

## 5 *Land redistribution in South Africa: the property clause revisited*<sup>1</sup>

Lungisile Ntsebeza

### *Introduction*

The pace of land reform in South Africa is undeniably slow. At the People's Tribunal on Landlessness which was organised by the Trust for Community Outreach and Education in December 2003, the then deputy director-general (now director-general) of the Department of Land Affairs, Glen Thomas, after listening to some witnesses describe the problems they had encountered in their attempts to access land through the land reform programme, admitted that 'I understand perfectly their frustration. I think sometimes it is justifiable...there are very difficult issues that we have to deal with.'<sup>2</sup> Within a year after the land tribunal, in their Red October 2004 campaign, the South African Communist Party (SACP) – an alliance partner with the ruling African National Congress (ANC) and the labour federation, the Congress of South African Trade Unions – made similar pronouncements about the slow pace of land reform in South Africa. The theme of the 2004 campaign was, 'Mawubuye Umhlaba!' Land! Jobs! Food! Within this context, the secretary general of the SACP, Blade Nzimande, is reported as having threatened: 'We will march to the departments of Agriculture, Land Affairs and the Reserve Bank in support for accelerated land reform' (*Umsebenzi* October 2004: 2). Most recently, the Department of Land Affairs organised a well-represented Land Summit in Johannesburg in July 2005, where the majority of participants expressed their frustration with the slow pace of land reform in South Africa.

However, while there may be general acceptance even from government officials and alliance partners of the ANC that the South African land reform programme is not occurring fast enough, there is no agreement on the reasons. My contribution will survey some of the reasons advanced by government and critics, in particular the critics' argument that the property clause in the Constitution is the main obstacle to large-scale land redistribution in

South Africa. As will become clear, this is not the first time concerns on the entrenchment of the property clause in the Constitution have been articulated. The matter received some degree of discussion during the period of political negotiations in the early 1990s, a process which led to the initial inclusion of the clause in the interim Constitution. I shall review these debates in order to provide a context for the current discussion. This will be followed by an analysis of the land reform programme since 1994 and an assessment of current debates on the reasons behind the slow delivery. These debates, it must be added, are by and large part of the wider evaluation of South Africa's performance ten years after the introduction of democracy in 1994.

The central question that this chapter seeks to address is whether it is possible to embark on a comprehensive land redistribution programme while recognising and entrenching land rights acquired through colonialism and apartheid, as the property clause does. In particular, the chapter argues that there is a fundamental contradiction in the South African Constitution's commitment to fundamental land redistribution to the dispossessed while at the same time protecting existing property rights. The two, I argue, cannot happen at the same time. This argument will take into account the wider context within which the land reform programme was formulated.

### *The property clause and the South African interim Constitution*

#### *The historical context*

It is important that the wider context within which the property clause debate is occurring should not be forgotten. A lot has been written and said about the broader historical context, but it is worth highlighting the following: starting from the 17<sup>th</sup> century, white settlers in South Africa, through a complex process of colonialism and land dispossession, ended up legally appropriating more than 90 per cent of the land, a process that was formalised with the passing of the notorious Natives Land Act of 1913. This Act confined the indigenous people to reserves in the remaining marginal portions of land. Despite increasing the size of land for African occupation in terms of the Land Laws of 1936, there was chronic shortage of land in these reserves. As a result, the indigenous people were gradually converted from once successful farmers prior to the discovery of minerals, particularly gold in the 1860s, to poorly paid wage labourers. Compared to other countries on the continent, the extent of land plunder in South Africa was extraordinary.

While colonialism and apartheid systematically undermined African agriculture, white farmers, on the other hand, benefited from substantial state subsidies. At the time of writing, there were about 50 000 white commercial farmers in South Africa, with varying degrees of concentration of landholding. These are the major beneficiaries of past apartheid policies and their continued control over the vast expanse of South African arable land lies at the heart of the enduring African exclusion and deprivation. Apart from the state subsidies, white capitalist agriculture has flourished as a result of the availability of a captured cheap African labour (see Mafeje 1988).

Although the liberation struggle in South Africa was not overtly fought around the land question, as was the case in Zimbabwe for example, there was always the expectation that unravelling centuries of land dispossession and oppression would be among the priorities of a democratic South Africa. Indeed, the ANC's Freedom Charter, drafted in the 1950s when decolonisation in Africa was on the agenda, had promised that '[t]he land shall be shared among those who work it' and will be 're-divided among those who work it, to banish famine and land hunger'.

But it is worth recalling the other reality in South Africa. The Freedom Charter was formulated at a time when the apartheid government was consolidating its rule, which was based on a bantustan strategy of retribalisation. Resistance to the bantustan strategy led to a vicious clampdown on political opposition, leading to the banning of political organisations such as the ANC and the Pan Africanist Congress (PAC). As countries in the rest of the African continent were celebrating their freedom from the yoke of colonialism from the late 1950s, the apartheid regime consolidated its bantustan strategy, taking the provisions of the Land Acts of 1913 and 1936 to their logical conclusion.

However, following a brief period of political lull in the late 1960s and early 1970s, resistance against apartheid re-emerged. Commentators often trace this reawakening to the strikes by African workers in Durban in the early 1970s. These strikes spread throughout the country. A few years thereafter, the students' uprisings in Soweto in 1976 fuelled political and economic opposition to apartheid. By the early 1980s, some commentators were concluding that South Africa was in a state of 'organic crisis' (Saul & Gelb 1981: 9). There was general agreement, even within the ruling class, that the apartheid experiment had failed.

