Alternative perspectives on land reform based on sustainable economic growth and nation building principles:

Dan Kriek and Nick Serfontein Report - Advisory Panel on Land Reform and Agriculture



TABLE OF CONTENTS

1. Introduction....3
2. Background....3
3. General remarks and approach of members responsible for minority report....3
4. Purpose of Minority Report....4
5. Proposals that are welcomed and supported:....5
6. Reports of the workstream in which minority report members were involved:....7
   - 6.1 Brief overview of South Africa's agricultural economy....7
   - 6.2 Food security....9
   - 6.3 Land, justice and equity in South Africa....10
   - 6.4 Preconditions for a successful land reform farming system....20
   - 6.5 The cost of land reform in South Africa....33
7. Findings and proposals that there is no consensus about:....38
8. Expropriation without compensation....42
9. Gaps in the Panel Report....45
10. Process comments....49
11. Conclusion....50

Annexure A....51
Annexure B....53
Annexure C....94
Annexure D....145
Annexure E....152
Annexure F....181

1. Introduction

We, the undersigned members of the Panel, after exhausting our options to ensure due process and after having made every effort to make constructive proposals on process and content, feel that we are left with no option but to submit a Minority Report. Whilst we are very clear that we fully support orderly and sustainable land reform and acknowledge the need to speed and scale up land reform, we differ strongly with some of the material findings and recommendations in the Panel Report. In this Minority Report, we set out our concerns about the process and certain proposals, but also state which proposals by the Panel we support. It is important to note that most of us submitted comprehensive written comments on the draft Panel report. Dan Kriek submitted a 31-page commentary document on the zero draft of the Panel report, as well as substantive comments on later versions of the report.

2. Background

A ten-member expert Panel was appointed by President Ramaphosa in August 2018. The terms of reference for this ten-member Panel contained four elements that encompasses the mandate of the Panel.

They were to:

- provide a consensus perspective on land expropriation,
- diagnose problems with policies, laws and implementation, and
- develop recommendations for a way forward;
- consider immediate action steps for expropriation without compensation and work out the cost implications of the implementation of Expropriation Without Compensation (EWC).

The Panel was given eight months to finish their work.

3. General remarks and approach of members responsible for minority report

"The stubborn adherence to a policy never allowing more than 12 to 14 percent of South Africa's land for the majority African population prevented any real solution to the land problem for Africans" - Harvey M. Feinberg, Our land, our life, our future, 2015.

South Africa's history of land is a complex one. It cannot be denied that it contained strong elements of dispossession. It is this history and its legacy that we need to address through land reform. We need to do it in such a way that it unites us as a nation and takes us forward. In this sense, land reform is both backward looking in what needs to be addressed, and forward-looking in order to address it in a sustainable way.

The Constitution seeks to change the path of conflict and destruction surrounding land. In our preamble we committed ourselves to acknowledging the injustices of the past, and to build a democratic South Africa on the founding values of human dignity, equality and freedom. Our Constitution asks from us a commitment to actively re-imagine ourselves, not based on our past divided identities, but as South Africans, who need to work actively together to realise our Constitutional goals. We, as the members who are drafting this Minority Report, fully support the constitutional values of "human dignity, achievement of equality and the advancement of all human rights and freedoms."

We are fully committed to work and be actively involved in building a South Africa where all citizens can reap the fruits of our constitutional democracy. We do so mindful of the injustices that we have to address and focused in proposing sustainable long-term solutions. Our commitment to an inclusive agricultural sector and the future of the country, in our respectful view, is the very reason why the President invited us to participate in the activities of the Panel.

25 years into democracy we are painfully aware that a better life did not come for all. We realise the dangers of not addressing the skewed patterns of land ownership. We need to redefine the failures of land reform and welcome it, since it enables us to unleash progress, creativity and ways to respond to the failure that makes us more resilient against the failure in the future. We should face this challenge head on, armed with credible evidence that might in some instance require us to rethink these deeply held beliefs.

When faced with the overwhelming task of addressing the failures of land reform, the most effective way is to break it down in smaller parts to enable a rigorous assessment of what works and what doesn't. As practical farmers we are well suited to do this.

Any proposal and suggestion, while done with a long-term view on sustainability and deep-seated social change, should always be regarded as tentative. Resilience is built by constantly assessing the impact of policy and legislation, welcoming mistakes as a way of adjusting the fault lines and refining the system.

4. Purpose of Minority Report:

The purpose of the Minority Report is not to comment in detail on the Panel Report. The Panel Report is very lengthy and promotes a very particular narrative, which we are generally not comfortable with.

Rather, the purpose of the Minority report is to clearly state which proposals and recommendations in the Panel report, we support and which ones we reject. We will also attempt to bring clarity on important gaps in the report and on the proposals that were not included that we believe warrant consideration.

The proposals of our workstreams that are included below demonstrate the following points, which are in direct contrast to findings and recommendations in the Panel report:

- The brief overview of South Africa's agricultural economy, illustrates the significant contribution of the agricultural sector to our economy and export earnings as well as the negative impact on the sector of policy uncertainty;

- The report on food security illustrates that the problem is not the availability of food, but the ability of poor people to afford food. This is due to unemployment and poverty. It also stresses the point that a balance needs to be found between the need for accelerated land reform and the stability that is required to maintain and grow production while ensuring that more people participate in growing agricultural production.

- The report entitled: "Land, justice and equity" in South Africa raises the concern that land reform to date has not been a success story. It proposes that the National Development Plan proposals on land reform should be fast-tracked. It proposes a virtual depository and a land reform fund.

- The report on Preconditions for a successful land reform farming system suggests that the idea that a large percentage of white commercial farmers can be replaced within a short space of time with smallholders is not really realistic. Specific support programmes for new black farmers are proposed. It also emphasises the importance of proper beneficiary selection.

- The report on the cost of agricultural land reform tries to create a basis for credible scenario planning and costing of future land reform. It uses official statistics to show that white commercial farmers owned 64 785 312 ha in November 2018.

5. Proposals that are welcomed and supported:

- The balance that is strived for, between social justice and human development and economic prosperity, as well as between rural and urban and between rectifying past injustices and building a sustainable future. Sadly, we do not think that the report achieves this balance, as there is insufficient focus on economic sustainability but the intention to create such a balance is supported.

- The acknowledgement of the role that corruption and ineptitude played in the failure of land reform and the intention to address that going forward;

- The creation of a land register or database of all state and public landholdings and including the Agri Development Solutions figures in such a comprehensive audit;

- The release of state land for land reform purposes

- Production support for new farmers;

- Putting into production underutilised land that has already been redistributed as well as communal land in the former homelands;

- A social compact for the agricultural sector – this was also an Agri SA congress resolution in 2014;

- The development of beneficiary guidelines that covers both rural and urban settings

across the wide spectrum of land reform. However, when it comes to agricultural land, selection criteria must consider the ability and passion for farming;

- The implementation of the NPD proposals on land and agricultural development. It is important that the necessary funding proposals be put in place and that functional district land committees be created which are free from corruption;
- The establishment of a land reform fund, as a public-private-partnership
- The establishment of an Agricultural Development Agency;
- The establishment of a Land Depository as a holder of donated land, with an administrative arm for maintaining land records and transaction data;
- The proposal for a clear and transparent selection strategy of suitable beneficiaries;
- An efficient system of farmer support based on a public-private partnership;
- A Land Redistribution Framework Bill that deals with beneficiary selection;
- A district-based approach – however the way that the Department of Rural Development and Land Reform (DRDLR) has managed the District Land Reform Committees (DLRC's) has left much to be desired. Checks and balances against corruption will have to be built into such an approach;
- The drafting of a Land Records Bill – however we are not comfortable with proposals to enforce competing rights on farms, if that is the intention;
- The establishment of a Land Ombudsman or Land Rights Protector;
- The proposal that Parliament be requested to establish a committee to respond to the High-Level Panel report – although this seems to have been dropped from the very last version of the report;
- Area based planning – involving the private sector and not run solely by municipalities;
- The development of an urban land reform policy;
- The establishment of conflict and dispute resolution structures at local level;
- Transferring the responsibility of the rural development responsibility from DRDLR;
- The proposal to strengthen the Restitution Commission.

6. Reports of the workstream in which minority report members were involved:

- Workstreams composed of Panel members developed detailed proposals on particular aspects. A lot of work went into these proposals. Unfortunately, the writers of the report very selectively took snippets from our workstream report rather than using it in its entirety. The result is that it does not make sense as it is presented in the final report of the Panel. We therefore attach the full reports that were developed by the workstreams that we were involved in.

- It should be noted however that in the report named: "Land, justice and equity in South Africa", as well as the report entitled: "The cost of agricultural land reform in South Africa", there are a few areas where a difference of opinion exists even between the four of us. Those areas will be highlighted in the reports concerned.

6.1 Brief overview of South Africa's agricultural economy

Often said is the statement that the macroeconomic standing of the agricultural sector has diminished over time – and this argument is supported by the sector's declining share of GDP, which fell from 4.2% in the 1996 to 2.6% in 2017.

What is not captured in this narrative, however, is the fact that the value of the agricultural sector has grown by grown by almost 50%, from R50.5 billion to R75.2 billion over the same period. This translates to a fairly modest average annual growth rate of 3.1% per annum over the past two decades. Primary agricultural sector is not becoming insignificant – it is only that other sectors, particularly the services sector, have grown at a faster pace.

In 2017, the sector had a good run, following two consecutive years of progressively drier seasons. As a result, 2017 saw the agricultural sector growing at 17.7%, (on a seasonally adjusted basis). This was boosted by strong output in almost all the subsectors, such as field crops, livestock and horticulture, amongst others.

Trade data complements the growth trends, as we saw South Africa's agricultural exports growing past the US$10 billion mark for the first time in 2017. This was boosted by growth in exports of edible fruits, beverages, spirits, vegetables, grains and other agricultural products. The depreciation of the Rand has increased the competitiveness of South African exports in the global market. The peaking of exports in 2017 represented a 15% increase from 2016 – a year that was characterised by El Niño induced drought.

In 2017, imports also increased, but by a marginal rate of 5% year-on-year, reaching US$6.7 billion. This was driven by a notable uptick in grain imports, particularly wheat and rice, on the back of reduced domestic production as a result of the Western Cape province's drought. Imports of rice and wheat – which South Africa cannot grow in large enough quantities to meet domestic demand – have generally grown in line with increases domestic consumption and population. In the case of rice, South Africa is traditionally a net importer, and we saw imports growing by 10% year-on-year to 1.1 million tonnes in 2017 due to higher demand.

A closer look at the trade statistics shows that South Africa's agricultural sector recorded a positive trade balance of US$3.3 billion in 2017, which is also a record level in a dataset dating back to 2001. The trade impact of the severe drought in the Western Cape province was minimal in 2017, and also in 2018, despite the table grapes and major vegetable products are set to decline by double-digits from the 2016/17 production season.

From a destination point of view, Africa and Europe continued to be the largest markets for South Africa's agricultural exports, collectively absorbing 67% of the country's total exports in 2017, measured in value terms. In more detail, Africa remained South Africa's largest market, accounting for 42% of agricultural exports, which is a percentage point increase from a five-year average share. The sector's export growth to the content was led by relatively competitive industries such as beverages, cereals, fruits, sugar and vegetables.

Trailing Africa was the European Union region which absorbed 25% of South Africa's agricultural exports in 2017, up by 13% from the five-year average share. South Africa's agricultural export growth to this region was also led by industries such as beverages, wool, sugar, fruit and animal fats.

Asia is also an important market for South Africa's agricultural exports, demanding a 24% export share in 2017, up by a third from the previous year. Wool, fruit, grains, beverages, vegetables and meat were the leading products exported to this particular region. The Americas and the rest of the world accounted for 5% and 4% shares, respectively. Exports to these regions were also dominated by fruits, beverages, sugar, flowers and ornamental foliage.

From a national policy perspective, in his 2019 State of the Nation Address, President Cyril Ramaphosa signalled that potential expansion in agricultural production would mainly be on export-oriented products. There is already a clear pathway for this initiative as South Africa is currently well-positioned in terms of export markets, and there is clarity about products that show a growing demand in the world market. With that said, South Africa's agricultural trade prospects for 2019 are not as positive as the previous few years, as unfavourable weather conditions in parts of the country could lead to lower production, particularly in grains. The current ban on the exports of beef is another factor that could lead to reduced exports in 2019. The subsectors that could still show solid export performance this year are horticulture and wine. Be that as it may, we still expect a positive trade balance for South Africa's agriculture in 2019.

Amid the uncertainty posed by domestic factors – such as policy uncertainty which is reflected by despondency in a range of Confidence Indices, climate change and policy – the country's agricultural labour market also experienced downswing but ended 2017 on a positive footing.
After experiencing a decline in employment in the first three quarters of 2017, South Africa's agricultural sector recorded a 5% q/q rebound in employment in the fourth quarter to 849 000 jobs. This quarterly increase was mainly in field crops, horticulture and livestock sub-sectors. The provinces driving it were the Western Cape, Eastern Cape and KwaZulu Natal.

Over the foreseeable future, South Africa's agricultural economy could continue to operate within the context of increasing uncertainty due to challenges posed by climate change – which remains largely unaddressed, as well as global trade developments where there is rising protectionism in some key markets – even with countries that South Africa has trade agreements with. The overall performance of the upcoming production seasons will partly depend on the interplay of the aforementioned factors.

6.2 Food security

Food security is about achieving the triple objectives of food being available, accessible, and nutritious to all the citizens of the country. As a country, South Africa compares poorly with other parts of the world in achieving food security at a national level, albeit being ranked the most food secure country in Africa, according to The Economist Global Food Security Index's results of 2018[1], with too many people going hungry, too many diseases that come from malnutrition and have severe an impact on children. Nevertheless, South Africa is in a fortunate position that food is actually available. Unfortunately, however, too large a proportion of the population do not have the means to buy food, and when they do, many poor people have to subsist on relatively cheap starchy staples because they cannot afford a balanced and healthy diet.

Both the private sector and the state currently play key roles in ensuring food security. On the one hand, farmers across the spectrum from large to small provide the raw materials that food processors, distributors and retailers need to feed the nation, while on the other the state provides social grants that are known to be beneficial in the fight against food insecurity. However, much more needs to be done. More opportunities need to be created through land reform for small farmers to play their rightful role in producing food, and at the same time improving rural and urban incomes through their employment multipliers to make food that is more nutritious more accessible. More investment is also needed in food processing, distribution and retailing, for the same reason. Yet the state needs to be cautious: a disruptive land reform can destroy what we are currently doing right, and make it impossible to implement what we need to do to improve food security for all of the citizens of the country. To this end, a balance needs to be found between the need for accelerated land reform and the stability that is required to maintain and grow production while ensuring that more people participate in growing agricultural production.

Also see the comments on food security on page 45 and 46 of this Minority-report.

[1] The Economist, 2018. Global Food Security Index. Available: https://foodsecurityindex.eiu.com/

6.3 Land, justice and equity in South Africa

Contribution to the Presidential Advisory Panel on Land Reform and Agriculture
by Mohamed Karaan, Wandile Sihlobo, Dan Kriek, and Nick Serfontein

Preamble: The big idea

Land reform is a broad social challenge that requires the commitment of every South African to ensure the sustainability and prosperity of an inclusive South African economy. Unfortunately, land reform in South Africa has proven to be a long and complex process that demands large inputs of time, skills and money, and has uncertain outcomes. After 24 years of land reform it is not possible to conclude in any definitive way whether land reform has actually benefited our economy or society. For every new urban and peri-urban settlement, and for every community and individual who have had the heritage that they lost through discriminatory laws and practices restored there is a 'failed' farming project or a small farmer still stuck in a remote area without hope of gaining a livelihood. Sometimes these successes and failures can be seen on the same project. And because agriculture depends on the rhythms and cycles of nature, premature conclusions of success or failure are just that: premature.

The result is that there are many opinions on what has gone wrong with land reform, and on what should be done about it. Yet there is one opinion that is shared by all, namely that the social fabric of the country and its economy are in danger unless a broad consensus can be reached on the way forward.

As a result, we believe that a fast track process, based on the National Development Plan, is necessary to kick-start the longer-term land reform that is required. The purpose will be to show our people that land reform will happen, to demonstrate to the investor community that it can be done with no negative effect on the economy, and to afford those most privileged by past injustices an opportunity to contribute regardless of whether they have any direct production or investment interest in land. What we propose here is to create opportunities for inclusive participation from all sectors of the economy in the process of redistributive justice. South Africans, specifically the most fortunate ones, should ask themselves what contribution they can make to help restore the dignity of their less privileged fellow citizens and to help secure a more just distribution of land ownership. We specifically target current land and property owners in urban and rural areas, commercial farmers, agribusinesses throughout the value chain and those whose wealth lies in other assets.

There are two key institutional components to this fast-track process, namely a virtual "land depository" and a Land Reform Fund to which those with the interest, expertise, and wealth can contribute, and from which those with the need can draw. The focus of these institutions is on the provision of land for human settlement, primarily but not exclusively in the urban areas of our country, and the provision of land for agriculture with the aim of creating economic opportunities, primarily but not exclusively in the rural areas of our country. In the language of our Constitution, therefore, the focus will be on land redistribution rather than on restitution and tenure reform.

These proposals do not, however, negate the need for restitution and for tenure reform. As importantly, we as a country need to consider the long-term effects of a situation where the (poor) majority have second class citizenship because their rights to land are inferior, and are held to be inferior in perpetuity. Hence these programmes must proceed, but will not form part of the fast track approach envisaged here.

This is, therefore, a call for land, capital, skills, and expertise to be contributed in the interest of inclusive economic growth, improved equity in land ownership, and greater economic opportunities. This is the *Thuma Mina* call for land and property owners.

What if we carry on as in the past? Or if we go radical?

This call rests on the history of dispossession, unfair discrimination and the resulting inequality in the ownership and occupation of land in South Africa, which has contributed the inequality in wealth. While fingers are pointed to allocate blame for the lack of improvement in the lives of many South Africans, we must recognize that current land ownership patterns may lead to political and social instability, which could slow economic growth and development over the coming years. Similarly, we acknowledge that the current land redistribution and restitution processes by the State have been slow, constrained by bureaucracy and patronage, and disruptive, and this has exacerbated the current inequality dynamics.

If we consider the numbers, then the 70 percent of South Africans who live in urban areas occupy less than five percent of the land. As a result, land reform will always be measured against progress with the transfer of agricultural land; hence there are four possible scenarios or outcomes in the absence of concerted action, given that there are some 100 million hectares of agricultural land in South Africa, of which roughly 85 million hectares is commercially farmed and some 14 million hectares lies within the 'communal' farming areas:

1. South Africa could conceivably revert to the land ownership patterns that existed in 1994 (i.e. where white commercial farmers owned and farmed all of the commercial agricultural land and black people occupied (but did not own) less than 14% of the agricultural land) because newly settled farmers cannot use the land productively because of inadequate support, while too few black farmers can afford to buy their way into the existing commercial farming systems

2. The existing pace of land reform is maintained. By mid-2018 the current programmes have resulted in the redistribution of 12.2% of freehold land redistributed via the restitution and redistribution programmes. If we add to this land bought by the State for land reform but yet to be transferred the proportion is slightly higher. In this scenario the land is used beneficially by the new owners (and they are actually granted secure property rights). However, given the slow progress to date, we are

unlikely to move rapidly ahead towards an improved scenario through this path.

3. Fast track land reform by expropriating at least 50% of remaining freehold land owned by white farmers without compensation, bringing about a 75:25 occupancy ratio, which would probably be politically acceptable in the short term but economically disastrous in terms of its impact on the property market, the financial system and the investment ambitions of the country.

> There was no support for this scenario.

4. Redistribute an initial 30% of land in freehold (i.e. some 28 million hectares) to black South Africans through a fast-track State-supported programme to achieve a new land ownership pattern where black farmers own that 30% plus they also have access to the use of communal land (i.e. the 14% mentioned above). Farmers retain access to some 55-60 million hectares of agricultural land. While this is a desirable scenario, it could also prove to be fiscally unsustainable.

> Dan Kriek questioned the sustainability and executability of this scenario.

Of the above, scenario 4 is the most plausible if viewed from the viewpoint of the need for building social cohesion as well as creating opportunities for inclusive economic growth. The two fast-track institutions, namely the virtual land depository and the Land Reform Fund, are designed specifically to address this potential pitfall.

How will it work?

The land depository

The land question is not only an agricultural land problem, but also relates to urban and peri-urban land. What we propose here is to deal with the land question in an integrated and all-encompassing way. So where should the land come from to help solve this fundamental question confronting post-apartheid South Africa? The different sources of land to address the different demands for land will include (voluntary) 'donations' from the following:

- Churches
- The mining houses
- Land expropriated from absentee landlords
- Municipal land and commonages
- Government land not under beneficial use, including land owned by State Owned Enterprises

- Urban landlords
- Commercial farmers, including game farmers and foresters
- Agribusinesses
- Foreign landowners
- Land redistribution farms in distress and close to failure

> Dan Kriek and Nick Serfontein's positions were that there is no justification to include commercial farmers or any specific commodity as the ANC had clearly indicated that productive farms will not be targeted.

These current landowners will be called upon to either donate land voluntarily, give up some of their time and expertise to mentor new entrants into the farming sector, invest in Land Reform bonds, or to contribute some combination of these, as the case may be. An inventory of this land will be maintained on behalf of the land reform programme, but the land title itself is only transferred directly to the beneficiaries under the appropriate conditions, because the organs of the State have proven to be inefficient and often corrupt landlords. The design of the conditions under which land is to be transferred to beneficiaries is the responsibility of the local Land Management Committees as envisaged in the NDP to address the inequality of land ownership, provide for the large urban housing demand and create new entrepreneurial opportunities in businesses involved in housing provision and maintenance, and in farming and agro-processing.

> Dan Kriek was of the view that the uptake was not likely to be substantial and that incentives will be key.

The Land Reform Fund

The second of the fast track land reform institutions is the Land Reform Fund, whose sources of capital will include:

- Land Reform Bonds issued by the Land Bank with the necessary state guarantees. Investments into these bonds will be by domestic and foreign investors, multilateral and bilateral donors and private social investment entities.
- Donations.
- Joint venture financing models, particularly implemented by agribusinesses, large commercial farmers, property developers and the commercial banks, amongst others.

The agribusinesses and commercial banks, through the Agricultural Business Chamber and the Banking Association of South Africa, have already committed to matching the State's budget for land reform in the interest of fast-tracking the progress in the form of a loan at a preferential rate over a set period. This could be done through the so-called Agbiz/BASA land reform model.

Above all, this Fund provides a unique opportunity for South Africans to build social and financial capital by creating an investment opportunity for individual and corporate capital market participants to make a meaningful contribution to land reform. This scenario decentralises the land reform process by leveraging private sector expertise and capital and stands in support of President Ramaphosa' s intention to create jobs and boost investor confidence in the country.

