

## Policy on the Restitution of Land Rights

### Introduction

A land reform process will consist of two elements: restitution for those who were dispossessed by apartheid forced removals, and a process of redistribution of land to deal with land hunger and the unequal distribution of land.

The Constitution requires that an Act of Parliament shall provide for restitution of land rights which were lost through dispossession which was effected under or for the purpose of furthering the object of a discriminatory law. Sec 121(1)

It is important that the restitution process be as speedy as possible. Many of those dispossessed are in a desperate position, and need urgent relief. The sooner this is achieved, the sooner a basis will be laid for a secure system of property rights for all South Africans. Those dispossessed by apartheid must now receive justice without further delay.

As a priority, the new government will propose to Parliament the enactment of a Land Rights Restitution Act. This Act will provide as follows:

#### 1 The right to restitution

Subject to the provisions of the Constitution and the Act, any person who was dispossessed of rights in land shall be entitled to restitution of such rights, where the dispossession was effected under or for the purpose of furthering the object of a discriminatory law. Sec 121(2)(a)

#### 2 Limitation of claims

The right to restitution shall not apply in the following circumstances;

Where the dispossession took place before 19 June 1913. Sec 121(3)

Where the rights in land were expropriated under the Expropriation Act or any other law incorporating by reference that Act, or the provisions of that Act with regard to compensation, if just and equitable compensation as contemplated in section 123(4) of the Constitution was paid in respect of that expropriation. Sec 121(4)(a)

Where the claim to restitution is not lodged with the Commission on Restitution of Land Rights within three years of a date to be fixed by the President, which shall not be earlier than the date when the Commission gives public notice of the procedure to be followed in lodging claims.

### 3 Commission on Restitution of Land Rights

The Act will establish a Commission on Restitution of Land Rights.

The functions of the Commission will be to:

receive claims to the restitution of land rights

investigate the merits of any such claims Sec 121(1)(a)

negotiate, mediate and settle disputes arising from such claims, including claims for compensation Sec 121(1)(b)

draw up reports and recommendations on unsettled claims for submission as evidence to the Land Claims Court (including a report on the failure of any party to negotiate in good faith), and to present any other relevant evidence to the court Sec 121(1)(c)

facilitate the submission of unsettled claims to the court

facilitate the implementation of orders made by the land claims court; the understanding being that the Commission will not itself be an implementing agency

assist people who obtain land as a result of an order made by the court, to make effective use of that land

make recommendations as to the most appropriate means of dealing with other forms of dispossession of land rights, which do not fall within the provisions of Chapter 8 of the Constitution.

generally, to achieve the speedy finalisation of claims to restitution of land rights.

The Commission will thus not have any decision-making powers.

To facilitate the work of the Commission and the court, the Minister responsible for land reform will take the necessary steps to have a register compiled of all land owned by the State at all levels of government. This register will be open to inspection by claimants and prospective claimants.

The Commission will be headed by a Director appointed by the Minister responsible for Land Reform. The staff will include a Deputy Director, and people with skills and knowledge in the area of law, land matters, planning, community development, and the history of forced removals under apartheid. The staff will be broadly representative of the South African population. The Minister shall invite nominations for appointment to the staff of the Commission. To avoid delay in the initial establishment of the Commission, there shall be no need to invite nominations for the appointment of the first Director and Deputy Director.

The Director will be able to delegate any of his or her powers (except the power of delegation) to the Deputy Director, either generally or with regard to a specific case. The Director may contract with any person (including a non-governmental organisation) to perform any function of the staff of the Commission, excluding the Director's decision-making functions.

The Commission will have a number of regional offices. There will be at least one office in each province unless the Director decides to the contrary.

The Director will, with the approval of the Minister, make regulations for the procedure to be followed in the submission of claims to the Commission. The framework of the procedure will be set out in the Act as follows.

## The Commission procedure

Claims will be lodged with the Commission by filing them at an office of the Commission.