An important point to bear in mind is that while it is possible to argue that the apartheid regime was under extreme pressure, particularly in the critical period of 'ungovernability and insurrection' in the mid-1980s, equally valid is the fact that the opposition forces were not strong enough to overthrow the apartheid machinery. By the late 1980s, there were clear signs that a negotiated settlement was on the cards. Already in 1986, big business argued strongly in favour of negotiations with the ANC. Their argument was that the ANC was not necessarily a communist organisation and that although 'years of apartheid have caused many blacks to reject the economic as well as the political system', South Africans should not 'dare...allow the baby of free enterprise to be thrown out with the bathwater of apartheid'.<sup>4</sup> Trips to the headquarters of the ANC in Lusaka became a common feature of South African politics in the late 1980s. For their part, the National Party (NP) embarked on talks at the highest level with Nelson Mandela, at the time a political prisoner (see Sparks 1994).

It is these processes that ultimately led to the release of political prisoners and the unbanning of political organisations, paving the way for the political negotiations of the early 1990s and the first democratic elections in 1994. What the preceding shows is that none of the main parties involved in the political negotiation process, in particular the NP and the ANC, had a clear advantage, something that suggested that the negotiation process would involve tough bargaining and, as will become clear, the possibility of compromises.

*The land question and the property clause debate up to 1994*

Reflections on what a future democratic South Africa would look like emerged as early as the mid-1980s<sup>5</sup> (Sparks 1994). Although not occupying centre stage, the vital question of how the land question would be resolved became part of this discussion. This was raised in the context of discussing a Bill of Rights for a future South Africa. It is striking to note that two South African judges – and this is during the apartheid era – took a progressive stance on the question of property rights. They reasoned that a lasting resolution of the South African problem would be threatened if existing property rights were protected. For example, Judge Leon, a fairly conservative judge who sentenced an ANC guerrilla, Andrew Masondo, to death in 1985, warned, in the same year he sentenced Masondo, that a constitutional protection of property

rights could cause serious problems for the acceptance of the Bill of Rights (Chaskalson 1993). Judge Didcott, one of the more progressive judges during the apartheid period, expressed similar sentiments in 1988:

What a Bill of Rights cannot afford to do here... is to protect private property with such zeal that it entrenches privilege. A major problem which any future South African government is bound to face will be the problem of poverty, of its alleviation and of the need for the country's wealth to be shared more equitably... Should a Bill of Rights obstruct the government of the day when that direction is taken, should it make the urgent task of social or economic reform impossible or difficult to undertake, we shall have on our hands a crisis of the first order, endangering the Bill of Rights as a whole and the survival of constitutional government itself. (quoted in Chaskalson 1993: 73–74)

The two judges seem to have perfectly understood that transformation in terms of property rights and redressing the imbalances caused by colonialism and apartheid were not likely to be possible if existing property rights were recognised and entrenched. It is not clear, though, what alternative measures they had in mind.

However, the issue of property rights appears to have been overtaken by other concerns when the negotiation process started in 1990. It received attention, according to Chaskalson, 'only in the last days...before the deadline for agreement' (1994: 131). When it was eventually discussed, there was a lot of controversy around the protection of property rights.

The ANC's initial position on property rights was similar to that of Judge Didcott's (mentioned earlier). This position was articulated in the ANC's Bill of Rights for a New South Africa. In terms reminiscent of the Freedom Charter, Article 12(1 & 2) unequivocally stated:

The land, the waters and the sky and all the natural assets which they contain, are the common heritage of the people of South Africa who are equally entitled to their enjoyment and responsible for their conservation. The system of property rights in relation to land shall take into account that it is the country's primary asset, the basis of life's necessities, and a finite resource.

The next section (13) of the ANC's Bill contained the following clauses, which are worth quoting in detail:

(3) Property rights impose obligations and their exercise should not be in conflict with the public interest.

(4) The taking of property shall only be permissible according to law and in the public interest, which shall include the achievement of the objectives of the Constitution.

(5) Any such taking shall be subject to just compensation which shall be determined by establishing an equitable balance between public interest and the interest of those affected.

(7) Legislation on economic matters shall be guided by the principle of encouraging collaboration between the public, private, co-operative, communal and small-scale family sectors with a view to reducing inequality, promoting growth and providing goods and services for the whole population.

(8) The above provisions shall not be interpreted as impeding legislation such as might be deemed necessary in a democratic society with a mixed economy which may be adopted with a view to providing for the regulation or control of property or for its use or acquisition by public or parastatal authorities in accordance with the general interest, or which is aimed at preserving the environment, regulating or curtailing cartels or monopolies or securing the payment of taxes or other contributions or penalties. (ANC 1993)

Once again, the influence of the Freedom Charter seems pervasive in the preceding provisions. The drafters of the ANC Bill were still cherishing the possibility of 'a democratic society with a mixed economy'. This presumably entailed that the economy would be guided by capitalist and socialist principles. However, how the two systems would coexist was not clear. What seems clear, though, was that the ANC position was not opposed to the inclusion of the property clause in the Constitution. Chaskalson's (1995) reading was that the land and property clauses of the ANC Bill were conceived, not as a device to protect the title of existing property owners, but rather to facilitate a legislative programme of land restoration and rural restructuring. According to him, there was within the ANC 'a land lobby' which 'was particularly concerned about the implications of a constitutional property right for a programme of land restitution to assist

the victims of forced removals' (1995: 224). It is important to note that the issue of forced removals received a great deal of attention and drew in a number of activists in the 1980s in particular. It led to the production of a report consisting of five volumes by the Surplus People Project in 1983. Apart from the report, the issue of forced removals was instrumental in the establishment of a number of non-governmental organisations (NGOs) which were later coordinated under the auspices of the National Land Committee (NLC). Although Chaskalson does not spell out the composition of the ANC 'land lobby', it would not be unreasonable to assume that members of the NLC had an influence.