While the housing and agricultural sectors are at the forefront of land reform, the capital required for such a programme far outstrips the capacity of these sectors; hence, opportunities will be created for other investors to contribute to the challenge of restoring social justice, equitable land ownership, decent housing, and equitable economic opportunities. Therefore, this also includes a call for voluntary financial donations from the financial services industry, the mining and manufacturing and another non-agricultural sectors. This is specifically relevant to businesses that do not own any landed property.

The end game of this process is to unlock economic growth and employment opportunities and to create a vision of a dynamic and vibrant rural economy, to restore decent life and economic opportunities in the urban areas created through a better-serviced local community and much more integrated and improved spatial dispensation of urban areas.

> Dan Kriek suggested that the name of this fund should rather be a Development Fund.

The fast track

The process is one where every South African buys into land reform, as a conscientious contributor, or a responsible recipient. The options that can be followed are diverse and can be tailor-made for each persons' unique circumstances, but most importantly the State will implement mechanisms where all contributions to this critical 'restoration' process are directly or indirectly incentivised, whether in financial terms or in kind, e.g. in terms of empowerment and other incentives.

A. Rural and farm land

Option 1:

Voluntary release of land (by mines, churches, municipalities, SOEs, government departments or absentee landlords) directly to beneficiary households, communities or

to the land depository (linked to the Land Bank). This entity will keep a proper record of all of these land parcels and provide a certificate for recognition to the donor. This certificate will entitle the holder to certain benefits such as procurement preferences, or a wide range of preferential financial arrangements, etc. This entity will (in collaboration with communities, local farmers' associations, financiers, commodity organisations, etc.) allocate the land to beneficiaries in a decentralised fashion with limited government engagement and no patronage, using the recommendations of District Land Committees envisaged in the NDP. A key issue will be the will to sub-divide land with great speed and ease but with great responsibility.

At the same time, clear criteria for beneficiary selection should be in place. It is vital that a demand-led programme be followed that places the beneficiaries' needs and aspirations at the forefront. If beneficiaries are paired with land parcels that are not aligned to their needs and aspirations, then they are being set up to fail. A needs assessment, followed by a means test must be placed at the forefront before a beneficiary is paired with a land parcel. Support systems through agribusinesses, commercial farmers, mining companies, and churches, etc. should be instrumental in operationalising these newly established farming enterprises or housing developments. The financial contribution to kick-start this process will come via the Land Reform Fund. These financial arrangements should happen on preferential terms (such as deferred interest payments and subsidised interest). In addition, a state guarantee for these on-lended funds could act as collateral to ease the access to finance for new farmers.

Commodities and agribusinesses, specifically the input suppliers, could also play a role in terms of training and mentoring new farmers on farm land released through this process. The success of the new farmers would be in the agribusinesses' best interest because they will be potential clients, especially in terms of the NDPs promotion of farming development that prioritises labour intensive crops that are also seeing growing demand in the global market.

<u>Option 2:</u>

For commercial farming operators there could also be an opportunity to contribute or donate land in a number of ways:

- Donating land without any ties attached as in option 1

- Subdividing land and allocating viable portions of land to workers (for farming or housing), tenants and potential beneficiaries. Again, ease of subdivision is key and efficient and quick registration of new owners should be possible.

- Joint ventures with privately identified beneficiaries (according to the criteria established by the panel). These joint ventures could access subsidised capital, water rights, market contracts, etc. At the same time, agribusiness should provide well-integrated support services for these new entrants.

  This option #2 largely operationalises the opportunity for commercial farming unions to offer land for the land reform programme in a pro-active manner. The commercial farming sector should create a process whereby well-located farmland is identified

and committed for land reform, beneficiaries selected, and finance, mentorship and support put in place, as envisaged in the NDP. Commercial farmers who participate in this manner should also receive a certificate of recognition whereby their contribution is recorded and recognised. Incentives should be created for participation. Guarantees regarding future tenure security for contributing farmers will go a long way in attracting more commercial farmers to participate.

A. Urban property

Here we refer to buildings (underutilised, vandalised, hijacked, or empty) as well as vacant and unoccupied urban land owned by the government, municipalities, private owners, and SOEs, etc. Again, the principle of donation of this land and property to an entity (linked to COGTA and Human Settlements) with supportive finance and urban and spatial planners and developers can immediately relieve the pressure on land needed for housing and shelter. This also creates an ideal opportunity to deal with the legacy of apartheid spatial planning.

Most municipalities own land (often in urban and peri-urban areas) that is leased to tenants – often white farmers – which presents an immediate source of redistribution by introducing certain requirements/conditions in terms of housing development and peri-urban agriculture for black commercial farmers. The government should instruct municipalities to ensure that tenants provide housing development or farming activities for black farmers on at least 50% of the land they lease from the municipality.
Housing developers and local government needs to join forces by using this opportunity to renovate buildings and invest in bulk infrastructure on the vacant land. In essence developers and municipalities will 'donate' their expertise and skills and co-finance to relieve the housing backlog by being proactive. This will, if implemented with rapid speed and at large scale, ease the land pressure and contestation in urban areas and bring people closer to their workplaces. More importantly, this could improve living standards and reduce transport costs for poor and lower-middle-class families.

As in the case of farm land, the finance can also be sourced from the Land Reform Fund.

Privately owned farmland next to rural towns is highly contested and should be addressed within the ambit of this plan. Farmers and municipalities should establish models whereby the joint development of these farms (which are often un- or underutilised because of contestation and crime) could be activated to satisfy the increasing need for serviced plots and houses. Donation of the land by farmers, which would be formally recognised under the land reform programme, would also contribute to creating social stability and reducing racial tensions in these communities. Municipalities also have a key role to play in relation to this type of land. The urban housing demand urgently needs to be addressed. Well located land is required for social housing to reverse the legacies of apartheid spatial planning. Peri-urban households spend a significant amount on money on transport to and from urban centres for employment. Well located land for social housing is therefore a key enabler to fight poverty. The challenge is that well located land such as peri-urban land is valuable due to its developmental potential. It is attractive for upmarket housing and commercial development and as such, becomes too expensive for low income families to afford. This situation can easily be remedied if municipalities act proactively in their spatial planning. Well located land must be zoned and reserved

for social housing developments. Through a simple administrative process, it will be affordable as competition for the land from developers are essentially nullified through the use of zoning instruments.

> Dan Kriek and Nick Serfontein were of the view that acquisition of the farms should also be considered, not just donation.

Unfortunately, spatial planning is the sole reserve of the local municipalities as per the Constitution – no one can do it for them. The legal instruments, most notably the SPLUMA Act, are in place. What is required is proactive action from municipalities.

B. Financial assets

The personal wealth of the elite, including business leaders and urban professionals, etc. vests in various financial assets and is substantial. This could be a valuable source from which voluntary contributions can be requested to fund the implementation of land reform in all its dimensions. Donations to the Land Reform Fund by individuals or asset managers should also be incentivised through incentives such as relief from tax. The main vehicle for such investments will be the envisaged land reform bonds. There is already considerable international interest in investing in such bonds with the understanding that the National Treasury will issue the necessary guarantees.

The creation of the Land Reform Fund should be a simple process whereby government funds, capital raised through the land reform bonds, and donor funds could be merged into a fund which should be accessed with ease by implementing agents and beneficiaries of land reform. In essence it will be the main element of a blended financing model for land reform whereby state funds, donor funds and the private sector contributions will facilitate the funding of land reform in a much quicker way without any additional fiscal burden.

C. Enablers

This plan relies strongly on the voluntary contribution of all South Africans to the goal of equitable land ownership. To make this work at scale and within a 5-year period, there should be some form of quid pro quo or alternatively a list of enablers that will entice participation. A potential list of enablers includes:

- Capital (to be accessed at preferential terms for contributors and beneficiaries)
- Real land rights with tenure security
- Water rights
- Preferential market access contracts (e.g. in the form of export permits)
- Reduced reliance on bureaucracy and red tape in approval and implementation processes,

- Incubators for aspirant farmers

> Dan Kriek felt that tax incentives should also be added as an enabler.

This list could potentially include more enablers, but we argue that there could, in essence, be **four big 'tickets'** to activate the voluntary contribution of land by commercial farmers and support the settlement of beneficiaries on this land in private decentralised fashion.

1. An easy process and one-stop shop to submit the record of the transaction for recognition (we can call this the 'land reform rainbow register').
2. The recognition mechanism should bring about an important benefit to the former owner. This could be in the form of some 'empowerment' recognition level or financial or other inducement. *[The recent decision about "once empowered always empowered" might be a particularly important commercial incentive for current farmers and owners of land to participate. At certain thresholds (still to be determined), either cash or quantity, the property and its owners might be deemed fully empowered. This status remains with the property as an enhancement and has significant commercial value. In attaching the status to the property it become generally applicable so would pass constitutional scrutiny and would most probably be value enhancing].*
3. The speedy transfer of title deeds/long term and tradable leases to beneficiaries of land reform, including those who occupy land already procured for land reform purposes
4. The allocation of new water rights to the existing and new enterprises (owned by the beneficiary). This will again allow the existing farmer to dispose of land and at the same time ensure the successful establishment of smaller farms on irrigated land.
5. Restructure of the Land Bank and establishment of a Land Reform Fund where acquisition grants, subsidised loans and subsidies for on-farm improvements can be accessed. Utilise the access to the land reform fund to leverage the donation of land by existing owners. This capital allows farmers to dispose of land for land reform purposes but at the same time provide them with finance to expand their existing business and employ more workers.

A social compact for an inclusive and equitable agricultural sector

As agricultural land covers most of the surface area of South Africa, it is, therefore, the dominant element in the land reform debate. At the same time, the productive use of farmland is critical for economic growth, rural economic opportunities and food security. It is, therefore, necessary that a specific 'social compact' is formed for the agricultural sector. All stakeholders will convene in a land reform and investment summit where elements of this programme will be pledged and recorded in a social compact. This compact will agree on the plan of action, a monitoring framework and time frame of the programme.

The idea is that this fast track component of the land reform plan should be in place for a 5-year period only, namely from June 2019 – end May 2024, striving towards the goal of Scenario 4 -- to demonstrate that it will be possible to achieve a new land ownership pattern of at least 44% Black and 56% White in the medium term. We believe that by sharing responsibilities and leveraging the goodwill that exists out there it will be possible to accomplish this goal.

Dan Kriek did not agree to these percentages.
Nick Serfontein held that the timelines were unrealistic.

Expert consultation

To help design mechanisms and instruments to make this programme work it will be necessary for the panel to convene expert consultations to design the details of the proposals presented here. The following aspects need further expert input:

a. The restructuring of the Land Bank to be the key institution to implement this plan.

b. The specifications, rules and location of the "Land Reform Fund".

c. Design of the 'land reform bond'.

d. The recognition mechanism and 'Land Reform rainbow register' (the land depository).

2. Monitoring and enforcement process.

3. Rules for preferential financial arrangements and market access

Dan Kriek suggested that the specifications, rules and relation to the Land Reform Depository needed to also be clarified by experts.

Conclusion

Our conclusion is that South Africa should change direction in terms of the implementation of land reform. To this end, we propose a fast track process, lasting for five years and heavily depending on a virtual land depository and a Land Reform Fund, as the key focus area of land reform. However, current efforts in the arena of land restitution and of tenure reform need not be held in abeyance: after all, these programmes form an integrated whole that is greater than the sum of its parts. However, there is one more element that needs to be emphasised, especially when it comes to agricultural land reform, which is that farmers, especially new entrants to farming, require a supportive farmer support

framework. Most of the elements of this framework have been highlighted above (market access, access to funds, security of tenure, skills, etc.). However, as long as the agencies responsible for the creation of this farmer support system are divided, principally as DAFF and DRDLR, the outcome will be suboptimal.

6.4 Preconditions for a successful land reform farming system

Introduction

There is a large body of research that shows that the past two decades of land reform in South Africa have yielded little success in establishing a new generation of commercial black farmers for a number of reasons, ranging from the slow pace of acquiring land, government reluctance to transfer the title deeds of the acquired portions of land to beneficiaries, and the poor post-transfer support system, amongst others. The extent to which the land reform programmes have met their respective targets remain contested, however, there is broad consensus that land redistribution and restitution has not progressed at the rate originally envisaged[2]. These challenges show that, to a certain extent, the failure of land reform thus far has largely not been because of a scarcity of land, but due to inefficiencies in the process of acquisition and systemic challenges faced post transfer as the farms acquired by government have also not shown an increase in production.

Moreover, there is no dearth of plans to address the aforementioned challenges, the focus should be more about operationalising some of the existing plans, such as the National Development Plan, which would have benefited from private sector participation. There is also a need to explore the possible farm redistribution (and business) models that would be necessary to operationalise the land reform programme. Furthermore, there are also historical lessons that can be drawn from the previous dispensation's farmer settlement programmes, which could ensure the success of the land reform recipients. In this report, we briefly reflect on the aforementioned points and further assess the merits and likely success of different farm models.

Hybrid approach linked to the proposals of the National Development Plan

Some of the land reform models that were designed in the past were never fully implemented in South Africa. The case in point is Chapter 6 of the National Development Plan. The pilots that started in some districts, most notably the pilots merged with the Strengthening of Relative Rights policy, never followed the approach prescribed by the process. The Hybrid approach could borrow lessons from the National Development Plan and further increase the value chain contribution (skills or financial, etc.) from agribusinesses' participation to ensure successful land reform.

As the NDP suggests, the identification of transferable farms and beneficiaries takes place at a district level, facilitated by District Land Reform Committees (DLRCs), which were formally established in 2015 but experienced considerable challenges relating to a vague terms of reference. This could be a Public-Private-Partnership- model, which would

[2] The original target set by the RDP was to transfer 30% of agricultural land to black beneficiaries by 1999.

be flexible and can take a number of forms, including the following:

- Farms for sale are identified by the DLRC and a leading successful farmer (possible synergy with a compulsory right of first refusal to identify farms for sale).

- This established farmer is appointed as co-investor to acquire new land together with a beneficiary.

- Beneficiaries will be selected using prescribed 'farmer selection criteria'.

- In acquiring the farm, the State can contribute 30% of land value in grant money to the beneficiary. Another 30%, to make 60%, can be a loan from the Land Bank or a commercial bank working through blended finance mechanisms in the names of the beneficiary and the farmer (50/50), or with the assistance of blended finance products. The contributing farmers would then receive recognition and be exempted from eligibility for acquisition in future land-reform programmes[3] and the farm could be operated via the farmers' existing operation to ensure success, or other structured incentives could be used to encourage participation.

  With regard to the loan component, a subsidised interest rate is provided and backed by a guarantee from the state or an agricultural development agency in the spirit of risk sharing. The land bank, commercial banks and DFIs should get the same assistance from the state / development agency and compete to offer the best interest rates. If farmers in districts work together and get at least 30% of land in each district transferred to black farmers and thereafter utilised productively, then land expropriation without compensation would not be needed. Agribusinesses and commodity organisations would also have to provide post-transfer support and mentorship to new beneficiaries.

Farmer Support and Farmer Settlement Schemes – lessons from past experience

The current land reform debate has also raised the issue of ensuring successful agricultural production. In this regard, South Africa offers a number of lessons for the establishment of commercial farmers (at any scale), although these were exclusively white farmers in the past. The former support schemes can be a way of transforming the commercial food production chain if applied appropriately.

The farmer settlement programmes were in the form of, among others, subsidised and state-guaranteed loan schemes for farmers. The Department of Lands came into existence when the Union of South Africa (SA) was stablished in May 1910. Its functions included the administration of all matters relating to Crown lands, irrigation, land settlement, land boards and surveying.

On 16 October 1912, the Land Settlement Act of 1912 came into force. The amended Land Settlement Act of 1956 introduced three important schemes in terms of which Crown land was granted to suitable applicants. These three schemes provide valuable lessons

[3] For as long as the farms are in the possession of the owner who made the investment, it could be exempted from expropriation or acquisition in the redistribution process. If a restitution claim is lodged and proved, alternative land or financial compensation should be awarded. Tenure relations will of course not be affected.

as we consider implementation plans to successfully settle black farmers on redistributed land or commercialise farming in the former homeland areas:

Scheme 1: Section 20 of the Land Settlement Act of 1956.

In this case, the applicant chose the land for which he intended to apply and obtained an option to purchase from the owner at a reasonable price. If the applicant satisfied the prescribed requirements and the acquisition was approved, he had to pay at least one-tenth of the approved price.

During the first two years, the settler made no payments, but there was marginal interest on the loan. The annual payment was calculated over a 63-year period. If the settler satisfied all the prescribed conditions after five years, he was entitled to the title deed, after which he could make use of the land at his own discretion.

Scheme 2: Granting of land in terms of Section 23 of the Land Settlement Act of 1956.

Vacant Crown land was divided into economic farming units and was offered for allotment in the Government Gazette and press in terms of this scheme. The land was leased to the successful applicant for five years. This period could be extended to a maximum of 10 years, but it was a condition that the option of purchase be exercised within the second period. When the option to purchase was exercised, the price with interest was redeemed over a period of 65 years.

The successful settler paid no interest for the first two years but, as with Scheme 1, the interest for the first two years was capitalised in the purchase price. The settler paid 2% rent calculated on the sale price of the holding during the third year. In the case of grants made in terms of Section 23, settlers were entitled to conveyance 10 years after the commencement of the lease, on condition that they satisfied all the conditions laid down by the Act.

Scheme 3: The allotment of land in terms of Section 29 of the Land Settlement Act of 1956.

Under this scheme, which was limited mainly to irrigation areas, the size of the incorporated irrigable land varied from 15 to 30 morgen (or hectare) per holding. Initially, a temporary occupation right of a maximum of five years was approved and the probationer lessee was regarded as a trainee. The lessee usually had little expense in the cultivation of his holding at the beginning, except for labour costs, which he had to pay himself. Probationary lessees were under the supervision of trained agriculturists during the probationary period. The time taken to complete the training course ranged from 18 months to two years. At the expiry of the probation lease, the holding was granted at a total purchase lessee in terms of the same provisions as described in Scheme 2.

Provision was also made for the payment of subsistence allowances and the provision of medical services to probationer lessees. These costs were recovered from crops and any other income that may have accrued to the probationary lessee from time to time. During the probationary period, the State took a quarter of all crops sold to cover the cost of feed, fertiliser, etc. with which the probationer lessee was provided. A third of the balance

was kept in a trust for the probationary lessee, and the balance was paid to him after any recoverable debts, such as the medical services mentioned above, had been deducted.

Overall, there are three very important features of these earlier schemes that contrast with the present-day initiatives:

- At the time, probationary farmers had access to a comprehensive package of support measures, ranging from access to credit and technical support through to social support initiatives such as medical services and education.

- The cost of which was expected to be repaid to some extent over a long period of time, forcing a degree of accountability; and

- Aimed at creating owner-operated farming enterprises.

  Therefore, a number of things need to be in place to ensure the success and sustainability of new farmers. However, it is important that one understands that these support programmes will only have the necessary impact if there is some form accountability, agricultural skills and commitment from the beneficiaries.

  The elements of a support programme could include:

  - Dedicated access to a well-qualified extension officers (in today's terms this service can be provided by the agribusinesses under contract from the state to ensure a focus on the developmental agenda).

  - No payments on the land mortgage for the first two years, but the interest for this period – at subsidised rates – as well as transfer costs are capitalised in the price of the land.

  - The annual payment for the land acquisition is calculated over a long period – perhaps 50 years (and not the standard 25 or 30 years).

  - If the settler satisfies all the prescribed conditions after five years, he/she is entitled to the title deed, after which he/she could make use of the land at his/her own discretion (implying that, prior to this point, the settler had to heed the advice of extension officers).

  - Subsidies for on-farm improvements and infrastructure could be provided via the CASP programme, but the payment process should be changed. It should work on the co-funding model and State reimbursement according to government-approved tariffs. The farmer, through access to State-guaranteed credit, perhaps blended with donor funding through a development agency, will pay for the expense or improvement and then claim the refund from the relevant government office, based on proof of expenditure and on-site inspection by the government official to verify actual expense. The refund can be offset against the outstanding credit amount.

  - Some form of social support initiatives, such as medical services and small start-up

salary grants, could also be considered to facilitate a smooth settlement process.

- There should be commitment from agribusiness firms and financiers to provide some of the elements of this support package on behalf of the government.

Recommendations and proposed strategies

The recommendations of this study are the following:

- **Recommendation 1: State-owned land**
  - Implementation of tradable lease-holdings with clearly defined rights.

- **Recommendation 2: Communal land**
  - Implementation of registered and tradable customary-holdings administered according to customary laws, subject to the constitutional guarantees of administrative justice and equality;
  - Thereafter, introduce an absentee land-owner tax. This would work in an inverse way to occupation and usage.

- **Recommendation 3: Privately owned land**
  - Maintain secure property rights, but structure incentives that will entice private sector participation;

    While a large share of South African farms are small family farms, this could be dependent on the transformation level of the farming business, a measure that would be somewhat similar to an incentive to either make land available for reform or take on a greater responsibility for transformation in the business.

The proposed strategies, or plans of action, offered by this study are the following:

Strategy 1: - for implementation of Recommendation 1
- Draft up a framework to operationalise the existing agri-hubs and also the Agribusiness Incubator experience;
- Draw on farmer support schemes under the previous dispensation;
- Establish a Monitoring and Evaluation Framework upfront.

Strategy 2: - for implementation of Recommendation 2
- Consultation with traditional leaders;
- Agribusiness Incubator experience for farmer support programmes;
- Draw on farmer support schemes under previous dispensation;
- Establish a Monitoring and Evaluation Framework upfront.

Strategy 3: - for implementation of Recommendation 3
- Compile a Land Governance Assessment Framework for South Africa (World Bank can assist);
- Conduct a full-scale land audit on a PPP basis and begin to populate an integrated land e-cadastre with all other land-based information contained in separate government registers (water rights, land claims, mineral rights etc.).

Farming models

The following matrix which explores possible farming models which will form the basis for discussion in this section. The models range from individual farming models to group farming models.

Individual smallholder models are the most successful in the developing world as well as in Europe and Japan. Individual commercial farming on the other hand will help with the growth objectives, but not with the employment objectives of the National Development Plan, unless it creates small commercial farms. Meanwhile, group farming models are universally unsuccessful as well as in South Africa. In this model, there is also room for corruption, with some cases recently noted in the media in South Africa[4]. In this section, we will primarily discuss the models in terms of agricultural production and income growth.

