation, plus an additional percentage that is referred to by lawyers as the *solatium*. In most cases, this formula arrives at a value well above the property’s market value.

The Department policy determines compensation in terms of sections 25(c) and (d) of the Constitution as market value adjusted for the present value of past subsidies. In other words, the Department will start with the market value of the property and subtract from that three types of subsidies:

- ♦ State subsidies toward the owner’s purchase of the property. Basically, this subsidy is the difference between the property’s market value at the time it was purchased and the price which the owner actually paid.
- ♦ Infrastructure subsidies. These subsidies are mainly used for building fences. The full amount of the subsidy is to be subtracted, regardless of the present condition and market value of the fencing or other infrastructure.
- ♦ Interest rate subsidies on the long-term mortgage for the property purchase. The amount of the interest rate subsidy is the difference between the interest rate charged to the owner (for example, by the land bank) and the rate he or she would have been charged by a commercial lending institution. Present values for interest rate subsidisation must be determined on a year-by-year basis.

Because **inflation** has diminished the actual value of these subsidies, the policy adjusts the subsidies according to the **consumer price**

WHAT IS INFLATION AND WHAT DOES IT MEAN TO ADJUST FOR INFLATION USING THE CONSUMER PRICE INDEX? Inflation is what makes prices rise so that 1 rand will buy less today than it bought ten years ago. The consumer price index (cpi) measures the all around decrease in the buying power of money over time. It is used to figure what a sum of money in the past would be worth on today’s market. The Department considered using more specific measures, like the general land price index, the yield on government bonds, or the producer price index for the agricultural sector, but finally settled on the general cpi as the appropriate index for valuing compensation.

In the fictional example given by the Department, a farm with a market value of R3.35 million is compensated at R1.44 million after the subtraction of acquisition, infrastructure, and interest rate subsidies according to the **compensation formula** developed by the Department. The total amount of compensation arrived at in the example is roughly 43% of the property’s market value.

DLA COMPENSATION FORMULA:

$$\text{Compensation} = C - k_0(B - A) - E_1 \cdot k_1 - E_2 \cdot k_2 - E_3 \cdot k_3$$

where **C** is the present day market value of the property, **k₀** is the inflation factor related to land acquisition, based on the cpi, **B** is the market value of the property at the time of acquisition, **A** is the actual price paid at the time of acquisition, **E₁**, **E₂**, **E₃**, etc., are the historical values of infrastructure and interest rate subsidies received, and **k₁**, **k₂**, **k₃**, etc., are the corresponding inflation factors for these subsidies, based on the cpi.

Who benefits from current policies? Taking a critical look

Is the Department of Land Affairs' compensation formula weighted in favour of land owners?

Calculating compensation: The Department's compensation formula is an improvement over the guidelines of the Expropriation Act, 1975, which gave expropriated landowners more than the market value of their properties. Nevertheless, the DLA formula is arguably more favourable to landowners than a strict reading of the Constitution might predict.

The DLA compensates using a mathematical formulation based on market value less direct state subsidisation of the property's purchase and development. The Constitution, on the other hand, stipulates that the purpose of the expropriation and the history of acquisition and use of expropriated property are to be taken into consideration alongside market value and state subsidisation.

Land reform is meant to redress both present conditions of inequality and the historical injustice of racially discriminatory land laws. Where an expropriation takes place on behalf of land reform beneficiaries, both the purpose of the expropriation and the history of the property's acquisition are especially relevant to the determination of compensation. These considerations would have the effect of bringing the cost of expropriation for land reform down further.

Moreover, many landowners did not receive the acquisition and infrastructure subsidies which are subtracted from market value in the DLA compensation formula. These landowners will be compensated at market rates for their properties.

How might the policies developed by the DLA for the expropriation of land affect farm workers?

Expropriations carried out in terms of ESTA have the potential to make security of tenure substantive for farm workers. Tenure security might be achieved through:

- ♦ the direct expropriation of residential and agricultural land on or near workers' place of employment; or
- ♦ the expropriation of certain "rights in property," such as permanent residential and/or agricultural servitudes.

WHAT IS A RIGHT IN PROPERTY? It is possible to expropriate a right in property, such as the right of access or residence, without expropriating the property outright. Rights of access to property, similar to servitudes, might be expropriated at lower cost than property itself.

Section 4 of ESTA, which allows the state to help farm workers acquire land or rights in land, or develop land for residential purposes, has played only a minimal role in the Department's land reform strategy to date. To the extent that the reluctance to implement section 4 of ESTA stems from the difficulties involved in obtaining consent from land owners for permanent developments on their properties, the use of expropriations might increase ESTA's developmental potential.

On the other hand, the Department's policy on expropriations fails to raise the issue of the security of tenure of farm workers living on expropriated land. These tenure rights would probably be dealt with under the procedural rules of ESTA, but terminated rights would not be compensated.

Is the DLA's expropriation policy likely to advance the cause of land reform?

While the policy developed by the Department makes expropriation for land reform purposes possible in limited circumstances, it would be a mistake to view the policy as the answer to the slow pace of land redistribution. In fact, the impact of the policy is likely to be insignificant. The policy itself is limiting in the following respects:

- ◆ Requirements that the Department use expropriation only after negotiations for the sale of land have failed lock in the principle of willing buyer-willing seller and prevent the government from realising the benefits of the expropriations compensation formula in all but exceptional cases.
- ◆ The policy is consistent with demand-led land reform in that beneficiaries are assumed to be identified and projects approved before expropriations are contemplated. The policy does not envision a proactive role for the state in expropriating and making available large amounts of property for rapid and efficient redistribution.

Despite its weaknesses, the policy itself is not the biggest obstacle blocking meaningful redistribution through expropriation. It is the current political climate that prevents the government from taking action to expropriate and redistribute the land. Partly in response to pressures from international lending institutions, particularly the World Bank, the South African government committed itself early on to a market-led land reform based on redistribution through willing seller-willing buyer transactions. As long as the market remains the government's primary tool for effecting resource redistribution, expropriations for land reform purposes will rarely be pursued, if at all.

How can we advance land reform within the current legal framework?

Political climates are subject to change. Pressure is mounting for implementation of meaningful land reform and resource redistribution. If real reform and transformation is to take place, debate over the use of expropriations will be unavoidable. You can contribute to this society-wide debate by:

- ◆ informing your community about the expropriations policy of the Department of Land Affairs.
- ◆ discussing the possibility of recommending land expropriation with your provincial DLA.
- ◆ organising around meaningful land reform strategies.

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