When it receives a claim, the Commission will give notice of the claim to all persons who in the opinion of the Director may have an interest in the matter. In addition, the Commission will give public notice of the claim, inviting submissions. Notice will be given by publication, on the radio, by displaying notices in public places in the vicinity of the land, and by other reasonable means which the Director considers may assist to bring the claim to the notice of people who may have an interest.

The Act will provide that any person who thereafter takes any steps to prejudice a claim lodged with the Commission, or to frustrate the process of the Commission or the court (for example by evicting or harassing potential claimants, or by attempting to sell the land or by burdening it with additional real rights) will be guilty of contempt of court. In addition, the court will be entitled to take any such conduct into account in making its decision on any claim.

Once public notice has been given of a claim to any public land, it may not be sold without the consent of the Director. "Public land" includes all land owned by organs of the State at all levels of government, and includes land owned by development bodies, local authorities, the Land Bank, and any company in which the state is the majority or controlling shareholder. The decision of the Director shall be subject to appeal to the land claims court.

The staff of the Commission will carry out such investigations as the Director considers necessary to facilitate the functions of the Commission or the court. In particular:

Where claimants are not themselves able to provide all the information necessary for the adequate submission of and decision on a claim, the Commission will take steps to have this information made available.

In order to facilitate the process and assist claimants, the Director will have the power to order the production of government files relating to the land, and to make them available to claimants and other parties. The Director will similarly have the power to require government departments to make relevant information available to the Commission and to claimants.

If the Director considers that there is a risk that any property which is subject to a claim may be damaged or destroyed, he or she may authorise the staff of the Commission to enter the land in question and to take an inventory of the property on the land and of the condition of the land.

If the Director considers that it may be more effective to do so, he or she may order that all claims to a particular area of land must be submitted within a stipulated time. This will enable the Commission (and, if necessary, the court) to deal with related claims at the same time.

The staff of the Commission will meet the parties, and attempt to mediate and settle disputes arising from any claim. The Director may appoint facilitators to assist in this process.

The court will not be competent to deal with claims until they have been dealt with by the Commission. Sec 121(6) Claims will be remitted to the court for a decision under the following circumstances:

If the parties to a dispute agree in writing that it is not possible to settle a dispute, the Director shall certify accordingly and the matter will then be remitted to the court.

If the Director is of the opinion that it is not feasible to attempt to resolve a dispute by mediation and negotiation, he or she shall certify accordingly and the matter will then be remitted to the court.

If the Director is for any other reason of the opinion that a claim is ripe for hearing by the court, he or she shall certify accordingly and the matter will then be remitted to the court.

If the parties to a dispute or a claim reach an agreement as to how the claim should be finalised they may, with the concurrence of the Director, submit that agreement to the court and ask that it be made an order of court.

The Act will make provision for the procedure to be followed when a claim is remitted to the court for decision.

#### 4 Land Claims Court

The Act will establish a Land Claims Court, which will be a specialised court of law.

The President will appoint the judge president of the Land Claims Court, and such other judges of that court as he/she may deem fit. The intention is that there will be several judges. Each case will be heard by one judge, unless the Judge President orders to the contrary. It will therefore be possible for several cases to be heard concurrently.

No person shall be qualified to be appointed a judge of the Land Claims Court unless he or she -

is a South African citizen

is a fit and proper person to be a judge of the Land Claims Court

is a judge of the Supreme Court or is qualified to be admitted as an attorney or an advocate and has, for a cumulative period of at least 10 years after having so qualified, practised as an advocate or an attorney or lectured in law at a university

A judge of the Supreme Court may be seconded to act as a judge of the Land Claims Court. Judges of the Land Claims Court shall have security of tenure on the same basis as judges of the Supreme Court.

The Minister of Justice shall appoint a panel of assessors for the court, and shall invite nominations for this purpose. The assessors need not be lawyers. They will be people with skill and knowledge which, in the opinion of the Minister, may be of assistance to the court. The court shall co-opt at least one assessor to participate in any disputed case. The assessors will have an equal vote with the judge with regard to questions of fact, but no vote with regard to matters of law or judicial discretion.