Table 1: Merits and Viability of Different Land Reform Models

		Ownership of the Farming Operation		
		Group	**Individual Small-scale commercial farms**	**Individual large scale Commercial farms**
		Group or collective farming is universally unsuccessful		
Ownership of the Land	**Government (DRDLR) PLAS Model** Leaseholders rarely got ownership or got it late	Unviable **(Model 1)**	Requires ex-ante identification of beneficiaries and immediate, secure long term leases **(Model 2)**	Requires ex-ante identification of beneficiaries and immediate, secure long term leases
	Commonage land Is probably mostly grazing land	Viable for livestock farms with individually owned animals **(Model 3a)**	Viable if animals individually owned but grazed on common pasture **(Model 4a)**	Viable with secure long term leases **(Model 5a)**
	Group/community Group ownership has often been successful, including in communal tenure	Group farming unviable and strategic partnerships rarely successful **(Model 3b)**	Highly viable for arable land, grazing and forest land often communally owned **(Model 4b)**	Requires leasing out of land, or strategic partner (rarely successful) **(Model 5b)**
	Private (corporate ownership?)	Group farming unviable and strategic partnerships rarely successful **(Model 3c)**	Highly viable **(Model 4c)**	Highly viable **(Model 5c)**
	Self	X	Highly viable **(Model 4d)**	Highly viable **(Model 5d)**

We will thus mainly focus on the viability and the conditions for viability of the different models. The conclusion summarised in the matrix above will be discussed under each model heading.

[4] Business Day, 2019. Officials looted millions in land reform scam. Available: https://www.businesslive.co.za/bd/national/2019-01-24-officials-looted-millions-in-land-reform-scam/

Model 1 and Model 3: group operations on government-owned land and on land not owned by the government

While the group model, if successful, would create significant employment and livelihoods, in our discussion in Section 2 we have highlighted the experiences and weaknesses with the group operations model – often implemented in the form of communal property associations (CPA) or community trusts. In many of the earlier land reform projects, communities owned the land through CPA's or community trusts and then also worked the land collectively. In later years the land would be owned by the state under the State Land Lease and Disposal Policy, with tenure rights afforded to CPAs. As the weaknesses of the group operation model is evident no matter what the ownership of land is, it is probably sensible to combine all options of group operations in this discussion.

Few of the Communal Property Associations and Production Co-operatives are farming successfully. While CPA's are an appropriate form of owning the land, when they are used for agricultural production *there are in-surmountable problems with incentives for labor, management input, and for investment.* This leads to many conflicts; within communities, with strategic partners, and with DRDLR officials. The poor performance in agricultural production of CPA's or Co-operatives is fully consistent with the theory of cooperation and with global experience.

A review of land reform projects in the North West Province in 2005 and again in 2010 (Kirsten et al., 2014) confirm some of the theoretical problems with group operations per se (whether on government or group owned land). The evidence from the two waves of surveys suggests that the group operation of smaller groups (<5) are most successful. It was established that the projects with five members or less had the greatest proportion (78%) of projects in which production was either stable or increasing. Furthermore, there is a steady decline in the proportion of successful projects as the sizes of the groups increase. In groups with 6-10 members, 50% of them are successful. Fewer (44% and 38%) are successful in projects with between 11-20 and 21-50 members respectively and only a third (33%) of the projects with more than 50 members was successful. It was observed that conflict between group members was an important reason for failure because in more than half (56%) of the projects with no conflicts production is either increasing or stable.

The evidence of a high failure rate amongst group-based operations confirms our theoretical arguments made earlier as well as confirming the global evidence. For the sake of brevity we will not repeat all our arguments presented earlier. Efforts have been implemented by the state to revitalize many of these failed group operations. One such process was the RECAP program often implemented in collaboration with strategic partners. Even if successful, the model of strategic partners often disempowers the beneficiaries, generates little employment and leads to little skills transfers. Yet subdivision of farms continues to be discouraged. It is often not even discussed as an option.

What we have presented here largely falls within the category of Models 3b and 3c – group operations on private owned land or land owned by community trusts. Our conclusion in Table 1 above is therefore confirmed by the evidence showing the unviability of many group operations on transferred land. The poor incentives to work hard and invest in group ventures, the intricacies of large farming operations, and the need for critical and

timely decisions put any group operation at risk of failure. It is however our view that group operations on commonage land – mostly grazing could be viable provided that community rules/institutions are intact and well enforced by community leaders.

While group and cooperative farming is a major cause of poor performance of land reform programs in South Africa, *group ownership of land can be a viable ownership model.* Communal tenure all over Africa and the rest of the World vests the property rights for land either in the state and the chief allocates the land to households, who normally have secure and inheritable user rights. Land reform programs in Mexico, Brazil, and Malawi, for example, provide ownership of land to the land reform communities, who subdivide the land used for housing and for crops into individual holdings, and often keep pasture and forests under communal use. The communal ownership is known to provide a safety net for poor community members. However, communal land cannot be used as collateral, which reduces access to credit. *The model is therefore a second-best compromise between the safety features of the model and access to credit.*

Due to the high prevalence of failed group operations it is unlikely that the model will contribute to the increased household income as well as improved food security objectives. In addition, the declining agricultural output and revenue makes it impossible for members of the group to secure full employment or a decent livelihood and are thus forced to find employment elsewhere. This is usually difficult and the result is increased unemployment and increased poverty. Low output from these projects surely has an impact on total agricultural output and agricultural value added and negatively impacts on economic growth.

Model 2: Individual smallholders on government-owned land

This model links up with the scenario where the State buys land under the PLAS programme and then leases the land to individual smallholders under the conditions of the State Land Lease and Disposal Policy.

Land acquisition via PLAS has proven to be very inefficient as land has often been bought at rates far exceeding a fair market value. A compulsory right of first refusal in favour of the state based on the Namibian model can assist in this regard. Whenever private sales are negotiated and concluded, the state should be offered the opportunity to intervene and purchase the land on the same terms agreed by the parties. Only when the state expresses no interest within a given timeframe, can the private sale go through. This will ensure that the state does not receive inflated offers. The Office of the Valuer-General (OVG) also needs to be capacitated and its legal mandate clarified. The OVG should be able to make use of mass valuation techniques used to assess municipal property rates. Where expropriation is contemplated, the Expropriation Bill should clearly outline the role which the OVG plays in determining the 'value' of the property using quantifiable factors and recognised valuation methodology suited to different types of land and agricultural commodities. The state should then be able to consider this report and apply qualitative factors relevant to the owner's own circumstances, to offer an amount of compensation which it deems just and equitable.

The difficulty with this model is brought about by the dilemma in accessing production finance. Most formal financial institutions implement strict collateral requirements for

production loans. As the ownership of the land is not linked to the operator of the land access to production finance is not in place and at the same time CASP funds or access to MAFISA loans are not necessarily available in time shortly after the lease is awarded to the smallholder.

This model is therefore unlikely to be successful unless operation funds are made available immediately the lease is awarded. In addition, it is important that the lease is long enough for the farmer to obtain commercial production loans after the first three successful seasons. Such funds should be provided to the farmer with a solid-state guarantee in place. In addition, the success of this model requires ex-ante identification of beneficiaries, and the immediate securing of long-term leases. As a minimum requirement, all beneficiaries should receive written lease agreements no shorter than 5 years. The practise of short-term leases as 'care takers' should be scrapped immediately.

Model 4: Individual smallholders on land not owned by government

From international and South African experiences, smallholders can contribute to both self-employment and employment as well as to agricultural production and growth. There are in essence four options under model 4 largely shaped by the nature of the ownership of the land.
In model 4(a) we have individual smallholders on commonage land. In this case the most viable option would be where individuals own their own animals but grazed on common pasture. In cases where the traditional authorities manage the grazing system effectively it will introduce sustainable production. The role of the state in providing veterinary services as well as basic animal infrastructure (kraals, sheds, auction pens, etc.) and marketing opportunities could effectively deal with some of the important challenges preventing these farmers from earning a livelihood from their meagre agricultural assets.

This conclusion is well supported by two case studies in the Eastern Cape Province. In the first case the National Wool Growers' Association is supporting communal sheep farmers in the former Transkei and Ciskei with mentorship programmes, training in basic shearing and wool classing, the building of shearing sheds and linking the better classed and better produced wool to the export market. This intervention increased the wool revenue in these production areas from R1 million in 2000/01 to R113 million in 2012/13. This is an illustration of how individual smallholders can make a decent living on commonage land provided that certain key aspects are in place.

In the second case the National Emerging Red Meat Development Programme was implemented by the NAMC and some private partners to introduce auction pens, feed lots and livestock auctions in many remote areas of the Eastern Cape. This programme improved market access, improved incentives and led to an improvement in the numbers and quality of animals offered for sale. Again, sale numbers and revenue increased rapidly as a result of this intervention.

Both case studies illustrate that individual smallholders on commonage land could provide a viable option provided that institutions, infrastructures and vital support services are in place.

Model 4 (b) is an option where individual smallholders farm on group owned land. We argue that this option could be viable for arable land, grazing and forest land often communally owned. The level of production of crops and animals will again depend on the availability of key support services as illustrated above. Local institutions dealing with land allocation and management will however also be critical to ensure some form of security of tenure that could incentivise investment and improvements.

Model 4 (c) refers to individual smallholders on privately owned land by renting or leasing the land form a private or corporate owner (perhaps, corporates or private persons that lease land at preferential rates to black farmers get BBBEE recognition). In this case there will be private contracts in place defining the rights to land. It is likely to be a viable option provided that the possible constraints to production finance are dealt with. Credit arrangements with the landlord, or interlocking contracts with retail or processing companies could provide viable options for smallholders. Some mentorship arrangements or contract farming operations could also be relevant here to assist with potential price and other risks.

In model 4 (d) the smallholder is the individual operator and also the landowner. This is the most prevalent and successful small farmer model around the World. Again, this is a viable option given that access to finance could be less problematic due to available collateral. Although this could increase vulnerability and risk of the farmer it could be overcome by string links with agribusinesses, input companies, financiers as well as solid off-take agreements. This model has been seen to be successful in many parts of the world where smallholder farming operations dominate.

Model 5: Individual commercial operations on land not owned by government

This model is well placed to contribute to agricultural growth. Under this model the land would be either (a) owned by the private operator or (b) owned by the government and leased to an individual private operator. The private operator could be a corporation or an individual beneficiary of land reform. Global experience is that model 5 (a) is a highly appropriate model for commercial farms of very small to very large land sizes. The reason is that work-, management- and investment incentives are all aligned because of the private profit objective of the model and the farmers who use it. It is also the model of the large scale commercial farming sector in South Africa which has been a high performing sector in the past 20 years, even though all programs and policies that provided it with special benefits have been abolished.

Model 5 (b) would also be a viable option if land leases were issued immediately upon purchase to beneficiaries who would have been identified prior to the land purchase and presented initial plans on what they would want to do with the land. As discussed, probationary leases should not be used because they undermine investment incentives, and even under poor performance, are almost never revoked. It is therefore hard to see what the benefits of such a system would be. Instead leases should be long term, renewable, and transferrable after a certain period. Land and banking legislation would need to be put in place so that the leases would be so secure that banks would be willing to accept them as collateral. However, experience so far under PLAS and the State Land Lease and Disposal Policy have not been encouraging; leases have often been delayed and have not yet been accepted as collateral for loans. Farm development is therefore often

seriously delayed, reducing the return on the government's and the farmer's investment.

How much post-settlement support is needed under this model depends on the size and beneficiaries of the commercial operation. Small farms settled with poor beneficiaries will need support with extension, marketing, and startup and investment grants, which they may supplement with credit. If instead the land transfer is to a middle - or upperclass beneficiaries, they should be expected to finance startup and investment costs by themselves, as otherwise such a model becomes and extreme case of elite capture.

Beneficiary selection

The main aim of the agricultural land redistribution programme is to redress the impact of past wrongs. For this reason, the programme would generally support aspirant black farmers. However, a programme of this nature will not make an agricultural producer out of every participant although it should go a long way in creating an inclusive and viable rural economy within which agriculture and the related linkages can develop.

There exists a rather obvious trade-off between having bureaucratically administered criteria that could be exclusionary or a broader-based programme that could allow for self-selection among the potential beneficiaries themselves. International experience highlights the limitations of officially administrated programmes where bureaucrats select the beneficiaries, while the pure reliance on the market mechanisms alone also has its disadvantages. Therefore, there is a need to have a balance between criteria setting and self-selecting processes.

In a market-driven land reform process (which was anticipated in 1996) the market will do the selecting, generally favouring those already empowered, albeit on a limited basis and leaving out the poorest and landless of the poor. It is, therefore, logical to assume that the market alone is not enough to do justice. At the same time, there are imminent dangers in relying solely on bureaucratic institutions to effectively distribute land. Experiences in Mexico, Zimbabwe and now also in South Africa demonstrate that it takes a long time to carry out effective administrative functions related to land reform.

As a consequence of the history of South Africa, four sets of principles for the selection of beneficiaries are relevant. These are:

i. Victimisation and disentitlement: It is obvious that one needs to consider those South Africans who were historically disadvantaged and victimised through disentitlement and denial of access to land and support services, to be beneficiaries.

ii. Poverty and need: a land reform programme should provide the rural poor with access to opportunities for income generation, employment and self-employment. It becomes critical therefore to incorporate criteria which give preference to the poor and the landless amongst the previously disadvantaged as beneficiaries.

iii. Productivity and sustainability: It is recognised that productivity in agriculture is a determining principle for participation in the land reform programme, particularly in relation to designing the level of support services needed to enhance the productive capacity of the beneficiaries.

iv. Participative processes: International experience shows that problems almost inevitably arise when groups are moved on a top-down basis into land-based schemes with unrealistic expectations as to what is involved in resettlement, with unclarity in what they are expected to do for themselves and what will be done for them. The expectations therefore of the beneficiaries, once identified, need to be anticipated and fully integrated into the planning process and subsequently dealt with in the implementation stage.

One of the key objectives of the programme to redistribute agricultural land has become the need to ensure the productive use of the land to promote agricultural growth, food security and exports – as was recently echoed in the ANC's December 2017 resolution on land reform. In this context and in light of the principle of "productivity and sustainability" we need specific criteria to select the best beneficiaries to transform the commercial agricultural sector and at the same time ensure productive use of the land.

There are the obvious elements such as good health; age between 30 and 45; education (not always formal but also years of experience); and gender (ensuring that women are included as beneficiaries). Moreover, Njobe and Van Rooyen[5] highlighted specific criteria that have been shown through international experience to improve 'agricultural success':

1. **Net financial worth.** This is a useful criterion to target the poor but also helps to identify those beneficiaries that exhibit strong repayment ability as well as willingness to increase the size of the holding and other assets. Obviously imbedded in net financial worth are the principles of financial leverage and secure rights to land.

2. **Previous farming experience.** Many studies have found that successful farming experience and acquired skills are strongly predictive of good performance. The main argument here is that previous farming experience and the understanding of the farming environment could ensure a productive and sustainable use of land. These aspects include: formal or informal training in farming practices; the previous existence of a viable black agricultural community; the existence of (indigenous) knowledge of viable farming; those who have lived and or worked on white-owned farms have through practice acquired knowledge of farming; and women involved in food production activities.

3. **Entrepreneurial skills.** Modern farming is a business like any other business but with far greater (external) risks. Entrepreneurial and business skills are therefore critical for the financial success of the commercial farming enterprise (i.e. to make money and a living from agriculture). These skills include: the cultivation of cash crops and marketing of the crops/livestock; the inclination to grow more cash crops; a desire to increase landholding; a more positive orientation towards training; employment of other people; exposure to agriculture and other information through the media; openness to the advice of fellow farmers, co-operatives and extension officers; the desire to contribute to the decision making process; awareness of the need for insurance; forward planning; a good knowledge of and a willingness to apply modern crop and cattle farming practices; some form of previous management training.

[5] For the full text see Johan van Rooyen and Bongiwe Njobe-Mbuli (1996). Access to land: selecting the beneficiaries. Chapter 18 in Agricultural land reform in South Africa: Policies, markets and mechanisms edited by Johan van Zyl, Johann Kirsten and Hans Binswanger, Oxford University Press, Cape Town.

4. **Managerial aptitude.** This has always been a major factor influencing the success of commercial farming ventures. Many white commercial farmers faced bankruptcy in the past due to their inability to manage risk, finances and marketing. It is for that reason that our Professors spend a lot of time talking to farmers (during the 1970s and 1980s) about the importance of management (financial, human resources, water, risks, markets). Farm management became a core of the agricultural curriculum at most universities and agricultural colleges as it became clear that the managerial skills of the farmer are critical for the success of any commercial farmer.

   Overall, the criteria for selection of beneficiaries is critical when one thinks about the ideal scenario to fast-track sustainable land reform. A parallel process can be followed that combines the streamlined benefits of a market-led approach for aspiring farmers to purchase commercial land through blended finance products and a decentralised process led by local institutions, such as District Land Committees to ensure that the landless and resource-poor are not marginalised. These committees would have to make use of the aforementioned criteria for beneficiary selection to ensure the allocation redistributed land is equitable and just, but at the same time ensure that there is a productive use of land and food security.

Concluding remarks

Clearly, the unsatisfactory performance of land reform thus far had less to do with the Constitution or broader policy design, but more with implementation inefficiencies and a failure to continuously improve on existing policies. Therefore, if the aforementioned models could be implemented efficiently, there could be good progress in ensuring the success of the South African farming sector. There has been a concerning trend in South African land reform to abandon entire programmes where challenges have occurred instead of tweaking the system to make corrections. We need to utilise the existing models, mechanisms and systems to efficiently operationalise land reform policies and make structural amendments only where necessary.

In this paper we have shown that the poor performance of land reform in terms of agricultural growth, self-employment and employment is primarily attributed to the use of the discredited group or cooperative farm model; the highly inadequate participation of beneficiaries in identifying, planning and implementation of the farms and the investments; the absence, late arrival or poor quality of the post-settlement support, and the capacity problems in the DRDLR, CRLR, and DAFF that results from the silo-based nature of the programs in support of land reform and their beneficiaries, and from the top-down involvement of the staff of these organization in all aspects of planning and implementation of the land transfers and investments, and the associated contracting and disbursement functions. This approach leads to an overwhelmingly large number of transactions to be performed that the staff cannot cope with.

To remedy the situation, a reformed program should be based on intensive participation of beneficiaries or their groups in the identification, planning, implementation and financial management of their projects. Based on detailed discussions of various farm models, beneficiary groups would decide whether or not to subdivide the acquired land, whether or not to use a strategic partner or mentor, and their selection. Such an approach would allow the staff of the three organizations to focus on the acquisition of land, the approval

of land acquisition and investment plans, and the supervision of financial management and implementation of the projects, thereby greatly relieving their capacity constraints. They would therefore be able to manage much larger groups of beneficiaries than up to today.

Among the farm models, it appears that the small farm model and the small commercial farm model can contribute significantly to both the agricultural growth and employment and self-employment objectives of the National Development Plan. It also is consistent with the large demand for land in rural areas. On commonage land, groups and small farmers can be successful if the animals are privately owned.

> Dan Kriek and Nick Serfontein proposed a clear conclusion that shows that land reform is in fact affordable and that there is no justification to resort to radical measures.

6.5 The cost of land reform in South Africa

Setting targets for land reform is problematic by definition since South Africa has no appropriate tool to measure the progress with land reform. Furthermore, South Africa also does not consist of a comprehensive land audit nor an agricultural census. In the latest agricultural census that STATS SA is currently undertaking, only VAT registered farmers form part of the survey sample and consequently a significant portion of the agricultural sector is not taken into consideration. This lack of data poses serious challenges for various critical processes that have to inform policies and targeted investments, measurements of land reform progress and detailed planning for farmer support programs. DRDLR uses the statistics from the redistribution and restitution programmes to report progress. This is however an undercount since it does not allow for land purchased by the state and leased to black farmers under the PLAS programme nor does it account for black individuals, companies or communities buying land without the assistance of the State.

Against this background, this section combines all relevant and official databases into an exercise to present one plausible future scenario where at least the NDAP target of 30% is reached by 2030. It is important to note that further calibrations and validations are required to refine the outcomes, but at least a methodology and tool is now available to consider potential sources of land and the total costs, including the transfer of land, as well as operational expenditure and support to get the new beneficiaries productive and sustainable. Based on our estimates and official statistics, the land reform progress is as follows:

Table 2: Land Reform Progress

Agricultural land acquired by the State since 1994 and still held by the State for land reform purposes (Source: DRDLR as at Nov 2018).	2 289 063 ha
Agricultural land acquired by the State for development purposes (municipalities and provincial government). (Source deeds office, 2018)	643 995 ha
Redistribution (Source: DRDLR, Nov 2018).	4 901 150 ha
Restitution (Source: DRDLR, Nov 2018).	3 692 294 ha
Private transactions (black willing-buyers buying from white willing-sellers without assistance or involvement from DRDLR).	1 968 057 ha
Land owned by white farmers (Nov 2018).	**64 785 312 ha**

Source: DRDLR, BER, ARS, Panel's estimates

If we take into account agricultural land lost to mining and urban sprawl since 1993 the farm land owned by whites in freehold before taking into account redistribution statistics was 77,581 million ha. Taking into account the official numbers listed above, a total of 12,79 million ha (conservatively estimated) have changed hands away from white farmers since 1994. This implies that to reach the 30% target (of 77,581 million ha freehold farm land) there needs to be a redistribution of a further 10,5 million ha and allocation of the land already in State hands (2,93 million ha) to individuals, families or communities.

In this section we estimate the total costs of this process – in terms of land acquisition, capital expenditure, support funds as well as operational expenditure for the first 3 years of transferred farms.

With this approach it is possible to estimate the 'in-kind' contribution of various redistributive mechanisms such as expropriation without compensation, land donations and land already owned by the state as all of these processes will have zero land costs but could involve funds for capital improvements, support, and financial arrangements for the first few years of operations.

The different sources of land to address the various demands for land will include a wide range of areas (including communal land and state-owned land) as illustrated in the Tables below:

Table 3: Available Farm Land for Land Reform by 2030

AVAILABLE FARM LAND FOR LAND REFORM BY 2030		HECTARES (million)	
		Source	Scenario 1 – to achieve redistribution of 30% of free hold farm land
COMMERCIAL LAND			
1	Commercial farmland acquired in the free market	2,18	2,18
2	Financially distressed farms.	1,38	1,38
3a	20% of existing water: green fields (virgin land)	0,14	0,10
	20% of existing water: brownfields (existing arable)	0,14	0,18
3b	80% of new water: green fields (virgin land)	0,03	0,03
4	Farms turned into JV's. (Excl. JV's in 3a and 3b)	6,62	2,80
5	Wildlife ranches - absentee landlords	1,02	1,02
6	Land donations. (e.g. churches, private owners etc.)	0,10	0,10
7	Restitution cases - not yet finalised	2,46	2,46
8	Mining land	0,55	0,30
TOTAL		**14,62**	**10,55**

Source: BFAP, BER, ARS, and Panel's estimates

The figure in the Table above refers to free hold land and will ensure that 30% of all freehold farm land has now been restituted, redistributed or owned by the state. We should however not ignore the constitutional imperative of tenure reform in communal areas and land already owned by the State. It is for this reason that we have also included the estimation of costs related to upgrading tenure rights and introducing commercial production in these areas on roughly 8 million ha.