For the NP, the other main party in the political negotiation process, the inclusion of the property clause in the Constitution and, crucially, the protection of existing property rights, were critical. They were intent on ensuring that the property of existing white owners would not be jeopardised in a future democratic dispensation (Chaskalson 1994, 1995). In the end, the NP won the struggle to have the property clause entrenched in the interim Constitution, with all the implications for recognising existing rights.<sup>6</sup>

Once the ANC recognised that they had lost the debate, their two main objectives were, first, to ensure that the property clause would not 'frustrate a programme of restitution of land to the victims of forced removals under apartheid' and, second, to see to it that the future democratic state had 'the power to regulate property without incurring an obligation to compensate owners whose property rights were infringed in the process' (Chaskalson 1995: 229). The ANC, it appears, was able to achieve its objectives largely as a result of what Chaskalson calls 'the strange proceedings of the Ad Hoc Committee on Fundamental Rights' (1995: 229) made up of Halton Cheadle and Penuell Maduna representing the SACP and ANC respectively, Chief Gwadiso of the Congress of Traditional Leaders of South Africa, Sheila Camerer of the NP, Tony Leon of the Democratic Party and Godfrey Mothibe of the Bophuthatswana government. The committee was supposed to resolve disputes on fundamental rights and held its first meeting in August 1993. As Chaskalson puts it:

[N]one of the committee members was chosen for any particular expertise in legal issues relating to land and property. The result was that the committee spent a great deal of time on land and property issues which were peripheral, while the central issues were resolved without much debate. Because the ANC member of the commission had a clearer sense of how to relate their objectives to the wording

of the clause than their National Party counterparts, these central issues tended to be resolved in favour of the ANC. (1995: 230)

One of the 'central issues' that is pertinent for our purposes is what Chaskalson refers to as the willingness of the NP to compromise on 'the principle that compensation for expropriation of property would not necessarily be tied to market value' (1995: 232). Chaskalson's understanding in this regard was that the property clause 'would not obstruct the operation of the restoration clauses because it allowed for payment less than market value compensation in appropriate cases of restoration' (Chaskalson 1995: 232). The issue of compensation, and the role of the market in particular, remains, as will be clear, one of the contentious issues in current debates on the slow pace of land reform in South Africa.

It is not clear why the NP agreed to a clause that stated that compensation for expropriated land would not necessarily be at market value. It is also not clear what the NP formula for determining the price of land would entail. But it is important to note that, for its part, the Chamber of Mines, not surprisingly, was perturbed by this development. The Chamber had argued that 'the right of an expropriatee to a market-related compensation determined by the courts should be expressly recognised' (quoted in Chaskalson 1995: 233). The Chief Justice raised another concern. Anticipating that these matters would somehow be referred to the courts, the Chief Justice argued that 'this sub-clause' would 'cause serious problems of interpretation and application' (quoted in Chaskalson 1995: 233). Cheadle, representing the SACP, was vague in his formulation. He pushed for a clause that would provide for 'just and equitable compensation', without clarifying what just and equitable compensation would be. Linked to the question of compensation for expropriated land was the concern whether the property clause would not 'place any obligation on the state to compensate property owners whose rights were interfered with by legislative schemes to regulate the exercise of property rights' (Chaskalson 1995: 234).

In the final analysis, an agreement was reached during a meeting on 25 and 26 October 1993, resulting in the inclusion of the property clause (Section 28) in the interim Constitution. The section reads:

1. Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

2. No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
3. Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investment in it by those affected and the interests of those affected. (RSA 1993)

It is widely accepted that Section 28 represented a compromise between the ANC and NP positions. There is a fundamental tension that goes through this section arising out of a constitutional protection of existing property rights while at the same time showing a commitment to expropriate land 'for public purpose'. Subsection 1 clearly protects existing property rights and those who have the resources to 'acquire' and therefore buy property, while subsection 3 opens a loophole for the expropriation of land with compensation.

Chaskalson's interpretation of these sub-clauses is interesting and, with hindsight, optimistic. According to him, Section 28(2) read with Section 28(3) 'set up a distinction between *deprivation* of rights in property and *expropriation* of rights in property. The former was to be performed "in accordance with law"' (1995: 236) while for expropriation there were two added requirements: 'the expropriation had to be performed pursuant to a public purpose and had to be followed by the payment of compensation' (1995: 236). The ANC, according to Chaskalson, understood the inclusion of Section 28(2) to 'mean that in the absence of an expropriation, compensation need not be paid to a party deprived of property rights by state action' (1995: 236). Apart from being optimistic, I find the interpretation that property could be confiscated without compensation in the circumstances of the political negotiation process in the early 1990s surprising. This matter needs to be pursued and deserves more research.

Chaskalson's optimism seems to have been based on his understanding and interpretation of the compromise reached in the negotiations. Although

agreeing that the wording of Section 28 'is not always clear', he imagined that the courts 'would do well to adopt a purposive approach' in interpreting this section, bearing 'in mind the compromise which the section' sought to achieve. Drawing from comparative legal history, Chaskalson concluded that if courts were 'overzealous in their protection of property rights...the potential for constitutional conflict between court and state will be substantial' (1994: 139).

Additionally, although the political negotiation process, and the particular moment this took place – namely, after the collapse of Soviet communism and the triumph of capitalism – presented a telling challenge to a radical agenda in South Africa, there was still optimism that some of the gains made in the 1980s would not be lost. A typical gain that had been made with regard to the land question, for example, was the fact that some white farmers, including those in the South African Agricultural Union, had come to accept that negotiations with African land claimants could mean that the latter would gain ownership of a portion of the farmers' land as part of a wider process of redress (Chaskalson 1993). In short, some white farmers had, by the early 1990s, come to accept that, for the sake of stability, they would have to part with portions of 'their' land for transfer to the historically dispossessed. From my personal recollection of working on land occupations in the Queenstown area of the Eastern Cape in the mid-1990s, the question of buying and selling land was hardly discussed: a significant amount of land had been grabbed and occupied by land-hungry black South Africans (Wotshela 2001). There was, behind these land occupations, the conviction by the historically dispossessed and their allies that existing white property rights were illegitimate. Some white farmers were beginning to accept that they would have to share land with black South Africans.