The seat of the court shall be determined by the Minister of Justice. However, the court may conduct its hearings at any place determined by the court. The intention is that the judges will travel as a circuit court, the aim being that as far as possible, the sittings of the court will be held at a venue accessible to the people affected.

Any party with an interest in a case before the court may appear before the court, either in person or represented by an advocate or an attorney. The State will have the right to be heard in all cases.

The court will have the power to receive any evidence which it considers relevant and cogent, whether or not such evidence would be admissible in any other court of law. This is essential because detailed documentary evidence of historical claims is often lacking. It is thus intended that the court will receive historical and anthropological evidence, and give to that evidence the weight which it considers appropriate.

The judge president may make rules governing the procedure of the court. It is intended that in general, claims to the court will be made in writing, in a manner similar to that followed in applications in the Supreme Court. Any party may apply to the court for leave to adduce oral evidence. The court may grant leave to adduce oral evidence if it considers that such evidence may materially assist the court in coming to a decision. In that event, any other party may cross-examine such witness. In general, the intention is that the procedure should be as simple as possible. The rules will include the power to make a special order for costs against any party held by the Court to be responsible for frivolous or vexatious litigation.

Every party shall have a reasonable opportunity to present its case. The Director may arrange legal representation for a party which is not able to arrange this itself, either directly (if necessary at the expense of the Commission) or through the State legal aid system.

The rules of court will provide for the court, at its own instance or at the request of a party, to convene at any stage a pre-trial conference of the parties with a view to clarifying the issues in dispute, identifying issues on which evidence will be necessary, and generally facilitating an

early trial and decision. The court may, after such conference, issue orders and directions as to the procedure to be followed before and at the trial.

The court will make the order which it considers just and equitable in the circumstances, taking into account the following:

The desirability of providing restitution or reparation to people who were dispossessed of rights in land as a result of discriminatory laws

The desirability of remedying past violations of human rights

The requirements of equity and justice

The desirability of avoiding major social disruption

Any other factor which the court may consider relevant and consistent with the spirit and objects of the Constitution

The court may:

where the land in question is in the possession of the state, order the state to restore or grant appropriate rights in that land to the claimant; Sec 123(1)(a)

where the land is in the possession of a private owner, order the state to purchase or expropriate the land (or any part of it or rights in it) and restore or grant the appropriate rights to the claimant; Sec 123(1)(b)

order the state, in lieu of restoration of the rights, to grant the claimant appropriate rights in alternative state-owned land designated by the state to the satisfaction of the court; Sec 123(3)(a)

determine the conditions which must be fulfilled before a right in land shall be restored or granted to a claimant; it being understood that these conditions do not refer to the use which is made of the land after the restoration or grant. Where a claimant is required to make any payment before the right is restored or granted, the court may determine the amount to be paid and the manner of payment, including the time for payment.

order the state, in lieu of restoration of the right, to pay the claimant compensation; Sec 123(3)(b) or

recommend to the state that a claimant be given priority access to state resources in the allocation of land and in appropriate development processes;

grant the claimant any alternative relief, including relief which will facilitate the return of claimants to the land in question; Sec 123(3)(c)

give directions as to how its order is to be carried into effect, including the setting of time limits for the implementation of its orders

The power to order the restoration or grant of rights in land shall include the power to adjust the rights previously held by a claimant, and to devise the form of title under which the rights will be held in future. The form of the new title will therefore not necessarily be the same as the form of the original title.

The Court shall have the power to order that rights in the land in question will be held jointly by or on behalf of claimants, whether as a group, community, tribe, association, corporate body, trust or on any other joint or communal basis. Where the court makes such an order, it shall do so subject to such conditions as it considers necessary to ensure that all dispossessed members of the group, community or tribe have fair access to the land or other asset, on a basis which is fair and non-discriminatory (including in relation to gender), and which ensures the accountability of those who hold the land or other asset on behalf of the group, community, tribe, association, corporate body or trust.

An order of the court shall have the same effect as an order of the Supreme Court.