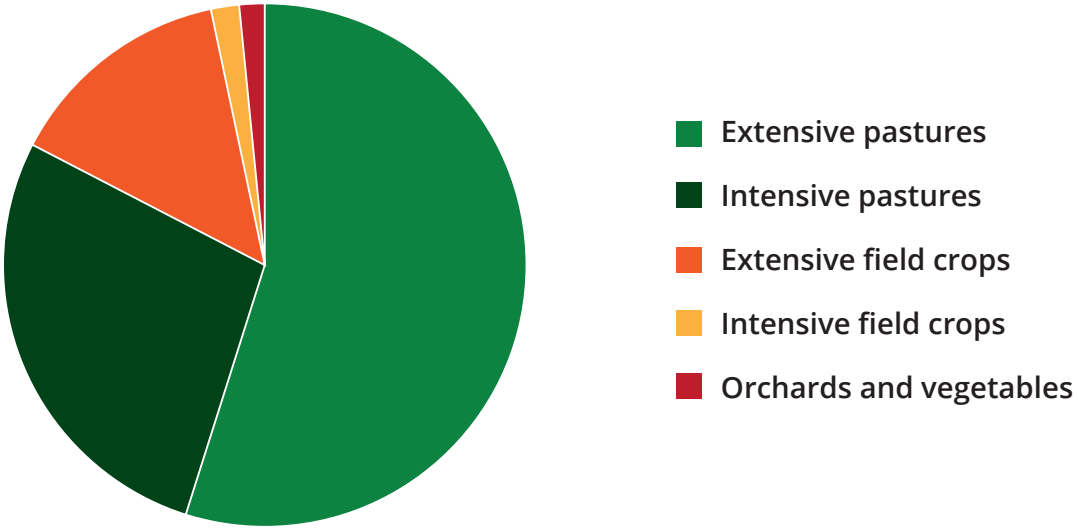
Table 4: State land and land in former homelands availed for land reform

STATE AND FORMER HOMELANDS		Potential	Scenario
1	Redistribution - commercial farms owned by governments	2,29	2,29
2	Redistribution - commercial farms owned by municipalities	1,64	1,64
3	Former 'Homelands' - tenure reform on communal lands	15,58	3,12
4	Former 'Homelands' irrigation	0,05	0,025
5	TRANCRAA lands - strengthening of property rights	1,26	1,01
TOTAL		**20,82**	**8,08**

Source: BFAP, BER, ARS, and Panel's estimates

As indicated earlier some of this land would be acquired by the State with financial compensation, and some without compensation, particularly the areas that are already owned by the State. In total, this could be 18.63 million hectares. If we take the distribution of South Africa's agro-ecological regions and land resources into account the land available for redistribution will broadly be in the categories of field crops (extensive – dryland and intensive – irrigation), horticulture (orchards and vegetables), and livestock farming (extensive pastures in arid areas and intensive pastures in higher rainfall areas) with more than half of the land only suitable for extensive pastures/natural veld (about 10 million of the 18million ha). This is depicted in the figure below:

Figure 1: Categories of land for 18.63 million hectares for land reform



Aside from land acquisition, one should have to budget for the post-transfer support which would unlock the economic value of the aforementioned areas. The budget for sustainable land reform is therefore much more than just the land acquisition and would include:

- Costs for land preparations and irrigation infrastructure
- Fixed farm improvements and movable assets
- Operational expenditure (For 3 years of operation of a farm)
- Support program in terms of agricultural extension, research and market access)

By taking account of the market value for different types of land, considering elements of improvements and support and the different operational costs the total bill for land reform of the 18,63 million ha is estimated at R370 billion inclusive of 3 years of operational expenses. The cost of land and water makes up only 16% of this total.

If the value of land (with water for irrigated agriculture) is properly valued based on market prices we estimate that a total of R59,8 billion is needed and will be funded as follows:

Table 5: Cost of land reform for an estimated period

	Million ha	Land value
Commercial farm land aquired in free market	2,18	17 306 235 200
Financially distressed farms.	1,38	6 746 510 880
20% of existing water: greenfields (virgin land)	0,10	734 384 000
20% of existing water: brownfields (existing arable)	0,18	1 652 364 000
80% of new water: greenfields (virgin land)	0,03	152 378 240
Farms turned into JV's. (excl. JV's in 3a and 3b)	2,80	7 938 640 000
Absentee landlords	1,02	2 867 200 000
Land donations. (e.g. churches, private owners etc.)	0,10	793 864 000
Restitution cases.- not yet finalised	2,46	19 529 054 400
Mining land	0,30	2 113 182 300
TOTAL	**10,55**	**R 59 833 813 020**

Source: BFAP, BER, ARS, and Panel's estimates

This proposal puts the land acquisition costs on the shoulders of the private sector via donations and commercial operations with beneficiaries. EWC will contribute about R5 billion (or 10%) of total land value and the fiscus will only have to deal with a potential land acquisition costs of R14 billion over the next 5 years – or almost R3 billion per year which is in line with the current land reform budget. However, in the process if properly incentivized we could redistribute 10,5 million ha of free hold land at a reasonable cost of R14 billion.

> Dan Kriek as well as Nick Serfontein pointed out that landowners cannot be expected to bear most of the cost of land reform. Although he understands the context that EWC here may refer to state land, Dan Kriek was also against any application of expropriation without compensation on private land.

The panel has also estimated the additional costs required to ensure productive use of this valuable farm land. Based on the Support and OPEX costs for typical farms in the various farm typologies we were able to estimate a ball park figure for these additional items:

Table 6: Costs of improving the land into productive use

Land type	Fixed improvements and movables	OPEX (3 years)	Support
Commercial Farm Land	74 921 230 240	155 379 384 000	1 417 016 961
State and former homelands	25 902 904 545	51 956 576 160	772 313 763

Source: BFAP, BER, ARS, and Panel's estimates

These funds will be sourced from the state (largely for smallholders, poor communities, restitution cases) private sector, normal bank loans and the preferential terms under the Land reform fund.

The total costs of the programme for the land reform on the total area of 18,6 million ha will be shared as follows:

- State grants and subsidies: **R126 billion**
- Private sector contribution (in the form of donations, and commercial finance and finance through land reform fund): **R237 billion**

  Of the total programme costs a total R107 billion (30%) will be earmarked for beneficiaries on State land and in the former homelands and on restitution cases. The rest will be aimed for commercial agricultural use with leveraging of land reform fund. The land reform fund capitalized at R100 billion would be sufficient to act as a revolving credit fund for land acquisition, OPEX and other small CAPEX to get the private sector to deliver on sustainable fast track land reform.

7. Findings and proposals that there is no consensus about:

- There is a huge emphasis on social issues in the report. This is understandable. It is fully acknowledged that land also has a social function. However, we cannot ignore and minimise the economic function of land. There needs to be a balance between the social and economic dynamics of land. Land reform cannot be focussed on a socio-economic impact only. There needs to be more of a focus on commercial food production and national food security. Without economic growth and food to feed the urban population, we will not be able to address the triple challenges of poverty, unemployment and inequality.

- Regarding the recommendations on the so-called "class agenda" of land reform: One needs to guard against a one size fits all approach. It is agreed that there should be a focus on the poor and the vulnerable, but their needs differ from that of the black farmers. The needs of the urban poor are also different to those of the rural poor. There should be different programmes to cater for the different needs and allocations from the budgets of different government departments to drive those programmes. The argument that land reform must be pro-poor and that the bulk of the land reform budget should go towards the poor may, on the face of it, sound like a sensible approach. However, the establishment of new black commercial farmers is also of critical importance. If the bulk of the land reform budget is to

go to the poor, we need to prioritise substantial amounts of money within budgets of other government departments such as the Department of Agriculture Forestry and Fisheries (DAFF) and Department of Trade and Industry (DTI) for black farmer development.

- The suggestion that the willing-buyer-seller approach be abandoned, is not supported. The State has had the power to expropriate already for the past 23 years. The State certainly have had enough "money" and certainly could have made much more money available by way of budget but simply failed to do so. It needs to be pointed out, that government was not obliged to buy farms at inflated prices. In redistribution, government had the option to simply refuse to buy farms offered at above market-value and in restitution it had the option of requesting the Land Claims Court to determine compensation in disputes. It also needs to be recognised that government has a preference for expensive land close to cities and major routes and highly productive land. It also chose to, in many cases, buy going concerns, which are much more expensive than buying just the land. Moreover corruption, collusion and poor valuation practices in all likelihood also contributed to the state in some cases paying too much for land. There is no proof that it was a general trend to pay inflated prices for land. In fact, studies indicated that in redistribution land was for a long time acquired at about 30% less than market value. "With the exception of one year within this period (1995), prices paid for land under the redistribution program have been below those of the general land market--by an average of 33 percent since 1997."[6] According to the information that was sourced from various annual reports from DRDLR and Treasury, the total amount spent on land reform to date amounts to approximately R 63,3 billion. This spending was on restitution, redistribution and development combined.

- On the recommendations regarding farm dwellers, we are of the view that a moratorium on evictions will indeed be unconstitutional. Legal opinions were obtained in the past by DRDLR that confirmed this view. The responsibility for the provision of housing, in terms of the Constitution, is a local government function. This function cannot be placed on individual landowners. We support the recommendation for the re-establishment of the ESTA task team. The 2016 ILO report on farm workers living and working conditions in South Africa seems not to have been considered at all[7]. We cannot support the recommendations for forced on-site developments that happen against the will of farm-owners as this is a recipe for conflict. We also do not agree with proposals to grant registered rights to farm dwellers that are then exercised in competition with the commercial farmer.

- On farm schools: There is a whole history behind the closing of farm schools which followed on the South African Schools Act of 1996. In many cases the Department of Education did not conclude agreements with farm owners or comply with agreements that had been concluded. Many of the schools were closed by the Department, not by landowners.

- Regarding the proposal for a land tax: Farmers are already heavily taxed. Amongst other types of tax, farmers pay municipal rates. The Davis Tax Commission (DTC) recommended in 2018 after a long investigation that a land tax on agricultural land was not desirable. The DTC found that a national land tax and an annual net wealth tax both present substantial

[6] "Land Redistribution in South Africa--A Critical Review": "Land price information for the first decade of the land reform program (1994-2004): Dr Edward Lahiff and Guo Li
http://documents.worldbank.org/curated/en/525981468302460916/pdf/808740WP0South0ox0379822B00PUBLIC0.pdf

[7] https://www.ilo.org/wcmsp5/groups/public/---africa/documents/publication/wcms_385959.pdf

obstacles to the introduction of a fair and simple wealth tax regime, due to the complexities involved in the fair and equitable valuation of both land and net wealth on a continuous basis. Some of the negative impacts of such a tax include:

- Agricultural costs will increase which will be passed onto the consumer in the form of higher food prices and/or incentivizing food imports, harming the poor in particular.

- A land tax over and above municipal property taxes could prove confiscatory for owners unable to generate enough income to cover both taxes. Some people, especially the elderly, might find that their land value may have increased considerably as a result of market movement, yet they may be cash poor. Upward pressure on total land taxes could force such people out of their homes.

- Overall tax in South Africa is already high by middle income country standards. In 2014, government revenue (excluding grants) was 30.6% of GDP, compared with an average of 21.0% for all middle-income countries [3]. Further taxes may drive down returns and viable investments generally specifically large-scale property development.

- There seems to be an underlying theme in the report that access to land in itself will guarantee a better standard of living for poor South Africans. This is not borne out at all by the history of rural land reform since 1994. Land itself, will never ensure a good standard of living. Smallholder farmers will need significant post settlement support, finance and other relevant assistance and most importantly tenure security, preferably in the form of title deeds to use the land productively. South Africa is a dry country with limited high potential soil. Title deeds may indeed assist in creating wealth simply because people will then have an incentive to improve their properties and will be able to use the property for collateral. But mere access to land without title or support or services carries the risk of becoming a poverty trap. We do understand however that restoration of land has to do with peoples' dignity as well.

- The report states that the Panel recommends that section 25 of the Constitution should be amended. Two possible formulations for such an amendment are put forward. The report should reflect the fact that many experts (including the HLP) expressed the opinion that it was neither necessary nor desirable to amend section 25. The HLP report, acknowledges that: "the failure of land reform thus far has largely not been because of a scarcity of land, but due to inefficiencies in the process of acquisition and systemic challenges faced post transfer as the farms acquired by government have also not shown an increase in production." We want to state clearly that we are opposed to any amendment of section 25 of the Constitution for what it seems, are purely political reasons.

- The statement is made more than once that agriculture contributes a very small percentage to the gross domestic product of South Africa. However, primary agriculture forms the basis of an entire agricultural value chain with forward and backward linkages into the economy. This value chain contributes between 10 and 15% to GDP. If primary agriculture is destroyed, this value chain will also cease to exist. See the links to the Economic Review of South African Agriculture 2017 / 2018 as well as a 2015 article by Jan Greyling[8].

[8] https://www.daff.gov.za/Daffweb3/Portals/0/Statistics%20and%20Economic%20Analysis/Statistical%20Information/Economic%20Review%202017%20-18.pdf
https://www.grainsa.co.za/a-look-at-the-contribution-of-the-agricultural-sector-to-the-south-african-economy

- We do not agree with the interpretation that section 25 allows for expropriation without compensation, other than in very limited circumstances and we are convinced that there are many other constitutional experts who would also agree with our point of view. We tend to agree with most of the opinion by Professor Elmien du Plessis, although we do not support any amendment of section 25 of the Constitution for whatever reason.

- **The taking of land at zero compensation is not supported. We understand that there might be limited circumstances where zero compensation is "just and equitable". It should however be left to the courts to decide this. The economic impact of zero or limited compensation takings will be disastrous.**

- We also have concerns about any kind of hard and fast compensation formula or policy that fails to consider all relevant factors in any particular case. At best there can be guidelines to helps the person that determines compensation to know what can be taken into account. It will not only offer guidance, but also ensure accountability The inflexible formula that is being haphazardly applied by the Valuer-General is very contentious and has already led to litigation[9]. We do not support an approach where a compensation policy dictates compensation. Our view is that every situation will have to be judged on its own merits taking all relevant factors into consideration. There can be no one-size-fits-all formula for compensation.

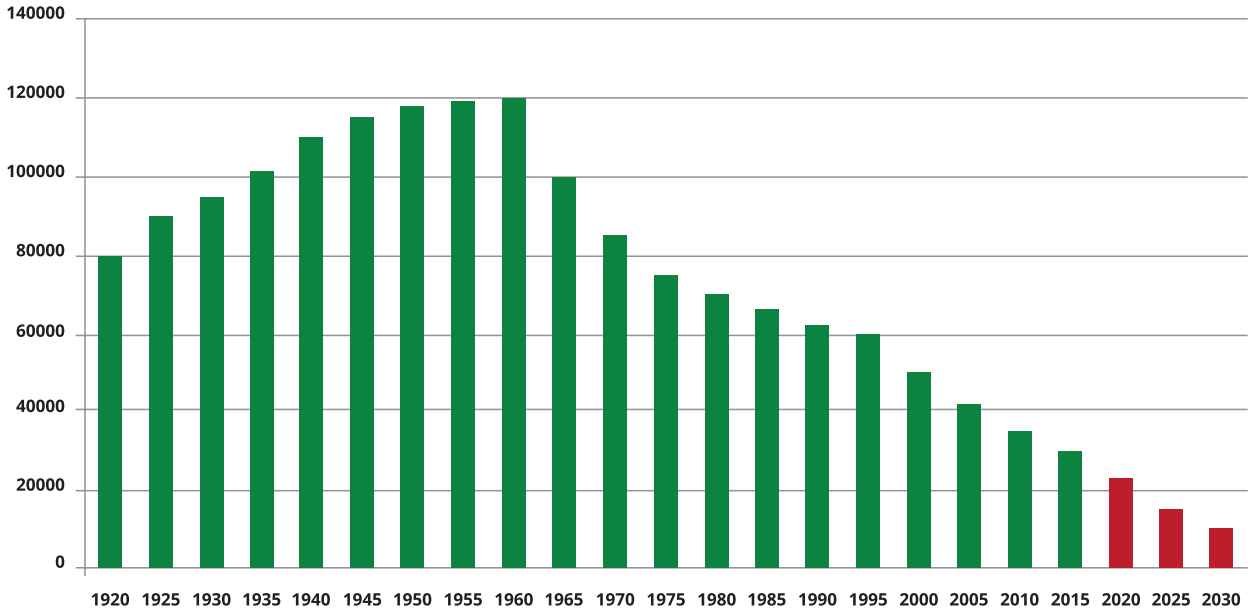
- We do not support an approach where a compensation policy dictates compensation. Our view is that every situation will have to be judged on its own merits taking all relevant factors into consideration. There can be no one-size-fits-all formula for compensation.

- The assumption that a great number of white commercial farmers are able to donate land is problematic. The majority of commercial farmers are medium scale family farmers who often struggle to make ends meet. Most of them will not survive economically if they had to part with any of their land. Between 2013 and 2016, the number of South African farmers have just about halved from 57 357 to 35 250, and nearly 60 per cent of those generate turnover of less than R500 000 a year. Of these, there are only 4 436 which make a turnover of between R5 and R20 million annually, and only 2 325 who make more than R20 million per year[10]. See the table on the decline in the number of farmers below.

[9] Emakhaseneni community v Minister of Rural Development and Land Reform: LCC3/2009 and Moloto community v Minister of Rural Development and Land Reform: LCC204/2010

[10] See CDE report on Agriculture, land reform and jobs: https://www.cde.org.za/infographic-agriculture-land-perform-and-jobs/ https://www.cde.org.za/wp-content/uploads/2018/11/CDE-Agriculture-land-and-jobs-final-final-report-ROUNDTABLE.pdf

Table 7: Number of Commercial Farmers in SA



Source: DAFF

There is no clarity on what qualifies as donations. In our view the term donation should include joint ventures and the donation of time and skills. That would be more feasible for landowners. There are no incentives for farmers to donate land and there are lots of legal, administrative and practical impediments to overcome for those who do want to go this route.

8. Expropriation without compensation

- The terms of reference for the panel sketches the background to this conversation. The National Development Plan's vision for 2030 with its six imperatives, the resolution adopted at the 54th National Conference of the ANC, adopted on 14 March 2018 that established a Constitutional Review Committee to review section 25 and make recommendations as to whether it should be amended or not. Parallel to this an Inter-Ministerial Committee on land reform was established, to which this panel reports.

- From the outset it should be noted that "expropriation without compensation" has different meanings in different conversations. One part of this conversation does not only speak to the legal mechanisms and the economics, but to the deeper emotions that arise out of injustices and the need for the restoring of human dignity. It is acknowledged that we need to find solutions for the problems of inequality in this country. "Expropriation without compensation" is sometimes also shorthand for "nationalization". In this report we will focus on a legal perspective on expropriation, mindful of the context in which this conversation takes place. The solution should ultimately be legally sound and constitutional and must seek to clarify the position and provide certainty.

- The Constitution is not an impediment to land reform and the undue focus on so-called "expropriation without compensation" diverts the focus and makes an accurate diagnosis of the problems surrounding land reform difficult. Nevertheless, we would like to state our position on expropriation, and our perspective on expropriation. Where applicable we rely on the opinion of Professor Elmien du Plessis that the panel sourced on fairly short notice. Attached to this document is the most recent version of the opinion.

- In paragraph 2.1 of the opinion it is stated that the Constitution is a "single-system-of-law, shaped by the Constitution". This requires that existing rights must be protected, insofar as they are consistent with the Bill of Rights, and where these rights are in conflict with the transformation objectives of the Constitution, a balancing of the existing rights and the need for reform are required. These rights are not standing in conflict with one another but are part of the same transformational goals in the constitution. This implies that property rights, even if it was acquired before the Constitution, may be subject to limitation under the Constitution. This is then the context in which compensation for expropriation must be understood: a legitimate limitation on the rights of ownership, where the goal is to strike a balance between existing rights and reform measures (such as redistribution of land and other reforms), in order to achieve the constitutional goal. That is why the Constitutional standard of expropriation is "just and equitable", and not market value. It seeks to avoid a zero-sum game.

- The duty to pay compensation should be understood contextually in terms of section 25 itself, in terms of the Constitution and in terms of the broader South African reality.

- For purposes of section 25, "property" has a generous meaning, and includes licenses (Shoprite case), permission to occupy (Herbert case) and customary law rights and interests (Maledu). While the motion and the conversation is limited to land, it should be noted that right in land, other than ownership, is also at risk of deprivation and expropriation.

- Section 25(1) requires that a deprivation of property (that does not require compensation) must not be arbitrary and must be done in terms of a law of general application. Deprivation refers to lawful limitations on property for purposes of public health and safety, and the environment. An overly burdensome deprivation may be arbitrary and therefore unconstitutional.

- Since every expropriation is a subset of deprivation, an expropriation also has to comply with section 25(1) requirements of arbitrariness. A substantive deprivation of property (like expropriation) will be subject to a proportionality analysis – is the interference proportional to the goal that the interference wishes to achieve.

- Section 25(2) requires that an expropriation be done in terms of a law of general application, it must be for a public purpose or in the public interest (which includes land reform) and compensation must be paid. In line with the opinion sourced, compensation is an indispensable part of an expropriation, which makes "expropriation without compensation" impossible. The court in the Agri SA case restricted an expropriation to where the state "acquired" property. As original method of acquisition, expropriation does not require the owner to agree. This is therefore an invasive state power, that should be subject to stringent controls. As mentioned above, "property" has a wide meaning in terms of the Constitution, and it is therefore not only the limited number of farmers whose property is subject to expropriation and can include, for instance, people living on communal land.

- Section 25(3) lays down guidelines on how the compensation must be calculated. It requires a balance between the person whose property is expropriated and the public interest. It is this balancing that in some very limited instances may mean that "just and equitable" compensation is nil compensation. It will be for the state to show that this is justifiable. Since the compensation component is retained (even if it is nil), it means that should the owner disagree with the assessment, they can query it. If the requirement of compensation is taken away, this might not be possible. The determination requires a balancing of rights, and in most instances nil compensation will disproportionately affect the owner (or right holder). In the same way, we are of the view that compensation much below market value will in most cases also be disproportional. The fact that most farmers use their property as both a place of residence and to generate an income, should play a substantive role in determining compensation. The loss of a farm is a loss of both our homes and our income.

- Sections 25(5) – (7) are the enabling provisions for land reform. Various pieces of legislation were enacted to give effect to these provisions, such as the Restitution of Land Rights Act 22 of 1994 and the Extension of Security of Tenure Act 62 of 1997. When land is expropriated for land reform purposes, there should be underlying legislation that authorizes the expropriation and that sets out the public interest that is sought with the expropriation (see 2.2.5 of the opinion). Currently there are not clear and proper legislation for the expropriation of land in the land redistribution context. This is something that should urgently be addressed, as it will create legal certainty and it will make sure that there is transparency and accountability on the state's power to interfere with property rights. It is also important to ensure that the right people benefit from land reform and reduce the risk of elite capture.