The question that needs to be asked is why, despite these favourable conditions on the ground, the property clause was entrenched in the interim Constitution. One possible explanation can be found in my preceding analysis, in particular the argument that the NP wisely opted for a political negotiation process from a position of relative strength in the sense that they had not been defeated on the battlefield. It was thus possible for the NP to squeeze some concessions from the ANC. Apart from this, analysts such as Marais (1998) would argue that the ANC and its alliance partners were often divided on what a future democratic government under the ANC would look like. As a 'broad

church' the membership of the ANC included people from a broad political spectrum, from conservative capitalist-inclined members to communists. The tension in Section 28 could also be interpreted as a compromise between the conservatives and the radicals within the ANC and its alliance partners.

*The final Constitution, the land reform programme and the property clause*

As the name suggests, the interim Constitution was a transition measure leading to the final Constitution. The latter was adopted in 1996. As with the interim Constitution, the property clause was entrenched in the final Constitution. In this document, the property clause is under Section 25 and the relevant subsections read as follows:

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) 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 of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) 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. (RSA 1996)

Subsection 5 implores the state to take 'reasonable legislative and other measures within its available resources' to create conducive conditions for 'citizens to gain access to land on an equitable basis'. Other subsections

address, amongst other things, questions of security of tenure and land restitution. All in all, the South African Constitution provides the framework for land policy in South Africa. This policy is based on three components of the government's land reform programme: land redistribution (to enable equitable access to land), land tenure reform (to eliminate tenure insecurity) and land restitution (to compensate for land dispossession).

As can be seen, the final Constitution essentially reinforced and refined what was already contained in the interim Constitution: protection of the existing property rights of landowners, the vast majority of whom are white, while at the same time making a commitment to redistributing land to the dispossessed majority. The main difference seems to be that while the interim Constitution allowed for expropriation only for public purposes, the final Constitution expanded this to include public interest. The issue of expropriating land only for public purposes raises the question of how to classify land expropriated for land reform purposes. It can be argued, though, that land expropriated for land reform purposes is not for public purposes given that it is transferred to the historically dispossessed. On this point, Chaskalson correctly argued that given that 'any substantial land reform programme is likely to depend on expropriation...land reform could be rendered "constitutionally impossible"' (1994: 136–137). By expanding expropriation to public interest, the possibility of expropriating land for land redistribution purposes existed.

A question may arise as to how to interpret Section 25(1) of the Constitution. What meaning should be attached to the notion that 'no law may permit arbitrary deprivation of property'? What amounts to 'arbitrary deprivation of property'? In this regard, it is worth recalling the warning of Judge Didcott cited at the beginning of this chapter. The judge cautioned that what a Bill of Rights 'cannot afford to do... (was) to protect private property with such zeal that it entrenches privilege' and makes it, amongst others, difficult 'for the country's wealth to be shared more equitably'. In other words, can this clause be interpreted to mean, following Judge Didcott, that it obstructs the government from 'the urgent task of social or economic reform', creating a situation where we have 'on our hands a crisis of the first order, endangering the Bill of Rights as a whole and the survival of constitutional government itself' (quoted in Chaskalson 1993: 73–74)? To attempt to respond to these questions, let us look at developments since the introduction of democracy in South Africa.

*Slow delivery and the property clause*

As pointed out from the outset, except among hardboiled party loyalists, there is wide acceptance today that the pace of land reform in South Africa is painfully slow. I shall not in this chapter assess the land reform programme in the first ten years of South Africa's democracy. This is adequately covered in Hall's chapter in particular, and touched upon in the introduction and some of the other chapters. Mine is only a reminder that at the end of the first ten years of democracy in South Africa in 1994, a mere 3 per cent of the land had been transferred to African hands.

Various reasons have been offered in attempts to explain the slow delivery in land reform. The bone of contention in current debates, it seems, is the interpretation of Section 25 of the Constitution. There seem to be broadly two streams to the debate. On the one hand, there are those who argue that the fundamentals in terms of policy are in place. These commentators would argue that what is now missing is commitment from the government to ensure that the policies are implemented. This allegation is often couched in terms of a lack of political will on the part of the ANC-led government. Others analysts, on the other hand, would argue that the problem is with policy, in particular the entrenchment of the property clause in the Constitution as well as the endorsement in policy of the 'willing seller, willing buyer' principle. Let us consider each of these arguments in some detail.

Before the Land Summit organised by the Department of Land Affairs in July 2005, government officials were the most fervent supporters of the claim that the fundamental were in place and that what was needed was the implementation of policy. The clearest public expression of this position was in the form of testimonies by Glen Thomas and Manie Schoeman, who were the government representatives at the Land Tribunal held in Port Elizabeth in December 2003. Both claimed that they did not have any problems with policy, including the notorious 'willing seller, willing buyer' condition. The issue, according to Thomas, was 'whether government has sufficient resources to buy land when there is a willing seller at a price at which the willing seller wants to sell the land' (see endnote 2). He was adamant that the 'land market is there. There's no scarcity of land that could be bought, but the question is at what cost, at what price? That's the point.'

When the chairperson of the Land Tribunal wanted to know how Thomas would respond to concerns raised by witnesses that the key obstacle was policy – that, in the words of the chairperson, ‘it’s not so much the scarcity of resources, but the commitment to the principle of “willing buyer, willing-seller”’ – Thomas was ambivalent: ‘What we can’t do is to confiscate, because by confiscating we shall be depriving certain people of their rights as reflected in the Constitution.’ He conceded that ‘there is a perception – justifiably – that the “willing buyer, willing seller” approach is problematic’. However, having said this, he was quick to point out that ‘government is also constrained’ and it ‘cannot be government itself that starts to violate the Constitution’.