In making its order, the court shall take into account any compensation that was paid to the claimant upon the dispossession, and may make an order with regard to any such payment. Sec 123(4)(b)

Any land which is owned by the State and held under a lease or similar arrangement shall be deemed to be in the possession of the state; provided that if the court orders restoration of the relevant rights in such land, the lawful occupier of the land shall be entitled to compensation

determined either by agreement or by the court according to the principles laid down in the Act.

The court will not be empowered to order restoration of land, acquisition of land by the state, or designation of alternative land unless the Minister certifies that restoration of the right in question is feasible. Sec 123(1), (3)(a)

The court shall not order the purchase or expropriation of land unless it is just and equitable to do so, taking into account all relevant factors, including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of its acquisition by the owner, the interests of the owner and others affected by any expropriation, and the interests of the dispossessed. Sec 123(2)

If the court orders the restoration or granting of rights of land, that decision will be final and binding on all other claimants to that land.

The court shall have the power to determine the amount of compensation -

to be paid by the state to any claimant. In this event, the compensation will be just and equitable, taking into account the circumstances which prevailed at the time of the dispossession, any compensation which was paid upon the dispossession (and who received such compensation), and any other factors which the court may consider relevant. Sec 123(4)(a)

to be paid to any private owner if the court orders the state to purchase or expropriate the land. In this event, the amount of compensation shall be calculated in the manner provided by section 28(3) of the Constitution. Sec 123(2)

Any party aggrieved by any decision made by the Director or by any other functionary acting in terms of (or purportedly in terms of) this Act may seek to have the decision reviewed by the Land Claims Court. The court will exercise all of the Supreme Court's powers to review of any such decision, to the exclusion of the jurisdiction of the provincial and local divisions.

Appeals from decisions of the Land Claims Court shall lie to the Constitutional Court, in the same manner as if the decision were a decision of a Provincial or Local Division of the Supreme Court.

The decisions of the Land Claims Court shall be a matter of public record on the same basis as decisions of the Supreme Court.

## 5 Certificate of feasibility

When a claim is remitted to the court for decision, the Commission shall request the Minister responsible for land reform to certify whether or not restoration of the right in question is feasible. At the time when this request is submitted, the Director of the Commission shall report to and advise the Minister on whether or not restoration is feasible. The parties to the claim shall be entitled at the same time to make submissions as to whether or not restoration is feasible.

In considering whether restoration or acquisition by the state is feasible, the Minister shall take into account

whether the zoning of the land in question has been substantially altered or the land has been substantially transformed since the dispossession, in such a manner that it is not practicable to restore the rights concerned.

any relevant urban development plans.

any matter which may make it not practicable to restore or acquire the land in question

The Minister shall have the power to certify that restoration of part of the land, or of certain rights in the land, is feasible.

In considering whether designation of alternative state-owned land is feasible, the Minister shall take into account

what land is owned by the state, in particular land which is in the same area as the land where the dispossession took place

the needs of the claimant

any relevant urban development plan

The Act will make it clear that the Minister is not required or entitled to consider whether restoration is just or desirable. Those are matters for the Court to decide. The only aspect to be considered by the Minister is whether restoration of the rights in question is feasible, ie practically achievable.

The Minister will be required to issue the certificate, or to refuse to do so, within 30 days of receipt of the request from the Commission. He or she will be obliged to give reasons for the decision.

The decision of the Minister will be subject to an appeal to the land claims court. The hearing of any appeal against the Minister's certification or non-certification of feasibility may, at the discretion of the court, be conducted at the same time as the hearing of the claim.

The decisions of the Minister, and the reasons for those decisions, shall be a matter of public record.

## 6 Transitional provisions

The Commission on Land Allocation will cease to function from a date determined by the Minister responsible for land reform. This will be the date when the Commission on Restitution of Land Rights is ready to commence its work.

All claims duly lodged with the CLA on that date, and not yet disposed of by the CLA, will be deemed to have been duly lodged with the Commission on Restitution of Land Rights. The latter Commission will then deal with them in accordance with the provisions of the Act; provided that if the Director is of the opinion that this is desirable, he or she may waive compliance with any or all of the Commission's procedures in a particular case.