- Section 25(8) provides that no provision in section 25 may impede the state from taking legislative and other measure to achieve land reform. This enables the state to expropriate property for land reform purposes. This, however, is not an unfettered power – it needs to comply with the provisions in section 36(1). Section 36(1) is applicable when rights are limited. Arguably, when land is expropriated at nil compensation this is a limitation of a right, and as such must be justified in terms of section 36. There will be very limited instances where such a great limitation will be reasonable and justifiable in an open and democratic society. To state that section 25(8) overrides all the other provisions of section 25 is not technically correct -at least there are many esteemed lawyers who have a different understanding of the interpretation and function of section 25(8) – only the Constitutional court can clarify the correct interpretation of this section.

- In the opinion of Professor du Plessis, it was made clear that international law does not tolerate expropriation without compensation. In terms of section 39 of the Constitution, when the Bill of Rights (including section 25) is interpreted, courts must consider international law. International law will therefore be an impediment on the state's power to expropriation without compensation on large scale. International law does, however, allow for compensation that is "fair", which does not always mean market value. It is desirable in terms of international law that the content of this be determined on a case to case basis.

9. Gaps in the Panel Report

The important matter of what land is held by whom and where the country currently stands with land reform, did not receive the attention that it warranted. There are figures quoted in the report that are not supported. The latest figures as reported by the Minister of Rural Development and Land Reform in response to a question in Parliament is attached hereto as Annexure A[11]. We also don't know the status of the land in terms of productive levels. A graph is included below demonstrating the impact of land reform on commercial agriculture:

Table 8: The impact of land reform on commercial agriculture

The impact of land reform on commercial agriculture: 1994 – 2030 (estimated)	
	Hectares
Commercial agricultural land in 1994	82,50 million
Minus land lost to development (1994 – 2016)	3,78 million
Minus estimated land lost to development (2017 – 2030)	2,00 million
Net commercial agricultural land prior to redistribution:	**76,72 million**

Commercial agricultural land redistributed between 1994 – 2016	
Commercial agricultural land acquired by government	2,21 million
Plus Commercial agricultural land acquired by government for non-land reform purposes	0,64 million
Plus Commercial agricultural land acquired by black people: Self	4,22 million
Plus With government assistance	1,91 million
Plus Land sold by black vendors to white buyers	0,39 million
Total: Land acquisition by black people: (1994 – 2016)	**8,59 million**

NDP target for land reform by 2030 (20%)	**15,34 million**
Land required to make up 20% target (Excluding financial compensation)	**6,75 million**
Restitution through financial compensation (1994 – 2016)	**2,77 million**

Source: Agri Development Solutions

The Agri SA audit shows that 12,1 million hectares (12 141 780 hectares) has been redistributed to black people. This does not include land in the former homelands or land transferred to trusts that used to form part of the old homelands. This is made up as follows:

- 2,8 million hectares purchased by the government;
- 3,2 million hectares bought in the restitution programme;

[11] https://pmg.org.za/committee-question/10315/
http://politicsweb.co.za/documents/govts-land-reform-surprise

- 4,2 million hectares bought by black people without any government assistance;
- 1,9 million hectares bought with government assistance of some kind.

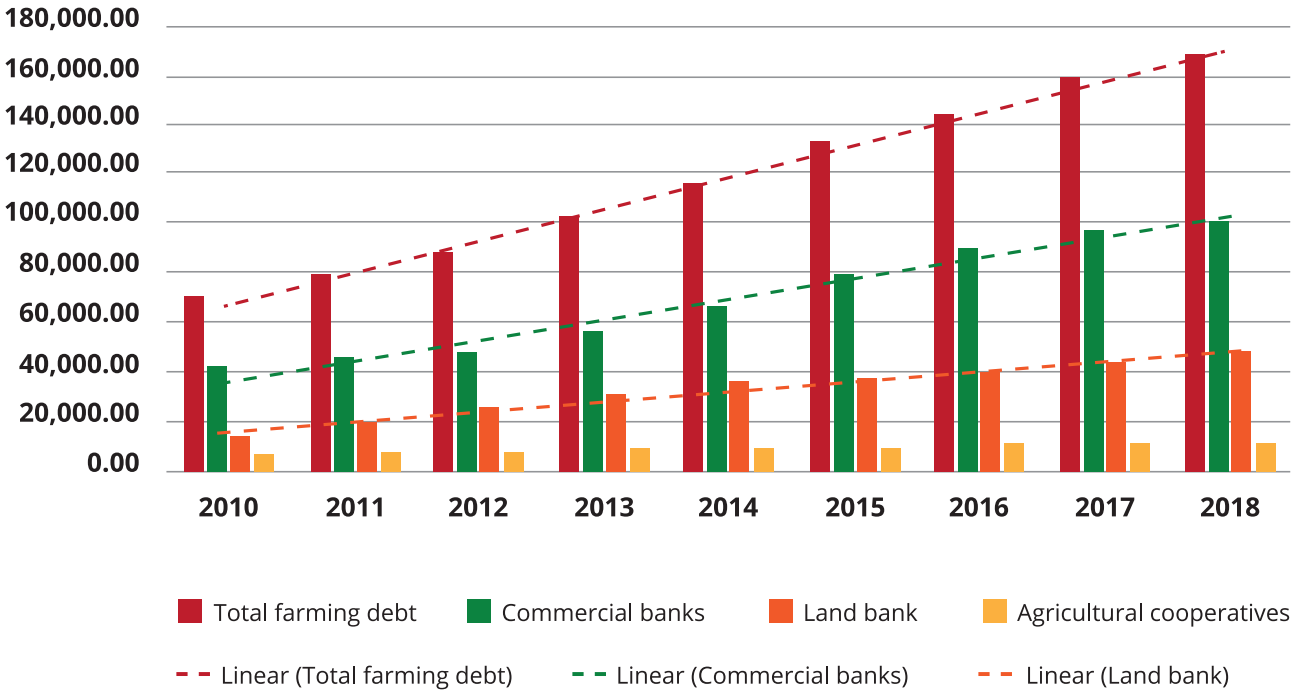
During the period between 1994 and 2016 a total of 59,3 million hectares of agricultural land was traded. That represents 63,4% of all agricultural land.

Projections show that at the current rate of acquisition, government will have purchased another 1,72 million hectares of agricultural land by 2030, which will be close to the National Development Plan (NDP)target of 20% or 15,34 million hectares of agricultural land.

- There was not enough focus on the NDP, the targets it had set, and the progress made in implementing the NDP. We attach a presentation by the Department of Planning Monitoring and Evaluation (DPME) on the progress (or lack thereof) made with the implementation of the NDP with regards to land reform, agrarian transformation and food security, basic services and rural employment. See Annexure B.
- No attention was given to the drastically declining number of commercial farmers in South Africa. This holds important implications for land reform and food security.
- There is not enough acknowledgement on past state failure, the extent thereof, the reasons for it and how to attempt to address this. For example, there is a report by the ARC and Entsika on the status of the Proactive Land Acquisition Strategy (PLAS) farms and what is required to revive those farms that have agricultural potential. See Annexure C in this regard.
- A proper assessment on international best practice was not done. For example, the report does not even mention the Food and Agriculture Organisation (FAO) guideline on compulsory acquisition[12].
- • The economic impact that the debate on expropriation has already had on investment in the agricultural sector has not been considered. In December 2018, it was reported that confidence in South Africa's agribusiness sector has waned in recent months, with a quarterly index sponsored by advocacy group Agbiz and the Industrial Development Corporation (IDC) falling to its lowest in nine years. After declining to 48 points in the third quarter of 2018 from 54 in the previous quarter, the Agbiz/IDC Agribusiness Confidence Index weakened further to 42 in the last quarter of the year, the lowest point since the fourth quarter of 2009[13].
- There is not enough focus in the Panel Report on best practice models and how these can be rolled out at scale. The Bela-Bela and Haga-Haga land reform summits presented a number of best practice models. A summary of these is attached as Annexure D.
- The detailed proposals for an Agricultural Development Agency (ADA), which Mr Serfontein has done a lot of work on, have not been given due consideration. Details on the proposed ADA are included as Annexure E.

[12] http://www.fao.org/3/i0506e/i0506e00.pdf
13 https://www.iol.co.za/business-report/economy/sa-agribusiness-confidence-index-at-lowest-in-nine-years-18376636

- There was hardly any focus on the **potential negative impacts of expropriation at low levels of compensation or nil compensation on food security and the economy.** It should be noted that a reduction in the recognition of property rights will endanger investment into the capital improvement of the land both by primary as well as secondary agriculture. The financial sector will reassess their exposure to risk in this sector as this asset base is devalued and diversify into other areas of the economy. Black farmers will not escape the negative impacts of EWC or expropriation at low levels of compensation. The erosion of asset value will have a massive impact on the sustainable establishment of new black farmers. What is also missing there is the perspective that South Africa is more than 65% urbanised and that urban dwellers are completely dependent on food produced by commercial farmers. In South Africa the whole food system starts with the primary producers, the risks and production capacity they must master in order to remain profitable. To clarify this matter further one must consider that the food system and food security cannot exist without funding. In South Africa one of the reasons we were so successful was because we own our land – and we can collateralise it.



Source: DAFF

The graph indicates that the distribution of farming debt is as follows:

- **Land Bank – R48.83 bn**
- **Commercial banks – R101.47 bn**
- **Agriculture co-operatives – R12.18 bn**
- **Other include private persons, Agricultural Credit Act and other financial institutions – R6.01 bn**

It is also important to understand that the Land Banks' terms of borrowing include unencumbered property rights at market values – the international lenders they account to will call up this exposure where property rights are affected, and market values compromised. The R112 billion from commercial banks and cooperatives will need to be serviced and represents a real contingent liability for the economy where farmers will not be able to remain profitable. Where uncertainty of the asset class comes into play – i.e. land that can be expropriated without compensation, whether it is for public interest or where there are arbitrary principles such as land held for "purely speculative purposes" or land used by "labour tenants", the price of the asset class will fall due to market risk. Production **lending** is what farmers access every year against the value of their assets to stay in production. The borrowing is done against the value of the land, fixed improvements, livestock and machinery. The reason why production lending can take place is because the lending is done against a secure asset – vis-à-vis the market value of the land and fixed improvements."

As far as food security is concerned, South Africa ranks highest in Africa in terms of the Du Pont Food Security Index at 45th followed by Tunisia 51st and Botswana 52nd. Arguably South Africa has the most sophisticated farming and food systems in Africa, with a net surplus in food exports and should be held as the benchmark for commercial food production in Africa. See the FAO world hunger map below:



Figure 2: FAO - World hunger map [6]

Southern Africa is very dependent on food from South Africa as most of the countries in Southern Africa has limited production capacity. Countries such as Zimbabwe, Mozambique, Botswana, Namibia are dependent on South Africa for food provision and in attaining food security.

EWC and continued policy certainty around agricultural land may well lead to food production declining because farmers would not be able to pay back their debts, causing the banks to foreclose on hundreds of farmers. Where production falls the whole food system in South Africa will come under severe pressure and we will very quickly move into a position where we will have to import food at export parity prices. Not only will food become unaffordable to millions of poor people, South Africa will become food insecure.

10. Process comments

President Ramaphosa appointed ten people, whose names are listed in the terms of reference of the Panel to advise the inter-ministerial committee on land reform on certain matters specified in the terms of reference. The responsibility rests on these ten people to do research, come up with recommendations and attempt to reach consensus as far as possible. The terms of reference of the Advisory Panel state amongst other that: "The Panel will strive to reach consensus where possible and indicate areas of consensus in its report. If conflicting views are unresolved, however, this should also be reflected in the report. The responsibility to carry out their task rests squarely on the shoulders of the ten persons appointed."

Although the understanding was that the responsibilty for the report rested on the shoulders of the ten members, two colloquiums were held, where-after the comments of various stakeholders and people made at those colloquiums somehow became part of the Panel's recommendations. While we have no issue with broader consultation, the comments were incorporated without the required attempts to reach consensus amongst the Panel members on the comments submitted.

Though repeatedly requested, some reports from members were still not available by the middle of March, just days from the deadline of the submission of the final report. There was hardly any focus on the National Development Plan (NDP) and how to align land reform within the NDP. There was too little emphasis on the international experience and very limited funding available to do research. Some of the work that was submitted by the members who are responsible for this Minority Report and which they regard as critical, particularly regarding the financing of land reform and best practice models, was simply ignored.

The Panel had very little legal support. Mr Kriek requested that a legal opinion be sourced to inform relevant mandates. An opinion was then commissioned at a late stage from Professor Elmien du Plessis. She submitted a seventy-page opinion, of which only a few paragraphs appear in the Panel Report.

Early in the process Mr Serfontein already expressed concern over the modus operandi that was being followed. In February 2019, in a letter to the Chair, Mr Serfontein stated that five months down the line the Panel had not yet reached consensus on anything. Moreover, there were many issues that the Panel had not even discussed, amongst other: the baseline land audit, land reform targets, cost of land reform and institutional arrangements. In an email to the Panel members dated 23 March 2019, Mr Serfontein made the following points: "During the course of five months I have written four emails (attached) in which I expressed my concern on the process and progress (or the lack thereof) of the Advisory Panel. These emails were over and above my oral comments regarding the process/progress during our meetings. The first email was dated 29 October 2018 and the last email was dated 23 February 2019. In the latter I suggested that an extension of time be requested, and it is regrettable that all my suggestions/ requests/comments were blatantly ignored." Mr Kriek suggested at the 17 January meeting that certain deliverables be agreed upon for the eight weeks remaining in which the Panel was supposed to finish its work. He requested that all workstream documents be made available in week one. By week four, responses to proposals were supposed to have been submitted and incorporated. As at 24 March 2019 a number of workstream documents remained outstanding. The final draft report was only sent to members late afternoon on 29 March 2019 and comments

were due by 31 March 2019.

President Ramaphosa assured members of the Panel that they will be able to retain their independence. Mr Kriek pointed out on several occasions that he regarded his independence and the mandates that he would require from his organisation, Agri SA, as non-negotiable. Where members disagree with recommendations by the Panel, they should therefore be in a position to state where they disagree through a Minority Report.

The Panel missed the 31 March deadline for the submission of the report to the Inter-Ministerial Committee. The only way the process could be salvaged was if more time to submit was granted. The date for submission of an executive summary, as well as a draft report was set for the 4th of April and later extended to 12 April. In our humble opinion it was impossible to save the report from being finalised according to the terms of reference due to timeline failure and process collapse. Dan Kriek cautioned that it was not realistic, in fact close to impossible, to reach consensus and submit a professional report within the proposed timeframe.

The whole process was back to front in that we were sent a Zero Draft full report on 7 March – which was a cut-and-paste job that was difficult to make sense of. We then received a summary of the report on the 19th of March. Then we received an expanded summary on 4th of April. Dan Kriek submitted written comments on all of these documents. Very little time was allowed to comment on very lengthy and ever-changing documents.

For these reasons, Messrs Kriek and Serfontein have decided to submit this Minority Report.

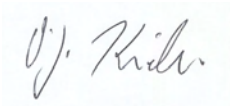
11. Conclusion

Participating in the Panel was an enriching experience for both of us. We participated because we are committed to finding workable and sustainable solutions to make land reform work in this country. For this country to move forward, it is imperative that the land reform question be addressed. While we might have differed on some aspects of the majority report, this Minority Report should not be seen as standing opposed to the whole of the majority report. Rather, this minority report is submitted to reflect what we think are the viable solutions to build our nation as one, sovereign, democratic state, founded on the values of human dignity, equality and freedom.

As such the submission of this Minority Report is submitted in a spirit of nation building and forward thinking.

Prepared by: Dan Kriek, Nick Serfontein.

Signed:



Dan Kriek



Nick Serfontein

Annexure A

Government latest land reform stats

Table 1: Are of land restituted or restituted by mode and province

Province	Restitution		Redistribution			Total
	(1) Restoration of land	(2) Financial compen-sation in lieu of land restitution	(3) Re-distribution	(4) Land tenure reform	(5) State owned agricultural land disposal	
E Cape	127 699	402 532	552 661	45 200	9 172	1 137 264
F State	58 104	147 754	426 092	44 544	4 122	680 616
Gauteng	17 443	23 371	61 151	4 879	513	107 357
KZN	847 912	172 259	590 272	206 289	5 382	1 822 114
Limpopo	706 423	827 955	181 209	33 797	6 730	1 756 114
Mpum	523 735	678 624	479 961	113 984	43	1 796 347
N Cape	701 014	503 943	1 544 127	57 203	0	2 806 287
N West	501 783	68 554	510 920	25 277	13 938	1 120 472
W Cape	11 042	95 394	554 722	251 314	0	912 472
RSA	3 495 155	2 920 386	4 901 115	782 487	39 901	12 139 044

Source: Reply by Ministry of Rural Development and Land Reform to a parliamentary question by Pieter Groenewald MP.

Table 2: Different classes of land in SA by area and relevant percentage

Province	Extent of each prov-ince	As % of coun-try	Former home-lands	As % of each prov-ince	Extent of commer-cial farms in 1996	As % of com-mercial farms 1996	Extent of individual-ly white-owned 'farms'	As % of IWOFs 2017
E Cape	16 891 700	13.8%	5 757 277	34.1%	10 327 660	12.6%	3 007 709	11.3%
F State	12 982 600	10.6%	238 582	1.8%	11 342 502	13.8%	3 748 192	14.1%
Gauteng	1 817 800	1.5%	91 447	5.0%	756 946	0.9%	275 021	1.0%
KZN	9 332 800	7.7%	4 223 491	45.3%	4 068 401	4.9%	853 152	3.2%
Limpopo	12 575 600	10.3%	3 399 298	27.0%	5 488 613	6.7%	1 139 454	4.3%
Mpum	7 649 500	6.3%	954 621	12.5%	4 544 012	5.5%	967 634	3.6%
N Cape	37 288 800	30.6%	1 689 794	4.5%	29 734 978	36.2%	11 498 449	43.1%
N West	10 488 100	8.6%	2 079 612	19.8%	6 179 490	7.5%	2 408 880	9.0%
W Cape	12 946 300	10.6%	0	0.0%	9 766 969	11.9%	2 764 652	10.4%
RSA	**121 973 200**	**100.0%**	**18 434 122**	**15.1%**	**82 209 571**	**100.0%**	**26 663 143**	**100.0%**

Table 3: Provincial percentages of where each mode of land restitution/redistribution has occurred

Province	Restitution		Redistribution			Total
	(1) Restoration of land	(2) Financial compen-sation in lieu of land restitution	(3) Re-distribution	(4) Land tenure reform	(5) State owned agricultural land disposal	
E Cape	3.7%	13.8%	11.3%	23.0%	5.8%	9.4%
F State	1.7%	5.1%	8.7%	10.3%	5.7%	5.6%
Gauteng	0.5%	0.8%	1.2%	1.3%	0.6%	0.9%
KZN	24.3%	5.9%	12.0%	13.5%	26.4%	15.0%
Limpopo	20.2%	28.4%	3.7%	16.9%	4.3%	14.5%
Mpum	15.0%	23.2%	9.8%	0.1%	14.6%	14.8%
N Cape	20.1%	17.3%	31.5%	0.0%	7.3%	23.1%
N West	14.4%	2.3%	10.4%	34.9%	3.2%	9.2%
W Cape	0.3%	3.3%	11.3%	0.0%	32.1%	7.5%
RSA	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Table 4: Hectares redistributed or restituted by province (all modes) as a proportion of different classes of land

Province	As % of extent of each province	As % of extent of com-mercial farms in 1996	As % of individually white owned 'farm' land 2017
E Cape	6.7%	11.0%	37.8%
F State	5.2%	6.0%	18.2%
Gauteng	5.9%	14.2%	39.0%
KZN	19.5%	44.8%	213.6%
Limpopo	14.0%	32.0%	154.1%
Mpum	23.5%	39.5%	185.6%
N Cape	7.5%	9.4%	24.4%
N West	10.7%	18.1%	46.5%
W Cape	7.0%	9.3%	33.0%
South Africa	10.0%	14.8%	45.5%

Annexure B

25-YEAR REPORT ON DEMOCRATIC GOVERNANCE AND SERVICE DELIVERY IN SOUTH AFRICA: 1994-2019

Rural Economy

planning, monitoring & evaluation
Department:
Planning, Monitoring and Evaluation
REPUBLIC OF SOUTH AFRICA

2030 NDP

Outline

1. National Development Plan – Vision 2030

2. Rural Economy – Outcome 7

3. 25 year review

1. Objectives
2. Key questions
3. Inheritance in 1994
4. Policies, Programs and Plans
5. Progress
    1. Land Reform
    2. Agrarian transformation and Food Security
    3. Basic Services
    4. Rural Employment

5. Case Studies

6. Persistent challenges

7. Priorities 2019-2030

8. Priorities 2019-2024

9. Conclusion

1. NATIONAL DEVELOPMENT PLAN – VISION 2030

National Plan to eradicate poverty, joblessness & inequalities by 2030

- Implemented in 5 year terms called medium term strategic framework (mtsf), 2014-2019 is the first
- 14 outcomes that need to be achieved on the current mtsf.
- Outcome 7 is rural economy, taken from Chapter 6 of the NDP. "*An Integrated And Inclusive Rural Economy*"

- 12 Departments contributes to 39 indicators and 5 High Impact Indicators of Outcome 7

NATIONAL DEVELOPMENT PLAN – VISION 2030

"An Integrated And Inclusive Rural Economy" will be achieved by:

1. Successful land reform, employment creation, and strong safeguards for the environment. The driving force for this is the expansion of irrigated agriculture together with the expansion of dryland production in some areas

2. Providing quality basic services, particularly education, health care and public transport

3. Promotion of non-agricultural strategies such as the promotion of agro processing, tourism where appropriate, fisheries for coastal areas and small enterprise development

2. Rural Economy defined

VIBRANT, EQUITABLE, SUSTAINABLE RURAL COMMUNITIES CONTRIBUTING TOWARDS FOOD SECURITY FOR ALL

- Farming and other non farming activities (enterprises) in rural areas
- Agriculture is the fundamental occupation of the rural people and forms the basis of rural economy.
- It holds significant potential for creating decent and productive jobs and contributing to sustainable development and economic growth.
- It accounts for a significant share of employment and output in many developing countries but is widely characterized by severe decent work deficits and poverty.
- Its promotion in a sustainable way has the potential of increasing employment opportunities in rural areas, reducing regional income disparities, stemming pre-mature rural-urban migration, and ultimately reducing poverty at its very source
- The promotion of decent work in the rural economy is key to eradicating poverty and ensuring that the nutritional needs of a growing population are met (ILO)

2. Rural Economy

VIBRANT, EQUITABLE, SUSTAINABLE RURAL COMMUNITIES CONTRIBUTING TOWARDS FOOD SECURITY FOR ALL

1. Increase the percentage of productive land owned by previously disadvantaged individuals from 11.5% in 2013 to 20%
2. Ensure that, by 2019, there is a 20% (or 16.2 m ha) increase in percentage ownership of productive land by previously disadvantaged individuals
3. Reduce the percentage of households who are vulnerable to hunger from 11.4% in 2013 to less than 9.5%
4. Reduce the percentage of the population living below the lower bound poverty line (R443 in 2011 prices) from 32.3% to below 22 %
5. Reduce rural unemployment from the current 49% to less than 40%

3. APPROACH TO 25-YEAR REVIEW - KEY OBJECTIVES OF THE 25-YEAR REVIEW

To assess the extent to which:

1. Government has succeeded in delivering on the promise of a *better life for all South Africans*

2. Government is on track towards achieving the priorities set out in the NDP 2030

3. Non-state actors (social partners, civil society, labour, private sector and other non-state actors have contributed towards accelerate progress towards the NDP 2030, noting that the NDP has been accepted by broader society as a macro-plan of the country.