If Thomas was at times ambivalent in his position regarding the adequacy of existing policy, his fellow government representative, Manie Schoeman, who defected from the NP to the ANC, was forthright in his unwavering support for government policy. Unlike Thomas, he was less inclined to opening discussions on the possibility of making some constitutional amendments, including revisiting the property clause. Schoeman preferred to restrict himself to the present policy of the ‘ruling party’ which endorses the property clause ‘as it is’. Although it could change, he thought that ‘the guarantee of ownership of property is also fundamental to a democracy’. However, although he thought that the 1913 cut-off date was ‘done in much wisdom in the interest of reconciliation’, he conceded that ‘it doesn’t take away the obligation from the whites in this country to acknowledge that they acquired property or their forefathers did in an irregular basis and that we don’t have an obligation to rectify that process’. Schoeman did not elaborate on what he meant by rectifying the process, given that he stood by his position that existing policies were perfect.

A more nuanced and coherent version of the preceding argument has recently been made by Ruth Hall (2004).<sup>7</sup> She does not query the fact that Section 25(1) protects existing property rights. Her point is that although the land reform policy is based on a ‘willing seller, willing buyer’ condition, the state can expropriate land. She argues that a far-reaching land reform is possible within the existing constitutional framework. Hall contends that the protection of existing property rights should be balanced against ‘an injunction towards transformation’ (2004: 6). According to her, ‘While protecting rights, the constitution also explicitly empowers the state to expropriate property and specifies that property may be expropriated in the public interest,

including “the nation’s commitment to land reform” (2004: 6). Expropriation as conceived in post-1994 South Africa, Hall reminds us, is not limited to instances of ‘public purposes’ such as the building of public infrastructure, but can now apply to the transfer of property from one private owner to another. In other words, Hall’s overall argument is that expropriation powers ‘have been largely unused’ (2004: 7), applied in only two restitution cases so far. This makes her conclude that there is ‘room for manoeuvre’ and that the call for legal and constitutional amendment ‘seems misplaced. Constitutional amendment is not the immediate challenge since the constraint is a political rather than legal one’ (2004: 7).

Hall seems to make a distinction between the property clause in the Constitution and the ‘willing seller, willing buyer’ condition in land reform policy. While she does not have any problem with the property clause, given her argument that although existing property is protected there is also the provision for expropriation, she seems worried that expropriation powers are weakened by the government’s adoption of the World Bank imposed ‘willing buyer, willing seller’ policy as a guide to land reform.

In many ways, Hall was responding to arguments raised by Hendricks and Ntsebeza (2000) and Hendricks (2004). The main argument in these writings is that the provisions of Section 25 in the Constitution are contradictory in the sense that the Constitution protects existing property rights, while at the same time making a commitment to redistributing land to the dispossessed majority. The two objectives, the argument goes, cannot be achieved at the same time simply because the bulk of land outside the former bantustans is under private ownership and consequently safeguarded by the Constitution. In this regard, a declaration that land will be made available to Africans is rendered void for the simple reason that whites privately own most land. This tension was also captured by the acting chairperson of the Land Tribunal, Advocate Dumisa Ntsebeza. In his closing remarks, he averred:

It does appear that there may well be a case here in the Constitution, which cries for an argument as to whether we don’t have within the same Constitution competing rights. And if we have those competing rights the question will arise, which of those rights must take precedence. That will probably be one of the remedies that the claimants in this case want to look at. (see endnote 2)

The property clause in the Constitution has prompted Hendricks (2004) to ask the question: Does the South African Constitution justify colonial land theft?

Hall (2004), though, has a point in challenging Hendricks and Ntsebeza on the property clause, in particular the fact that we are silent on the expropriation clause in the Constitution. We have never really addressed the vital issue raised by Hall regarding expropriation. I will in the pages that follow respond to this challenge.

As already stated, it is subsections 2 and 3 of Section 25 of the Constitution which deal with the question of expropriation. Important to remember here is that expropriation, as Thomas reminded those attending the Land Tribunal, 'has to be with compensation because without it, we are talking about confiscation'. This then raises the question of how compensation is determined. Subsection 3 of Section 25 of the Constitution is supposed to guide the determination of compensation. However, it is widely accepted that this subsection is extremely vague. It merely states that 'the amount of compensation and the time and manner of payment must be just and equitable'. But what precisely counts as a 'just and equitable' dispensation is not clearly spelled out, except that the subsection goes on to state that compensation should reflect 'an equitable balance between the public interest and the interests of those affected'. In this respect, regard would be accorded to 'all relevant circumstances'. The pertinent ones for the purposes of this chapter include the history of the acquisition and use of the property; the market value of the property; and the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property.

In recognition of the vagueness of some of these provisions, a so-called 'Gildenhuys formula' is used to determine compensation. Justice Gildenhuys is a Land Claims Court judge who worked out a particular formula for the determination of compensation in cases involving expropriation in restitution cases. It is argued here that this formula could be used as a guide even in cases of land redistribution. In essence, the formula takes into account two of the circumstances mentioned in subsection 3 of Section 25 of the Constitution: the market value of the property and the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property. In a nutshell, the amount of compensation is the market value of the property minus the present value of past subsidies.

The question that confronts us is whether a consideration of the expropriation measure and the clarity that the Gildenhuis formula has brought undermines the argument, which I support, that the property clause is a major obstacle in fundamental land reform in South Africa. I contend that the expropriation clause does not affect my core conclusion about the property clause. In the first instance, the government has itself shown great reluctance to invoke the expropriation clause. Thomas conceded in his testimony that although the government has expropriated land for land reform purposes, this is not the norm. In his response to a question from the president of the PAC on the 2005 State of the Nation address, President Mbeki has also shown great reluctance in using expropriation as a mechanism to redistribute land. In recent times, particularly after the Land Summit, the Department of Land Affairs has given notice to expropriate a number of white-claimed farms in cases involving restitution. However, it remains to be seen whether the government will pursue these cases in the event, as is most likely, the farmers take the matter to court.

Second, even if the government were to pursue the issue of expropriation, there is still the question of compensation and how the price is determined. In this regard, the Gildenhuis formula could be a guide. We have seen that, according to the judge, the price of land should be determined by the market. Although the Gildenhuis formula takes into account the critical issue of subsidies, which should be deducted from the market price, the fact that compensation is based on the market price almost makes it impossible for the government to budget for land reform for the simple reason that the role of the state in determining the price is very limited. Thomas conceded in his testimony that the fact that landowners were inclined to inflate their prices was a potential problem, something that made Advocate Dumisa Ntsebeza, the chairperson of the Land Tribunal, observe in his concluding remarks: 'Because if one is going to use the market to establish the price of land in restitution cases, it means that government can also not afford to buy land and restore it to the claimants. It does appear that there is inadequate legislation to deal with questions of land restitution.' Hall also concedes that, in practice, white farmers 'determine when, where and at what price land will be made available' (2004: 6).

A point worth making in this regard is how the Gildenhuis formula has severely called into question what I earlier called Chaskalson's optimism regarding the compensation amount. Chaskalson argued that the amount of compensation

in cases of expropriation could be determined without necessarily taking the market value into account. The judgement by Gildenhuis has created a precedent that pours cold water over Chaskalson's optimistic position.

It is intriguing that the history of how colonialists acquired land in the first instance is not receiving prominence in the determination of compensation. In so far as reference is made to history, the suggestion is that this refers to the history of land acquisition by the affected landowner. Yet, there is the history of colonial conquest and land dispossession that lies at the heart of the land question in South Africa. It is hard to imagine how any process of land redistribution that downplays this history can hope to gain legitimacy, in particular in the eyes of those who were robbed of their land. Closely linked to this is that the naked exploitation of African labour which was central to the success of white commercial farming in South Africa is, interestingly, not considered to be one of the crucial factors that must be taken into account when the amount of compensation is calculated.

Lastly, some commentators and activists have attributed the seeming reluctance to expropriate land to a lack of political will on the part of the government. We have seen that, according to Hall, the 'immediate challenge' is not a legal but a political one. It is not clear what Hall means by the issue not being 'legal'. I would argue that the issue of compensation, even if the Gildenhuis formula is used, can end up in law courts if white farmers decide to contest the compensation amount. Nothing stops them from doing that. There are implications if the matter goes to court. First, legal processes can be frustratingly protracted. For example, if the owner does not accept a compensation offer, she or he has, in terms of Section 14(1) of the Expropriation Act, up to eight months to make an application to a court. The process can drag on after this. In addition, legal processes are very expensive. Both these factors are discouraging. Even though a legal contestation would involve rich farmers and the state, it is poor, landless Africans who end up suffering either through delays and/or in instances where court decisions favour white farmers. It is also worth bearing in mind that in a court case involving the state, it is in the end the taxpayers' money that is involved. I argue that the entrenchment of the property clause in the Constitution, in particular Section 25(1), puts farmers in a very strong position in situations where they contest expropriation and the determination of price.

*Evaluation and conclusion*

A key challenge facing the post-1994 South African state is how to reverse the racial inequalities in land resulting from colonial conquest and the violent dispossession of indigenous people of their land. Closely linked to this is whether land redistribution within the current market-led approach will happen at a pace that will lend popular legitimacy to the state and encourage economic growth. There is clearly a huge gap between the political freedoms enshrined in the Bill of Rights and the economic realities of post-1994 South Africa. The land question is an important indicator in this regard. South Africa has joined the growing list of liberal capitalist democracies the world over where the political emancipatory project is not matched by any significant economic freedoms.

This chapter has attempted to explore the reasons behind the slow delivery in land reform. The chapter has argued that some of the key obstacles are the entrenchment of the property clause in the Constitution, in particular the protection of existing property rights, and the acceptance of the 'willing seller, willing buyer' policy. It has been argued in the chapter that the fact that there is provision for expropriation makes very little difference given the fact that the conditions attached to expropriation weigh heavily in favour of white farmers. The much-vaunted Gildenhuis formula, I have argued, strengthens the white farmers' position quite considerably in allowing the market to determine the amount of compensation.

However, as I draw this chapter to a close, it is important to address the hard question why the state has not acted and does not or seems very reluctant to act in a manner that may antagonise white commercial farmers. A standard response from some analysts, as we have seen in the case of Hall, suggests that the state does not have the political will to use its expropriation powers. Others, such as Marais, argue that part of the explanation is that the left within the Tripartite Alliance was defeated in the mid-1990s when there was a shift from the Reconstruction and Development Programme (RDP) to the Growth, Employment and Redistribution (GEAR) strategy. The important question, though, is why the left lost the battle.

A more substantial explanation, I would argue, cannot afford to ignore the global political and economic order that emerged after the collapse of Soviet communism from the late 1980s and how this affected the balance of

forces. The transition to democracy in South Africa in the early 1990s took place at a critical moment. Burawoy (2004) suggested in his Harold Wolpe Memorial Lecture that after the collapse of Soviet communism the ANC was left without a compass. Although not a communist or socialist organisation, the influence of communists in the ANC was palpable. Some of the clauses of the Freedom Charter bear testimony to this. However, at the time of the political negotiation process in the early 1990s, it must have been extremely difficult for the radical provisions of the Freedom Charter to be sustained. The international climate clearly favoured pro-capitalist forces. This could be one explanation for Marais' claim. Indeed, given the dominance of neo-liberal capitalism in the 1990s, the question should be asked: what would a left radical agenda be under such conditions?