4. Specific constraints and obstacles have impeded progress towards the set objectives and targets, and the extent to which progress is impeded

5. Effective strategies have been developed to address identified constraints and obstacles

KEY OUTPUTS OF THE 25-YEAR REVIEW

1. A credible, evidence-based 25-Year Review Report
2. Roadmap for accelerating service delivery during 2019-2030, including capacity requirements

POSSIBLE DATA SOURCES

Diversity of sources, including:

- Official statistics
- National Surveys (Household surveys, community satisfaction surveys; Quarterly Surveys)
- Research Reports
- International Reporting Obligations
- Administrative data systems
- Legislative processes
- Published departmental information
- Case studies

Other Custodians of data

- NGOs/CBOs/FBOs
- Academic Institutions

METHODOLOGY

- Complex project, requires
  - Diverse measurement techniques;
  - Analysis of massive wealth of data that exists
  - Triangulation of administrative data with empirical data from credible sources
  - Primary data collection – interviews with key informants
- Balancing objective and constructive feedback – even if not-complimentary – with destructive commentary with hidden agenda

KEY QUESTIONS

1. What are the key developmental priorities that the democratic government of South Africa has sought to address over its 25-years in office?

2. What are the key commitments that government has made in its policy pronouncements and plans?

3. What are the major milestones that have been achieved over 25-years?

4. What has been the impact of these milestones on the lives of ordinary South Africans

5. What is the evidence-base for these?

6. What has been the role and contribution of non-state actors in the reported progress?

KEY QUESTIONS

7. What binding constraints has government encountered over the 25-years?

8. What measures were developed and implemented to address these?

9. What should the key priority areas for 2019-2024?

10. What should the key priority areas for 2019-2030?

11. How should government service delivery machinery be enhanced to achieve these new priorities?

12. What should be roles of development partners, civil society and other stakeholders in accelerating progress toward priorities?

INHERITANCE IN 1994

1. Imposed regulations against black land ownership, weak land administration,
2. Apartheid shaped access to economic opportunities & government services
3. Rigidly enforced tenure, settlement and labour policies and Traditional leadership.
4. Skewed land distribution system - 87% owned by whites & 13% of land by blacks,
5. Majority of the 13% land allocated to blacks, homelands.
6. Barren land, far away from economic opportunities and trade, limited economic activities ex agriculture, (rural economy & poverty eradication).
7. Homelands - dense semi-urban settlement patterns, communal land tenure, poor services, marginal economies and weak institutions.
8. Rural people were poor and marginalized, large inequalities existed between farmers and farmworkers, and there was poor provision of services for farmworkers
9. Land Act of 1913, limited African land ownership to 'native reserves', with communal land tenure administered by traditional leaders.
10. Overwhelming majority of blacks' households (93%) were engaged in subsistence farming; led to overexploitation of the land thus massive degradation rendering them imaginal.

Policies, Programmes and Plans

- The Constitution of the Republic of South Africa (Act 108 of 1996), which sets out clearly the legal basis for land reform, particularly in the Bill of Rights. “The public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" (Section 25, 4 and 27b) it also made references to access sufficient food and water.
- The Reconstruction and Development Programme (RDP) (1994) - an integrated, coherent socio-economic policy framework. - to mobilize all our people and our country`s resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future;
- The Growth, Employment and Redistribution (GEAR) strategy in 1996 to stimulate faster economic growth to provide resources to meet social investment needs. The policy encompassed most of the social objectives of the RDP but was also aimed at reducing fiscal deficits, nlowerig inflation, maintaining exchange rate stability, decreasing barriers to trade and liberalizing capital flows;
- The Accelerated and Shared Growth Initiative for South Africa (ASGISA) (2005), - it acknowledged the challenges of prolonged poverty driven by unemployment, low earnings, and the jobless nature of economic growth. It envisioned: Reduce poverty by 2010, and halving unemployment by 2014 from 28% in 2004 to 14% by 2012;
- The New Growth Path (NGP), (2010), aimed at enhancing growth, employment creation and equity. Principal target: create 5 million jobs over the next 10 years. Five key areas were identified namely: energy, transport, communication, water and housing, sustaining high levels of public investment in these areas will create jobs in construction, operation and maintenance of infrastructure;
- The National Development Plan (NDP) 2030 (2012) - cornerstone and blueprint for a future economic and socio-economic development strategy to eliminate poverty and to reduce inequality in South Africa by 2030. Goals (poverty eradication, inequalities and joblessness) by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society.

Acts, Policies, Programmes and Plans

- Restitution of Land Rights Act of 1994, = addressing the land questions.
- Government committed itself to the Sustainable Development Goals: Development of sustainable rural communities through land reform, agrarian reform, improving rural household food security, rural services, improving access to education and creating employment in rural areas, skills development, youth development, cooperative and small enterprises development.
- "willing-buyer willing-seller" principle. In 1990's = Settlement and Land Acquisition Grant (SLAG).
- Land Redistribution for Agricultural Development (LRAD) Grant
- Proactive Land Acquisition Strategy (PLAS). Land purchase grants were discontinued. State acquire strategically located land through PLAS. Only form of land redistribution and leased rather than transferred to land-reform beneficiaries.
- Land Restitution Amendment Act of 2014, re-opened land claims process, (July 2014 to June 2019). Constitutional Court ruled this Act as invalid, due to inadequate public participation as required by section 72(1)(a) and 118(1) of the Constitution
- Legislation to protect farm workers from evictions: Extension of Security of Tenure Act, 62 of 1997; Extension of Security of Tenure Amendment Bill 2013; Land Reform (Labour Tenants) Act, 2 of 1996
- Communal Land Rights Bill (2002), = Communal Land Rights Act (CLARA) of 2004. CLARA has not been implemented, Constitutional Court declared the entire Act invalid incorrect procedure.
- Property Valuation Act of 2014 (effective August 2015) will help government to expropriate farms under claims as working entities for less than market value.
- **Expropriation Bill of 2015,** (withdrew in August 2018). Parliamentary process of reviewing section 25 of the Constitution, which is an outflow of the adoption of motion by Cabinet to amend the Constitution as to allow for the **expropriation of land without compensation.**
- The Spatial Planning and Land Use Management Act (Act No.16 of 2013) seeks to bridge the racial divide in spatial terms and to enable transformation of the settlement

Policies, Programmes and Plans

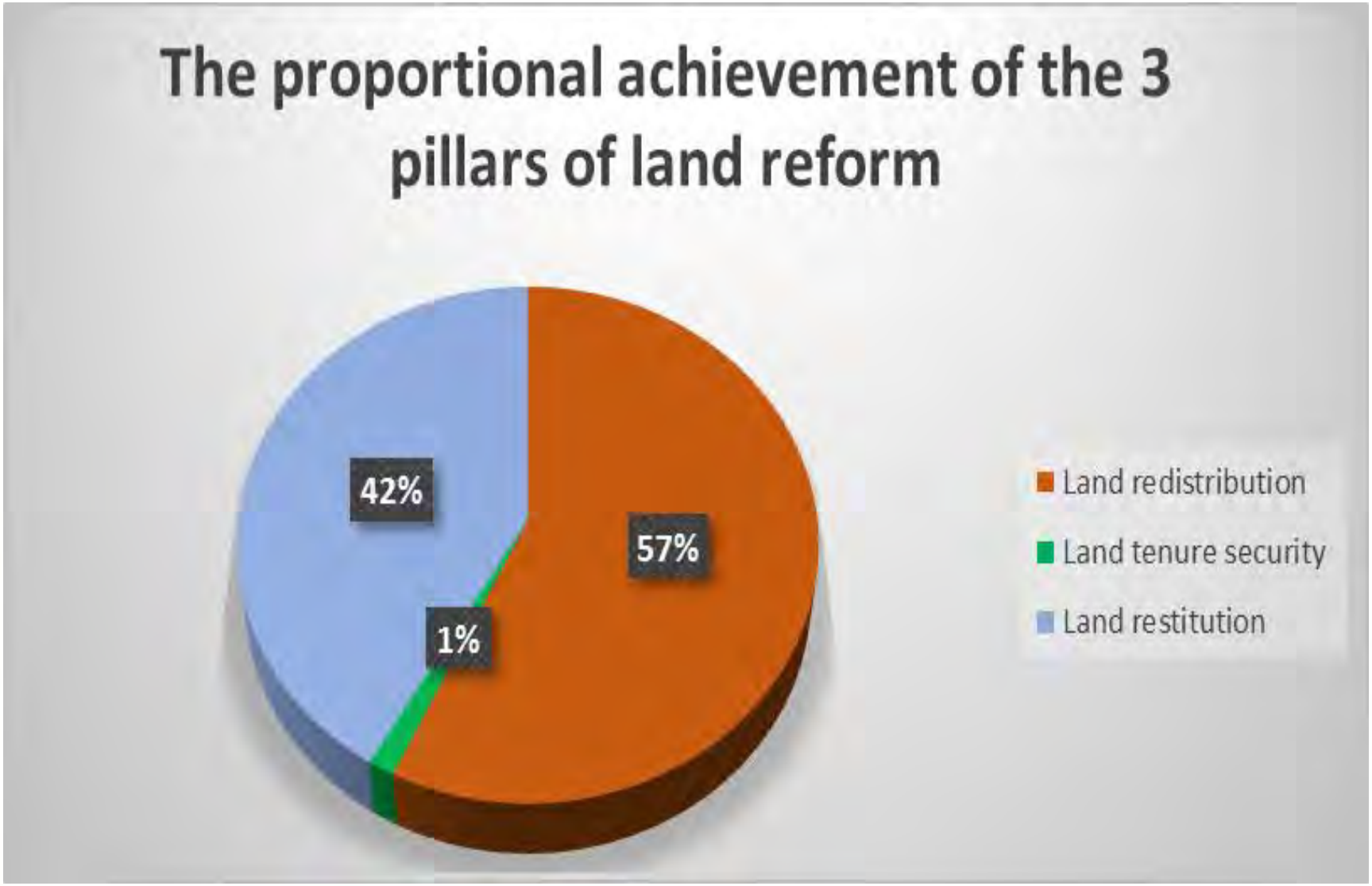
Programmes, to promote the productive use of land and the economic participation of poor and women in the agricultural economy apart from the funding and grant instruments, were introduced since 1994.

- Comprehensive Rural Development Programme (CRDP) (2009) to provide basic services to rural communities and to restore their dignity according to the Bill of Rights.
- Comprehensive Agriculture Support Programme (CASP) (2004) targets emerging farmers in rural areas, including women, - offers a range of support services such as financial assistance; infrastructure on- and off-farm; technical and advisory services; training and capacity building; marketing and business development, and information and knowledge management.
- One leg of CASP is Micro-Agricultural Finance Scheme of South Africa (MAFISA), launched in 2005
- An agricultural policy action plan (APAP) (2015), - providing more coordinated support to black farmers, and the guidance framework for Operation Phakisa: Agriculture, Land Reform and Rural Development.
- Recapitalization and Development Programmes (RADP/ ReCAP) (2010) focus on struggling land reform farms with potential acquired since 1994, (technical and financial support).
- Illema letsema (2008/9fy) with the primary aim to address the triple challenges of poverty, unemployment, and inequality through increased food production for vulnerable households.
- Agri-parks (2015) after the announcement of government's the 9 Point Plan have embarked on rolling-out Agri-parks to all 44 Districts, to kick start the Rural Economic Transformation.
- Animal and Veld Management Programme (AVMP) (2015), focussing on soil rehabilitation of degraded lands for crop production; de-bushing, and infrastructure to support the livestock industry (24 DM).
- In 2014, (5th administration), Government committed: Increase the % of ownership of productive land by PDI with an additional 2 Million hectares of land, reduce number of ha of transferred land to PDIs which is underutilized by cultivating an additional 1 million ha of land, reduce the percentage of households vulnerable to hunger to less than 9.5% and to reduce the rural unemployment rate to 40% rural unemployment, by 2019.

Progress

- Land Reform (1994-2018)
  - Redistribution – 4.9 million ha
  - Restitution – 3.5 million ha
  - Tenure Security – 112 882 ha
- by March 2018, is 8.4 million hectares which accounts for 10.2% of the total agricultural land, equates to 52.5% of the NDP target of 20% (16.4 million hectares) by 2030.
- Blacks now own close to 27% of all farmland in SA (Land Audit, 2017), significantly more than the 13% they owned in 1994

Progress


The proportional achievement of the 3 pillars of land reform
42%
57%
1%
Land redistribution
Land tenure security
Land restitution

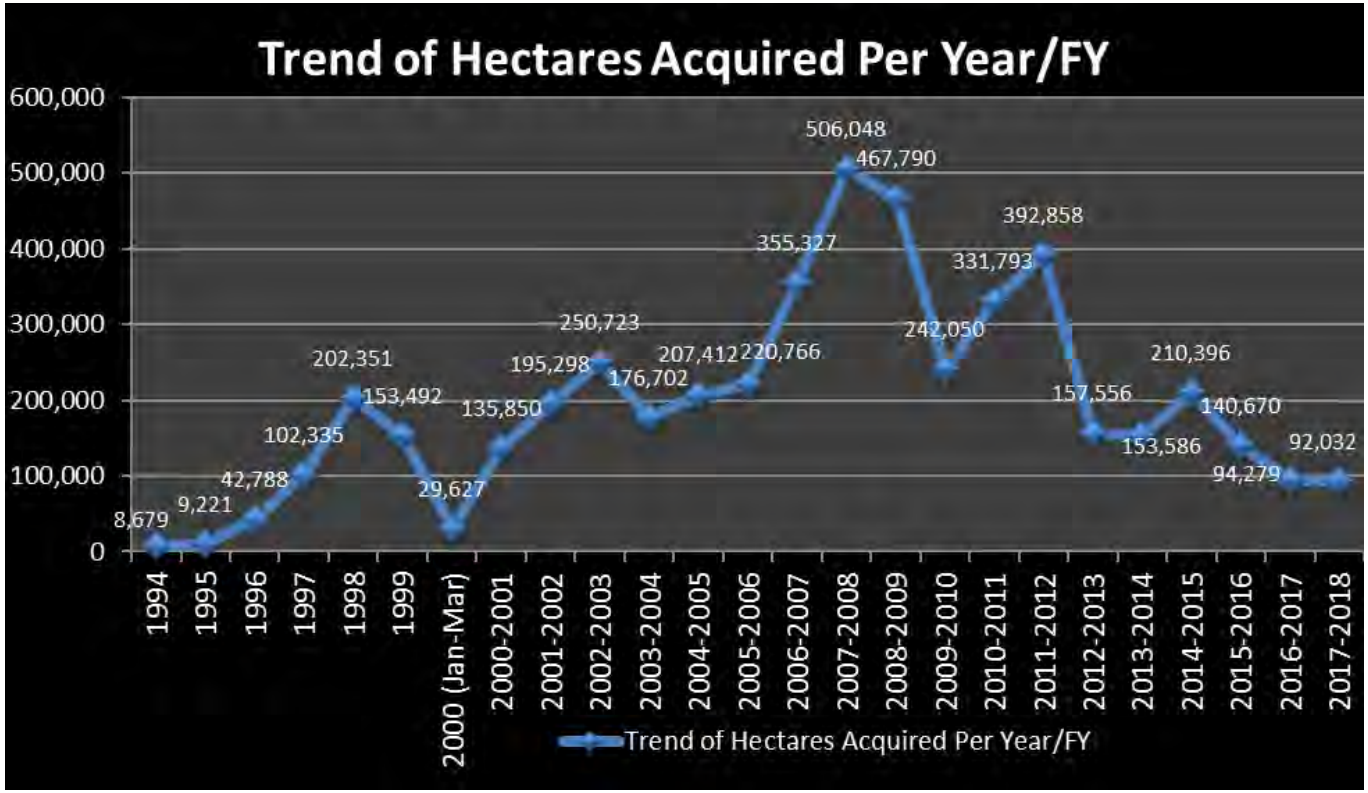
Progress

Table 1: Land Redistribution Farms Delivery till March 2018

Province	FARMS	HECTARES ACQUIRED AND REDISTRIBUTED							BENEFICIARIES/TARGET GROUPS								
		SETTLEMENT/TENURE SECURITY		MUNICIPALITY	AGRICULTURAL		REDISTRIBUTED LAND										
		SLAG	SPLAG	MUNICIPAL COMMONAGE	LRAD	PLAS	OTHER (Donation, Church Land, LASS etc.)	TOTALS	Individuals	Women	House Holds	Labour Tenants	Farm Dwellers	Military Veterans	Agricultural Graduates	Youth	Disabled
EC	882	44 425	1 021	57 319	191 172	254 284	17	549 431	27 122	3 868	1 508	15	1 470	4	0	2 526	28
FS	893	42 580	0	32 344	126 189	211 750	0	417 813	8 492	2 298	2 205	0	990	0	0	1 005	1
GP	413	5 269	293	1 756	7 262	47 470	0	62 111	7 686	1052	6 003	13	959	0	0	465	2
KZN	925	140 184	60 916	1 637	187 772	179 923	9 552	580 450	84 826	21 936	42 870	5 138	51 868	1	28	14 459	133
LP	415	33 797	0	0	44 488	102 688	81	181 919	11 648	1 487	6 114	195	284	51	8	872	37
MP	628	112 573	0	5 389	92 900	250 781	10 595	472 238	42 315	5 349	18 177	5 501	14 342	288	0	2512	21
NC	384	61 914	0	726 436	120 656	635 417	0	1 544 423	9 817	1182	6 160	75	114	1	1	711	35
NW	542	24 735	800	17 946	164 861	284 794	137	498 399	84 259	22 826	37 012	0	4 170	3	35	3 545	385
WC	325	251 306	8	3 105	229 593	69 609	0	554 185	29 746	10 664	9 560	0	11 577	2	0	9 310	126
TOTALS	5 407	716 783	63 038	845 932	1 164 893	2 036 718	20 381	4 860 968	305 911	70 662	129 609	10 937	85 774	350	72	35 405	768

- 305 911 beneficiaries of the Land Reform programme,
- 70 662 women, 35 405 youth and 768 people with disabilities.

Land Redistribution



- land redistribution has been slowing down, from 2012 to date.
- The Pace of Land Reform is slow, impact negatively on transformation, social cohesion and economic growth.
- reasons for the declining progress is the diversion of funds away from land acquisition and redistribution towards other unfunded activities such as Agri-Parks, 1-household-2-dairy-cows, 1-Household-one-hectare and the Recapitalization and Development programme and the Rural Development component of DRDLR s introduced in 2009.

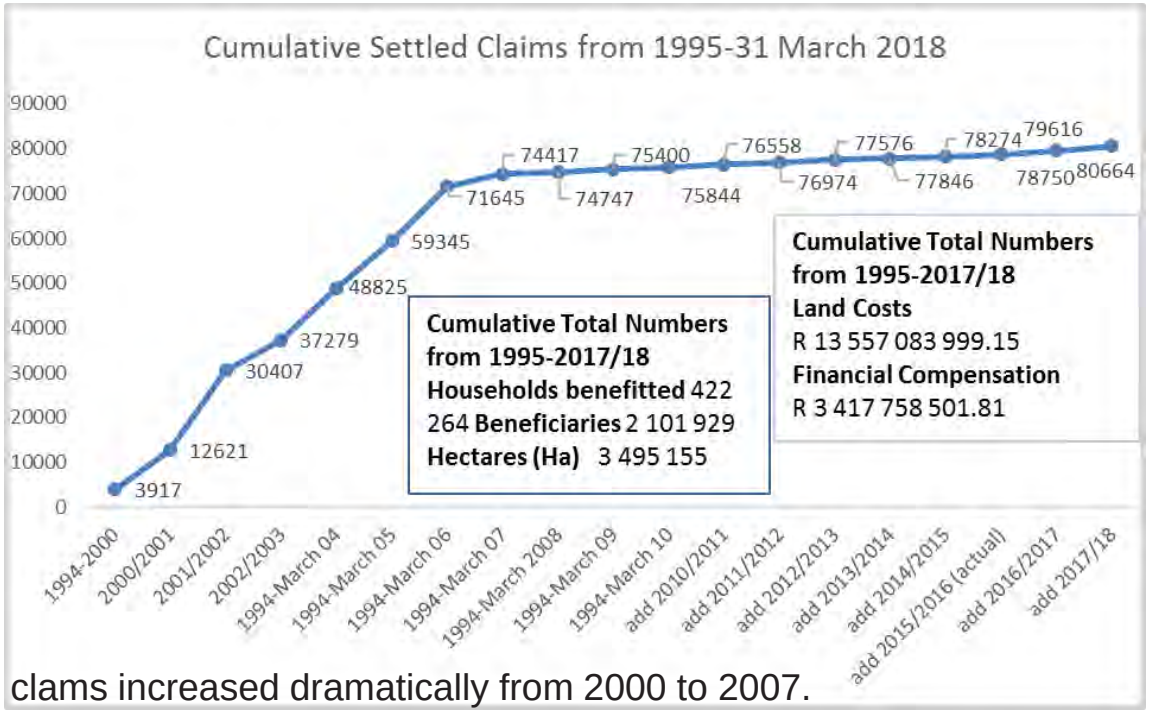
Progress

- During, 2014-2019, Government embarked on acquiring and allocated 1 million ha of land to smallholder producers and 200 000 ha of land to people living and/or working on farms. By March 2018, a total of 487 782 ha were allocated to Smallholder producers and 112 882 ha were allocated to farm workers and/or dwellers.
- Land reform has not yet realised its potential to stimulate economic growth and employment, especially in the agricultural sector. Around 13,8% (2,33M) of all hhs in SA are agricultural households compared to 19,9% (2,88M) in 2011, a decrease of 550 000 hhs. Decrease was due to the severe drought in 2014-16. Black Africans have the highest proportion of hhs involved in Agricultural Households at 15.5%. (Stats SA CS 2016).
- The main challenge (“willing-buyer-willing-seller”) of land bought by Government and redistributed - A critical issue in both restitution and redistribution is that of escalating land prices. = slow pace of land redistribution and land valuations. Market value principles are applied when government acquires land for land reform purposes.
- There is a need to properly analyse and aggressively implement the framework of how to deal with land valuations and the determination of the compensation which should be linked to section 25(3) of the Constitution, 1996 of the Republic of South Africa ("the Constitution").
- The establishment of the OVG will provide a compulsory valuation service in respect of property that has been identified for land reform, as well as a voluntary valuation service to departments for the acquisition or disposal of property. The OVG also provide a regulatory service which entail the setting of criteria and procedures for valuations as well as the monitoring of valuations to ensure compliance

Land Restitution

- A total of 63 455 claim forms were reported as lodged with the Commission by the extended deadline of 31 December 1998
- The total number of claims was a shifting target: Where different claim forms were submitted by members of one community, these were consolidated into a single claim. More commonly, group claims were split up and counted separately, for instance where the land rights had vested in individuals or households, or where claimants were divided on the outcome (eg. if some wanted to return to their land while others opted for cash).
- The official total has been revised upwards on several occasions, rising to 79 696 by 2007 and is rising even more as the process continues. (PLAAS, 2016).

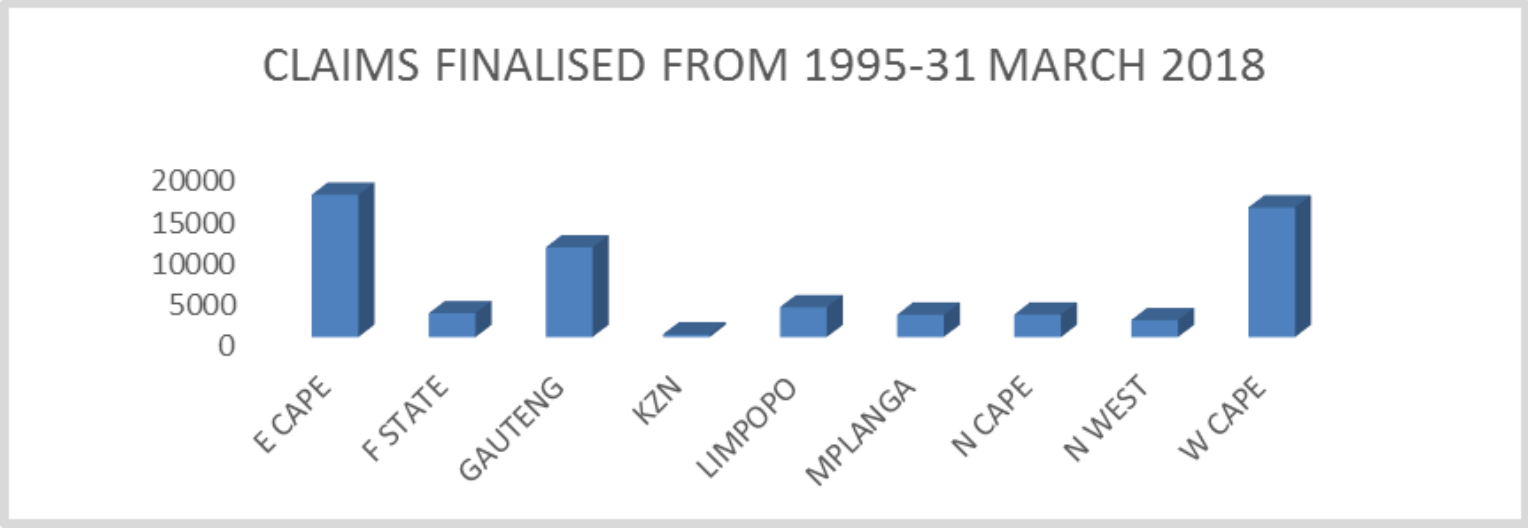
Claims Settled



- Rate of settling land clams increased dramatically from 2000 to 2007.
- Rate of settlement of rural claims consistently slow and moved particularly slowly after 2009 to now.
- Rate by which claims are settled have declined due to the complexity of the claims.
- More than 80 000 claims were received from inception in 1996 till the cut-off date 31/12/98.
- Cumulatively more than 80 664 claims were settled and 62 475 finalised by March 2018 from inception.
- Total of 80 664 settled claims includes dismissed claims and adjustments (ongoing verification and reconciliation.
- Progress is slow in attaining finalisation of claims, especially on complex old claims on high value land dating back to the first lodgment period that closed 31 December 1998. Reasons include burden of proof on claimants, tensions between the Traditional Authorities and CPAs and lack of a single funding model not only for Restitution per se, but in support of Land Reform in general.

CLAIMS FINALISED

- More claims were finalized in Western Cape and Eastern Cape. The low number of claims finalized in Kwazulu-Natal may be due to the fact that the Ingonyama trust already exist from 1994 and owns 2.8 million Hectares of land in Kwazulu-Natal (Ingonyama Trust, February 2015).
- According to the Expenditure performance review on Land restitution, 2014, only 8% of South Africans want land to farm; thus 92% of settled claims had been settled through financial compensation rather than the restoration or physical return of the land.
- Claims finalized from 1995 – 31 March 2018, (DRDLR 2018, cumulative out of annual reports



AGRARIAN TRANSFORMATION

- To reduce the 4 million ha of underutilisation of newly transferred land to PDIs an estimated 1 891 369 ha plus an additional 692 672 ha till March 2018 were cultivated inclusive of Agri-parks, Recapitalisation farms, communal areas programmes. (DRDLR PoA cumulative report, June 2018).
- The allocation of land to rural people without water use rights contributed to the underutilized land. Land under irrigation used by smallholder producers was expanded with 17 671 ha, from 2014 (March 2018), through various interventions such as Government's response to the drought, 872 water use licenses to black farmers, 3 647 resources poor farmers gained access to water and 239 projects implemented through the revitalization of irrigation schemes initiative. (DRDLR PoA report June 2018).
- Since inception in 2009 to 2018, there are approximately 1 675 farms under the Recapitalisation and Development programme (ReCAP / RADP). This constitutes 1 500 617 million ha amounting to over R 4.9 billion and secured approximately 772 strategic partnerships to provide technical, financial and Infrastructure support to farmers. The support varies from production inputs, Infrastructure, machinery and implements. (DRDLR Annual reports, cumulative and 2017/18 financial year end report).
- The Implementation evaluation done by DPME on RECAP shows that the effectiveness in capacitating the farmers/beneficiaries was not satisfactory, with different results for the different capacitating roles, despite spending per project being relatively high.

AGRARIAN TRANSFORMATION

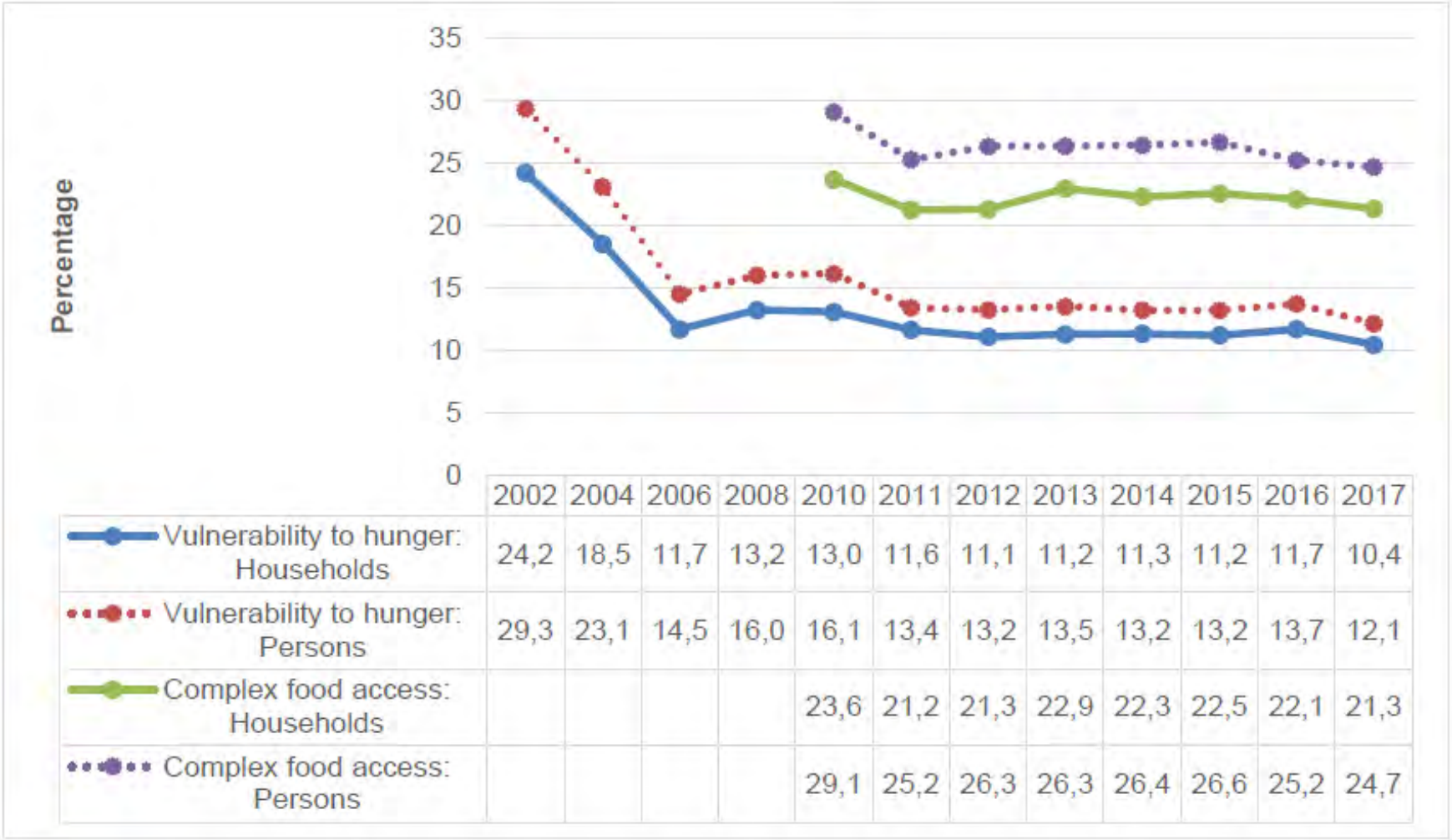
- In table 2 below, give an indication of the Recapitalisation and Development Farms, number of hectares, number of beneficiaries and number of jobs created.

PSSC	RADP STATISTICS 2009 – March 2018																
	Projects	Partnerships	Others (Service provider/Direct Support/ Self Sufficeint etc)	Co-Management /Share Equity	Mentors	Strategic Partner	Hectares	Beneficiaries	Jobs Created	Women Employed	Youth Employed	PWD Employed	Farmers Trained	Women Trained	Youth Trained	PWD Trained	Rand Value
EC	223	124	99	2	72	47	138 488	3 637	936	286	501	2	270	88	91	0	R 659 032 899
FS	207	92	115	8	48	36	141 279	1 017	353	172	184	2	601	270	180	5	R 508 862 826
GP	128	39	89	0	31	8	23 611	537	341	126	142	4	355	156	86	2	R 308 278 796
KZN	228	111	117	0	52	59	143 289	8 389	1156	470	575	2	559	194	253	3	R 961 197 776
LP	261	96	165	0	86	10	110 611	3 892	2 970	1503	1284	23	1546	663	358	4	R 589 107 515
MP	232	104	128	0	67	32	191 575	7 830	1181	500	509	9	565	215	240	1	R 660 435 225
NC	89	63	26	0	32	31	473 784	765	2 896	571	1373	48	933	335	245	5	R 378 191 970
NW	219	104	115	24	36	44	187 422	2 362	781	122	376	1	562	177	152	3	R 625 405 029
WC	88	39	49	6	21	12	90 561	2 526	2 953	1 575	1 690	37	1039	163	180	0	R 250 407 851
TOTALS	**1 675**	**772**	**903**	**40**	**445**	**279**	**1 500 617**	**30 955**	**13 567**	**5 325**	**6 634**	**128**	**6 430**	**2 261**	**1 785**	**23**	**R 4 940 919 887**

FOOD SECURITY

- The right to food is a basic human right that is entrenched in the constitution of the Republic of South Africa (No 108 of 1996, section 27).
- The constitution obliges the State to take all necessary steps to enable residents to meet their own basic food needs. The underlying causes of food insecurity include a declining trend in subsistence food production due to drought and other factors, the cost of food relative to the incomes of the poor, and poor dietary habits leading to malnutrition.
- Government's social assistance grant programmes, its initiatives to develop smallholders such as Illema/Letsema and Fetsa Tlala, Community Nutrition Development Centres, National School Nutrition Programme, community gardens, and several other food and nutrition programmes are all aimed at addressing these.
- The percentage of persons that experienced hunger decreased from 29,3% in 2002 to 12,1% in 2017.

Vulnerability to hunger and access to food, 2002–2017 (Stats SA GHS 2017)



	2002	2004	2006	2008	2010	2011	2012	2013	2014	2015	2016	2017
Vulnerability to hunger: Households	24,2	18,5	11,7	13,2	13,0	11,6	11,1	11,2	11,3	11,2	11,7	10,4
Vulnerability to hunger: Persons	29,3	23,1	14,5	16,0	16,1	13,4	13,2	13,5	13,2	13,2	13,7	12,1
Complex food access: Households					23,6	21,2	21,3	22,9	22,3	22,5	22,1	21,3
Complex food access: Persons					29,1	25,2	26,3	26,3	26,4	26,6	25,2	24,7

Source: Stats SA: General Household Survey, 2017, Published Jun 2018, P0318

FOOD SECURITY



FOOD SECURITY

- Percentage of hhs who were vulnerable to hunger reflects the same pattern as persons. % of hhs that were vulnerable to hunger declined from 24,2% (2002) to 10,4% (2017), including a spell during which the % increased to 13,2% (2008) before continuing its decline. The Household Food Insecurity Access Scale determine households' access to food questions due to limited sources to obtain food, found that the % of hhs that had limited or complex access to food decreased from 23,6% (2010) to 21,3% (2017). Simultaneously, the % of persons with limited or complex food access declined from 29,1% (2010) to 24,7% (2017). (StatsSA GHS 2017).

- Though, the decline in the % in vulnerability to hunger, there is still a high number of hhs and people experiencing hunger. The rising cost, 19% for 2017, (BFAP 2018) of the basic food basket over time had further restricted access to food for the poor and vulnerable. Data shows that household access to food remained static since 2011. Further, the total number of households involved in agricultural production had declined with 550 795 households from 2 879 638 to 2 329 043 (Stats SA CS, 2016).

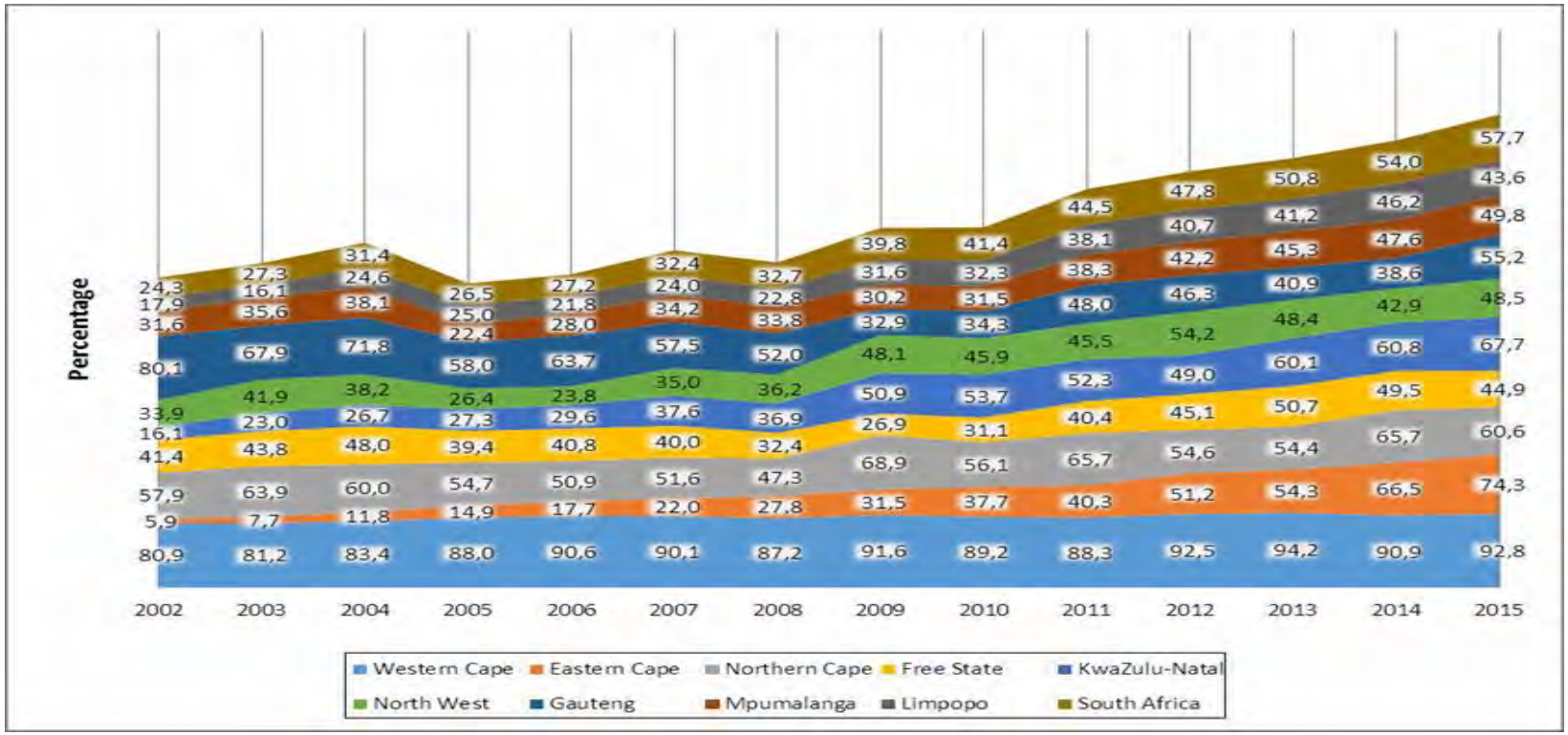
- Only 9,9% of the hhs involved in agriculture reported getting agricultural-related support from government during the year preceding the survey. Provinces where significant support was provided for farming hhs were KZN (13,6%), EC (20,3%) and NC (22,5%). Nationally, slightly less than two per cent (1,9%) of the households reported receiving training and 6,0% received dipping/ livestock vaccination services. [StatsSA, GH,2017].

- Results of the Livelihoods, Food and Nutrition Security Reports (South African Vulnerability Assessment Committee) in the Open Access/ communal areas of 4 provinces (FS, Limpopo, KZN and MP), 2015-2016 provide more details on some food and nutrition security indicators. Unemployment of a large number of household heads / acting heads across the 4 provinces challenging food security. Social grants were found to be providing a major socio-economic safety net. Child Support Grant was found to be the most dominating grant type across the four provinces followed by Old Age Grant. Notably, even in areas with highest percentage of hhs receiving grants, high levels of hunger still existed, particularly in areas where high levels of unemployment existed with little to no supplementation of grant income with own food production. (DAFF, 2018)

ACCESS TO BASIC SERVICES

- Access to decent basic service infrastructure in rural areas forms part of the Government's programmes to address the Bill of Rights and the Sustainable Development Goals.
- Access to basic services were not disaggregated to urban and non-urban as in 1994, but were disaggregated in the General Household surveys, which started in 2002.
- According to the StatsSA (2016), GHS 2002-2015 in depth analysis and Community survey 2016, report rural households with access to improved sanitation facilities increase more than doubled between 2002 and 2015 in all provinces.
- The figures 6-8, below show that there are huge differences on the number of households in rural areas and that improvement on households' access to water, electricity and sanitation are moving targets.

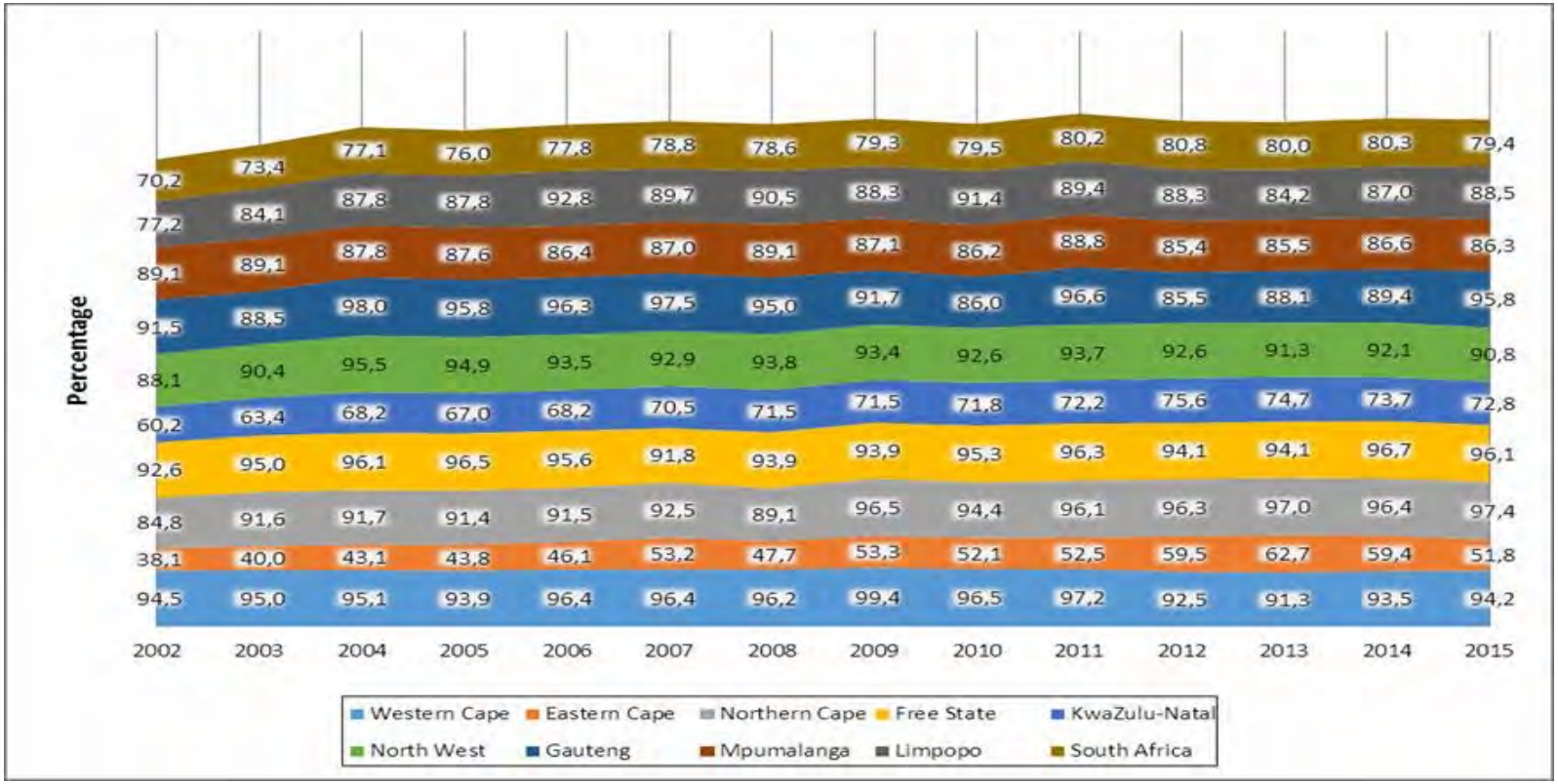
SANITATION



The highest increase was recorded in the Eastern Cape, where 74.3% of households had access to improved sanitation facilities in 2015, compared to the almost 6% of households who had access in 2002. However, there are still 238 000 households using bucket toilets according to Stat SA, GHS Special development indicators report (2018), 1.5% of the total households in South Africa.