It is common cause that when the ANC launched its election manifesto, the RDP, in 1994, there was a fundamental reversal of the Freedom Charter's call for the nationalisation of land. Although the RDP had redistributive elements, the document equally committed the ANC, albeit cautiously, to a market-led land reform programme. Two years thereafter, in 1996, an ANC-led government formally embraced conservative neo-liberal economic policies in the form of GEAR. With regard to the land reform programme and its implementation, not only did government commit itself to a market-led programme, but land reform policy in South Africa was also to be based on a 'willing seller, willing buyer' principle. This was despite the fact that this principle had by the mid-1990s proved to be a failure in, for example, neighbouring Zimbabwe. The justification for the shift is often couched in similar terms as elsewhere where these turnabouts have been made: 'there is no alternative' to global capitalism. Indeed, the shift to GEAR and the endorsement of the 'willing seller, willing buyer' condition must have dealt a serious blow to the 'land lobby' in the negotiation process which had hoped for at least a 'mixed economy' and radical reform in a democratic South Africa.

Writing at the height of the triumph of neo-liberalism, Ellen Wood (1995) reminded us that under capitalism, citizenship and democracy are limited in scope. Her argument is that 'representative (liberal) democracy' distanced itself from the ancient and literal meaning of the term (democracy), resulting in a shift in focus 'away from the active exercise of popular power to the passive enjoyment of constitutional and procedural safeguards and rights, and away from the collective power of subordinate classes to the privacy

and isolation of the individual citizen' (Wood 1995: 226–227). Hence the domination of the liberal principles: 'limited' government, civil liberties, toleration, the protection of a sphere of privacy against intrusion by the state, together with an emphasis on individuality, diversity and pluralism. Thus, by separating 'the economic and the political', or the transfer of certain 'political' powers to the 'economy' and 'civic society', capitalism has, according to Wood, created a seemingly anomalous situation where socio-economic inequality and exploitation coexist with civic freedom and equality. In her words:

The separation of civic status and class position in capitalist societies thus has two sides: on the one hand, the right of citizenship is not determined by socio-economic position – and in this sense, capitalism can coexist with formal democracy – on the other hand, civic equality does not directly affect class inequality, and formal democracy leaves class exploitation fundamentally intact. (Wood 1995: 201)

It is in this sense, she emphasises, that 'political equality in capitalist democracy not only coexists with socio-economic inequality but leaves it fundamentally intact' (Wood 1995: 213).

The implication of Wood's argument for South Africa is that by adopting GEAR, in particular, South Africa was putting itself in a position where political equality in the form of periodic elections was unlikely to translate into economic equality. It should be noted, though, that Wood's critique is directed against the system of capitalism, neo-liberal or otherwise. For her part, Gill Hart has lamented: 'GEAR sits uneasily astride the emancipatory promises of the liberation struggle, as well as the material hopes, aspirations, and rights of the large majority of South Africans' (2002: 7).

There seems little doubt that the ANC-led government is under tremendous pressure from both local and international capital to pursue a neo-liberal capitalist agenda in South Africa. For example, the Land Summit in July 2005 passed radical resolutions regarding land reform in South Africa. But it will be difficult for the Department of Land Affairs to deal with the resolutions of the Land Summit. While the overwhelming majority of participants agreed that extraordinary measures had to be taken to accelerate land delivery, including scrapping the 'willing seller, willing buyer' principle, a tiny minority of white commercial farming delegates belonging to the farmers' union AgriSA stood in

opposition to these resolutions. They threatened that if there was interference with the market, there would be consequences far beyond the imagination of those at the summit. They pointed to Zimbabwe as an example, giving a clear message that should the South African government defy the principles of neo-liberal capitalism, South Africans would find themselves in a position where this world boycotts them, as is the case in Zimbabwe. In a sense, white commercial farmers in South Africa, despite being a minority, are aware that they have an international capitalist system behind them.

The apparent strength of agribusiness contrasts sharply with the relative weakness of land-based organisations. These could apply pressure on the government 'from below'. It must be noted in the first place that the organised voice from below in the land sector was a group of land-based NGOs that established a network referred to as the NLC. These organisations had emerged during the apartheid period as a response to the forced removal of millions of Africans from white-designated areas.

Despite the fact that the ANC had adopted a market-led approach to land reform, there seems to have been a sense amongst many that the ANC government was seriously committed to redressing historical injustices and that this would somehow be done within the limits of neo-liberal capitalism. For its part, the government had in 1994 followed a World Bank recommendation that 30 per cent of white-claimed agricultural land be transferred during the first five years of democracy. As a result, some members resigned from their organisations and joined the Department of Land Affairs as government officials. Those remaining in the organisations took it upon themselves to support the department. The presumption, it seems, was that 'this is our government' and that the room to manoeuvre was quite wide.

The embarrassing and frustrating pace of land delivery, however, gave rise to discontent which fed into the formation of the Landless People's Movement (LPM) in 2001. The NLC played a crucial role in the establishment of the LPM. Events in Zimbabwe also helped to propel the formation of the LPM, as did connections with the Brazilian Landless Workers' Movement and La Via Campesina, an international movement of peasants.

The growth of a discontented landless people, supported by the NLC, was rather short-lived. By the end of 2003, the NLC and LPM were in disarray. Long-standing disputes within the NLC over support for the LPM intensified

in the period following the World Summit on Sustainable Development in 2002. By 2004, the NLC formally disbanded as a network, although its affiliates continue to exist, with some establishing an informal network. After the demise of the NLC, there came into existence, shortly before the Land Summit, an alliance of various movements under the acronym ALARM (Alliance of Land and Agrarian Reform Movements). Although committing itself to rural transformation and the poor in these areas, it is early days to say what the future holds for this alliance.

Whatever pressures the international situation dominated by a neo-liberal agenda exerts on the South African government, the overall context of land dispossession and land reform in this country should not be forgotten. The claims that dispossessed and poor South Africans are laying are legitimate. At the same time, there is no doubt that the market-led approach to land reform, including the protection of property rights in the Constitution and the 'willing buyer, willing seller' approach to land reform, will not unravel years of colonial and apartheid dispossession. There is a need to open up debate and discussion on these matters. The starting point in that debate should be whether a comprehensive land redistribution programme in South Africa can take place if it ignores colonial conquest, land dispossession and the fact that commercial farming triumphed as a result of the naked exploitation of African labour. Above all, the debate would have to engage with the fundamental proposition in this chapter, namely, that there is a contradiction between the protection of private property rights to land and a commitment to fundamental land redistribution. The debate would have to bring clarity to Section 25(1), particularly on what precisely constitutes 'arbitrary deprivation of property'. Indeed, South Africans should revisit the claim made in the ANC Bill in 1993 (see earlier) that 'land, the waters and the sky and all the natural assets which they contain, are the common heritage of the people of South Africa who are equally entitled to their enjoyment and responsible for their conservation'. The question here is whether land should be privately owned or not. Lastly, it is important, especially for the short term, to give clarity to the status of the so-called Gildenhuys formula with regard to the current South African law. To what extent can it be binding or influential to future cases of expropriation?

*Notes*

- 1 A much shorter version of this chapter was published in Alexander (2006). This version is published with the kind permission of the Centre for Civil Society.
- 2 The transcript of the Land Tribunal proceedings is available at the offices of the Trust for Community Outreach and Education in Mowbray, Cape Town.
- 3 This is an isiXhosa phrase for 'the land must return'.
- 4 This was often quoted in the 1980s, and the remarks, which appeared in the *Financial Times*, London, on 10 June 1986, were by Zach de Beer, the Chief Executive of Anglo-American.
- 5 As will be clear, this section draws heavily from the work of Chaskalson (1993, 1994, 1995). He is arguably the only analyst who has written extensively on the property clause in the interim Constitution.
- 6 For details of how this was achieved, see Chaskalson (1994, 1995).
- 7 A similar position was advanced by Edward Lahiff, a colleague of Hall in the Programme for Land and Agrarian Studies, University of the Western Cape, in his comments on an earlier version of this chapter, presented at a conference that was organised by the Harold Wolpe Trust in Cape Town in March 2004. However, I haven't seen any written expression or expansion of Lahiff's position.

*References*

- Alexander M (2006) *Articulations: A Harold Wolpe Memorial Lecture Collection*. Trenton: Africa World Press, Inc.
- ANC (African National Congress) (1993) *A Bill of Rights for a New South Africa*. Available at <[www.anc.org.za/ancdocs/policy/bill\\_rights.html](http://www.anc.org.za/ancdocs/policy/bill_rights.html)>
- Burawoy M (2004) *From liberation to reconstruction: Theory and practice in the life of Harold Wolpe*. Harold Wolpe Memorial Lecture held in Cape Town on 29 July.
- Chaskalson M (1993) *Should there be a property clause: Implications of the constitutional protection of property in the United States and the Commonwealth*. In M Venter & M Anderson (eds) *Land, Property Rights and the New Constitution*. University of the Western Cape.
- Chaskalson M (1994) *The Property Clause: section 28 of the Constitution*, *South African Journal on Human Rights*, 131: 131–139.
- Chaskalson M (1995) *Stumbling towards Section 28: Negotiations over the protection of property rights in the Interim Constitution*, *South African Journal on Human Rights*, 11: 222–240.

- Hall R (2004) Restitution and the politics of land reform: Stepping outside the box. Paper presented at a Conference on Ten Years of Democracy in Southern Africa, Queens University, Kingston, 2–5 May.
- Hart G (2002) *Disabling globalization: Places of power in post-apartheid South Africa*. Pietermaritzburg: University of Natal Press.
- Hendricks F (2004) Does the South African Constitution legitimise colonial land alienation? Paper presented to the Sociology Department seminar series, Rand Afrikaans University, 5 March.
- Hendricks F & Ntsebeza L (2000) The paradox of South Africa's Land Reform Policy. SARIPS Annual Colloquium, Harare, Zimbabwe.
- Mafeje A (1988) The agrarian question and food production in Southern Africa. In Kwesi K Prah (ed) *Food security issues in Southern Africa*. Selected Proceedings of the Conference on Food Security Issues in Southern Africa. Maseru 12–14 January 1987. Southern Africa Studies Series no. 4. Institute of Southern African Studies. National University of Lesotho.
- Marais H (1998) *South Africa, limits to change: The political economy of transformation*. London: Zed Books Ltd.
- RSA (Republic of South Africa) (1993) Constitution of the Republic of South Africa Act 200 of 1993. Available at <[www.info.gov.za/documents/constitution/93cons.htm](http://www.info.gov.za/documents/constitution/93cons.htm)>.
- RSA (1996) Constitution of the Republic of South Africa. Available at <[www.info.gov.za/documents/constitution](http://www.info.gov.za/documents/constitution)>.
- Saul J & Gelb S (1981) *The crisis in South Africa: Class defense, class revolution*. New York/London: Monthly Review Press.
- Sparks A (1994) *Tomorrow is another country*. Sandton: Struik.
- Wood EM (1995) *Democracy against capitalism: Renewing historical materialism*. Cambridge: Cambridge University Press.
- Wotshela LE (2001) Homeland consolidation, resettlement and local politics in the Border and the Ciskei region of the Eastern Cape, South Africa, 1960 to 1996. Unpublished PhD thesis, St Antony's College, Oxford University.