It is also evident that the more rural provinces such as Eastern Cape, Kwa-Zulu Natal, Mpumalanga and Limpopo had the least access to sanitation in the 2002 and also showed that the highest percentage of households received sanitation are in these provinces. With urbanization and migration of people to Gauteng, there are also less rural areas in Gauteng, therefore the decline from 80.1% to 55.2% of households in rural areas with access to sanitation.

WATER



The percentage or rural households with access to improved drinking water sources by province, 2002-2015, is illustrated in figure 7 below. An overall improvement from 70.2% in 2002 to 79.4% in 2015 is observed, which meant that nearly four-fifths of rural households had access to improved drinking water sources in rural areas

It is also evident that the more rural provinces such as Eastern Cape, Kwa-Zulu Natal, North-West and Northern Cape had the highest percentage growth of households with access to improved drinking water. A worrying factor is that Mpumalanga showed a 3% decline in percentage of households with access to improved drinking water. This can be due to migration to Mpumalanga and a higher demand to access to improved drinking water.

ENERGY

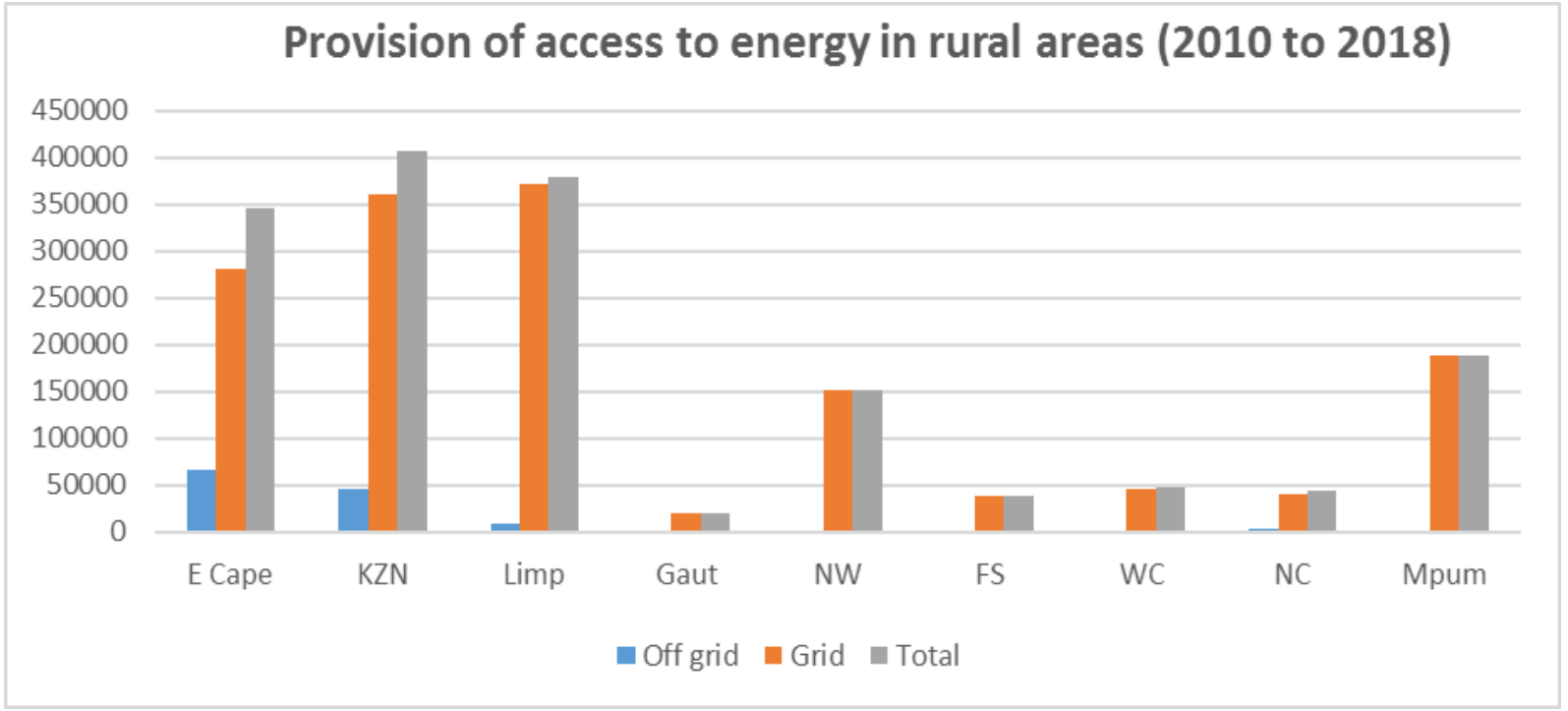
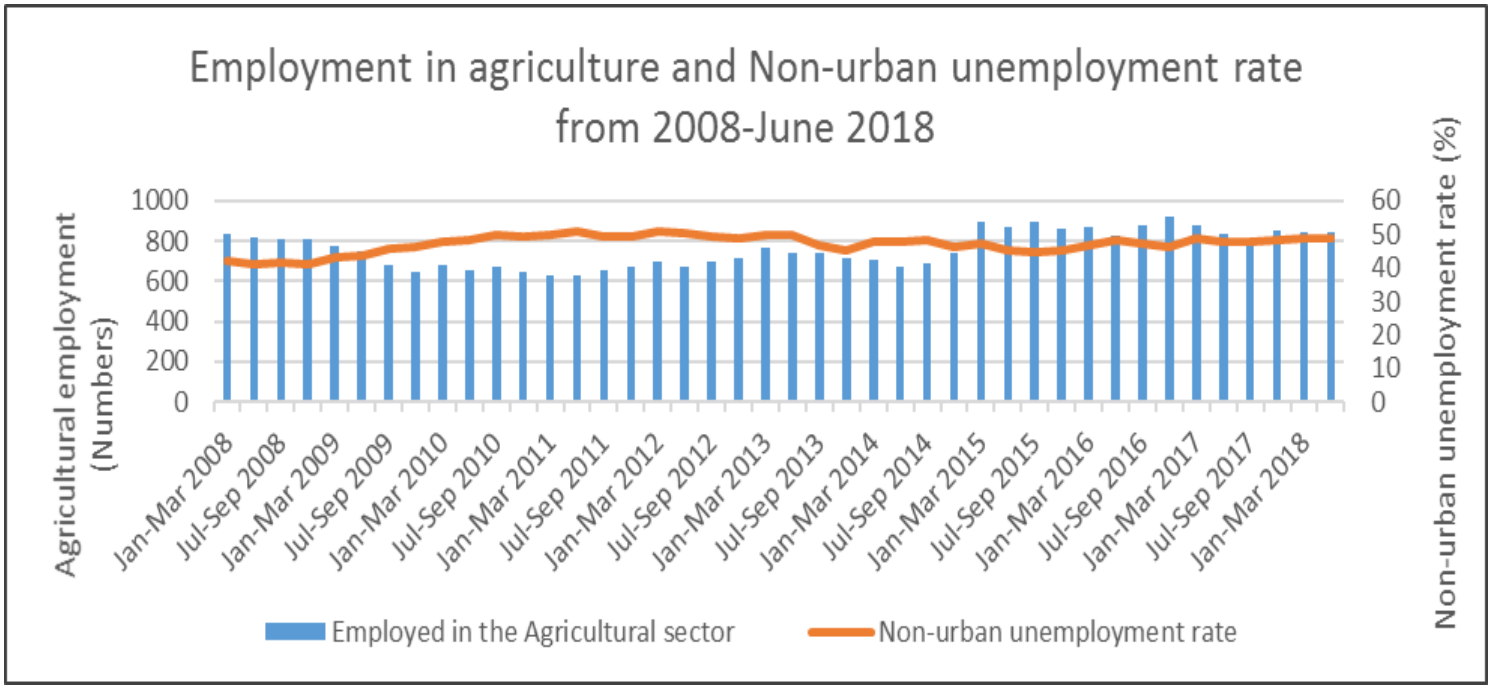


Figure 8 below depicts the provision of access to energy, off grid and grid, in rural areas from 2010 to 2018. These households' forms part of the 91.1% of households' country wide which were had access to electricity (off-grid and on grid) in 2016. (StatsSA CS 2016). More households were connected to the grid or off-grid to have access to energy in the provinces with more rural areas such as Eastern Cape, Kwa-Zulu Natal and Limpopo. These provinces also had low levels of access to electricity in 1996, according to non-disaggregated data (urban versus non-urban) in the Community survey of 2016.

RURAL EMPLOYMENT



The National Rural Youth Service Corps (NARYSEC) introduced in 2010, as a youth skills development and employment programme aimed at empowering rural youth (age 18-35) from each of the 3 300 rural wards where the CRDP is piloted. Since its inception in September 2010 to date, NARYSEC has recruited 22 341 (March 2018) rural youth in all 9 Provinces. (DRDLR Website)

In Figure 9 below, the trend in agricultural employment versus non-urban unemployment van be seen. If there is a decline in employment in Agriculture, there is an increase in the non-urban unemployment, which a strong indication that agriculture employment is a counter measure for rural unemployment and can assist in eradicating poverty, creating employment and stimulate economic growth. Uncertainty related to land ownership contributes to a lower production, thus also a lower employment in Agriculture.

CASE STUDIES

- Although, expenditure on land reform continues to comprise less than 1% of the national total, yet the literature is mostly critical of the performance of land reform since 1994.
- Some positive impacts of Land reform are that most urban land claims have been resolved, and most were settled with cash payouts. In relation to dignity restoration', then, cash settlements do not confront the underlying dehumanization, infantilisation and political exclusion that enabled the dispossession. (PLAAS 2016).
- Some rural land restitution claims have resulted in significant benefits to beneficiaries.
- There are a relative small number of successful land restitution projects. These depend critically on effective management and the employment of skilled professionals and access to private sector finance. E.g. Makuleke community tourism venture in the Northern part of Kruger National Park, Moletele claim, Hoedspruit, in partnership with private sector companies, Ravele CPA, Levubu valley in Limpopo, export-oriented macadamia nut farms, and Amangcolosi community, Kranskop in KwaZulu-Natal, Ithuba Agriculture,
- Some apparent 'success stories', such as the joint ventures between TSB Sugar and communities, Nkomati area in Mpumalanga, are problematic, especially in terms of how widely the benefits are spread. (James and Woodhouse, 2013).
- There are projects which have not been planned well, or not received financial or other support services, or have 'gone wrong' in some way or other, but which have nevertheless led to livelihood enhancements. They generally occur through a combination of smallholder agriculture and other livelihood opportunities, together with well-located settlement, developed by people themselves rather than through official support for these kinds of strategies. These are less visible, but some are documented in case studies such as Munzhedzhi and Morebene in Limpopo.
- Some land redistribution projects have delivered improvements in livelihoods. Lahiff et al (2008) document four cases of the latter type of project in Limpopo, where land use has been more intensive than it was before land reform, mainly though individual cropping by smallholders. The economic benefits have been real but modest, focused largely on improved food supply rather than cash income, and in the face of a range of problems: constrained supplies of labour, insufficient access to cash for purchase of inputs, weak communal property institutions, and inadequate project design and support from government. (Lahiff et al, 2008).

What have been the persistent challenges to date?

1. Slow pace of land reform and land restitution in South Africa due to systemic constraints and governance challenges due to regressive legislative changes that are underway and current legislation. Amidst slow progress, there is also growing evidence of elite capture of land reform, by state-connected elites and traditional authorities, often in partnership with corporate interests.
2. Inadequate implementation of section 25 (3) of the Constitution to achieve land expropriation through just and equitable provisions, for the defining of what is just and equitable need to be done. Use of “market value” principle over “just and equitable” in the compensation of land owners slowing the pace and inflating the cost of land restitution and redistribution.
3. The legacy of apartheid spatial planning entrenching racial, gender and spatial inequality and constraining economic development of urban areas, townships, villages and small towns.
4. The Prohibition of Subdivision of Agricultural Land Act number 70 of 1970 and slow progress on Preservation and Development of Agricultural Land Framework Act prevents agriculture transformation and drive changes in land use away from productive Agriculture.
5. Legislation which failed to meet the objectives outlined in the Constitution and in policy documents or which is not in place or where it is lacking to ensure that the aim/goal of the initiative is achieved,
6. Unproductive land due to inadequate and in-appropriate post settlement support, concentrated ownership and production patterns, appropriate infrastructure and water use entitlement constraining participation of Smallholder producers.
7. Farmers support programmes are fragmented and not yielding the desired outcomes, for only 15.6% (2017) of South African hhs are involved in Agricultural Production. (Stats SA GHS, 2017)
8. Tenure security and conflicting views on approaches to resolve traditional communal area tenure and Continued disputes within Communal Property Associations hampering Post Settlement support.
9. Since the establishment of the Comprehensive Africa Agriculture Development Programme (CAADP) in 2003, there has been lax implementation of the pillars. Member states committing to increase public investments in agriculture to at least 10% of their annual national budgets by 2008. Currently, the percentage of total MTEF for DAFF and DRDLR is 1.9% of the National budget for MTEF 2018-2021.
10. Staff vacancies, especially at senior level (MPAT results) and lack of consistent leadership due to political interference in the roles and responsibilities of the accounting officers at both DAFF and DRDLR.

What should be the priorities for 2019-2030 (11-year Horizon)

1. Development of a Land Reform Framework Bill to give effect to S25(5) and to provide framework legislation for the interpretation and operationalization of all land-related laws and policies;
2. The development of a Land Records Bill to create a robust land administration system across tenure types, to provide the basis for realizing S25(6) and its requirement for measures to be taken to provide tenure security;
3. Define “Just and Equitable” to ensure adequate implementation of section 25 (3) of the Constitution to achieve land expropriation through an integrated broader property plan to add value and to facilitate restitution, tenure security and equitable access to land without diminish property value, economic growth and food security.
4. Adopt and implement a National Sector Land Assembly Strategy to ensure that all spheres develop a comprehensive visioning for strategic areas, balancing spatial, economic, social, agricultural, environmental demands and land administration etc.
5. Build the capacity of local government for appropriate land and housing delivery, with emphasis on municipal spatial.
6. Review Legislation to ensure tenure security through adequate recognition to and protection of the rights of long-term occupiers and labour tenants and Communal Land Tenure and transfer tittle deeds to the rightful owners.
7. Accelerated Agrarian Reform through pursuit of social compacts with established agricultural sector to promote participation and development of emerging and smallholder farmers
8. Invest more in Agriculture to ensure food security, economic growth and job creation, for Agriculture is a catalyst for economic growth in rural communities and small towns.
9. Consolidate all smallholder producers support programmes in line with the Comprehensive development support of producers Policy

WHAT SHOULD BE THE PRIORITIES FOR 2019-2024 (5-YEAR HORIZON)

1. Provide comprehensive, workable, quantifiable and scientific support to smallholders to ensure increased productivity and expansion of production. Investment in agro-processing and consolidate all smallholder support programmes to have a bigger impact.
2. Expropriation of land without compensation, while ensuring that capable support is in place for the land to remain productive
3. Sustainable management and use of natural resources to ensure optimal production and to ensure all unproductive land is used for production.
4. The pursuit of further consultation on the Expropriation Bill, to pave the way for its adoption and signing into law, to bring legislation in line with constitutional provisions on expropriation of land for land reform purposes, subject to 'just and equitable' compensation; and Review all laws regulating expropriation to ensure that they include the principle of expropriation without compensation (or through just and equitable provisions), without harming the economy and food security and in line with international agreements.
5. Expedite the transfer of the Recapitalisation and Development Programme from the DRDLR to DAFF to ensure newly transferred farms remain in production.
6. Implementation of the 26 initiatives of Operation Phakisa: Agriculture, Land Reform and Rural Development which are as follows:
    i. Producer Support: Blended Financial Solution, NDIMO Desk, The Demand led public/ private agri-skills unit, merged with Livestock training
    ii. Land Reform: District Land Reform Delivery Centre, Fast tracking the settlement of outstanding restitution claims in a sustainable manner, Accelerated Land Development and Redistribution Initiative (ALDRI), Promote and protect rights of persons living under insecure tenure
    iii. Rural Development: Strategic leadership and coordination for structural transformation, Basic services
    iv. Horticulture: Integrated Horticulture Value Chain, Unlocking Water for Production, Trade Promotion, Retention and Optimisation (P.R.O)
    v. Grains: Integrated Grain Value Chain/Unlocking Finance through PPP, Grain Know How
    vi. Livestock: Access to commercial and alternative livestock value chains, National livestock census (NLSC) and an animal identification and traceability programme (LITS), Fortified veld management for sustainable livestock production
    vii. Labour: National Agricultural Decent and Strengthening Legal Compliance Mechanisms, The Farm worker house and land ownership
7. Improve integration and coordination of rural development across and between all spheres of government departments for the implementation of synchronised rural development strategies towards achieving concrete targets.
8. Calling a halt to Parliament's processing of all pending legislation related to land, in view of the recommendations of the HLP – including the Communal Land Tenure Bill, Communal Property Associations Amendment Bill, Extension of Security of Tenure Amendment Bill, Traditional and KhoiSan Leadership Bill, Regulation of Landholdings Bill, Preservation and Development of Agricultural Land Framework Bill;
9. Amendment of the Interim Protection of Informal Land Rights Act to make it permanent as a basic level of protection of people holding informal land rights, including 30% of the population living in the communal areas of the former Bantustans;
10. Clarification of the future of the Ingonyama Trust in order to recognize residents' de facto ownership of land and the repeal of the Ingonyama Trust Act and re-organization of governance of land in the communal areas of KwaZulu-Natal to meet the requirements of tenure security in S25(6).
11. A comprehensive agricultural census and land audit is of paramount importance. Without a comprehensive database, the planning, financing and implementation of a holistic land reform programme will remain haphazard and futile.

CONCLUSION

- Significant milestones had been achieved, reducing, amongst others, poverty and vulnerability to food in-security post-democracy however, challenges still prevail in rural communal and farm areas. Progress in urban areas stands in stark contrast to the often extreme levels of poverty many South Africans in rural areas still endure. Social deprivation and underdevelopment continues to haunt too many rural areas. For nearly half a century, the apartheid regime viewed the inhabitants of rural areas simply as labour reserves, unworthy of development efforts, whereas the post-1994 development paradigm was premised on the assumption that urban development would inevitably cascade to the rural periphery. Consequently, rural areas have not realised much development with many rural people, seeking a better future by migrating to the cities, resulting in over-urbanisation. The development paradigm thus far, with its over-emphasis on urban development and sustaining a sizeable proportion of the rural economy through the social security assistance programme, is not yielding the desired outcomes.
- Case studies undertaken to assess the overall impact of Land Reform on land use, production and livelihoods as well as of the institutional arrangements within these projects tells different stories. Therefor every case must be managed according to its own individual circumstances.
- DAFF's programmes are not achieving the desired impact on key transformative indicators in the sector such as the constraints to investment, increasing the number of commercial farming units, the rate at which new entrants become successful commercial farmers, the low wage income and poor living conditions of farm workers.

NGIYATHOKOZA

DANKIE

NGIYABONGA

INKOMU

KE A LEBOGA

NDIYABULELA

NDI KHOU LIVHUHA

Thank you

planning, monitoring & evaluation

Department:
Planning, Monitoring and Evaluation
REPUBLIC OF SOUTH AFRICA

2030 NDP

Annexure C

rural development
& land reform

Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

Project Management Services (PMU)

Scientific Analysis of the Proactive Land Acquisition Strategy DRDLR: Advisory Committee

Date: 01 November 2018

CONTENTS

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

1. Introduction

- Background, appointment as per TOR
- Scope of Work
- Mandate and Objective
- PMU Approach
- Factors for successful farming
- GIS Implementations
- Project Analysis
- Process Overview: Project Roadmap (Berlin)

2. Progress to date

- Progress on Farm Assessment
- Progress on Farm Analysis
- High level results of 262 priority projects

3. Technical Review and Funding Requirements:

- Cropping Projects
- Livestock Projects
- Fruits projects
- Vegetable projects
- Additional proposals to follow

4. Monitoring and Evaluation

5. Key findings in terms of the critical success factors

6. Closure

1. INTRODUCTION

- Background, appointment as per TOR
- Scope of work
- Mandate and Objective
- PMU Approach
- Factors for successful farming
- GIS Implementations
- Project Analysis
- Process Overview: Project Roadmap (Berlin)

rural development & land reform

Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

entsika
Driven by a desire to make a difference

ARC • LNR
Excellence in Agricultural Research and Development

BACKGROUND, APPOINTMENT AS PER TOR

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

The Agricultural Land Holding Accounts (ALHA) is a Trading Account established by the Department of Rural Development and Land Reform (the Department) to implement and manage the Proactive Land Acquisition Strategy (PLAS). The strategy includes the acquisition of strategic land and the development thereof. In 2009, the Department took a conscious decision to conceptualise and implement the Recapitalisation and Development Programme (RADP) as an all-encompassing development strategy, in a concerted effort to ensure productivity and food security.

The following are key focus areas:

- The ability of these farms to generate steady income, underpinned by philosophy of extracting value from the land, is fundamental in achieving appropriate returns to the state
- ALHA is overall responsible for financial management including effective asset management and collect of lease rental
- **Proper project management is key in achieving high level of performance by these farms. In this case, project management must focus on reducing underperforming projects and increasing optimal land utilisation.**

Problem Statement:

The Department identified that:

- Most of the PLAS farms are not yielding the required success as anticipated and thus some are in distress, or had failed due to a lack of adequate and appropriate post-acquisition support
- The current status of these farms varies substantially in terms of productivity and sustainability.
- Most of these farms are not performing up to the expectation and some of the challenges are attributed to a lack of proper capacity within the Department to provide day to day Project Management services to theses farms

ARC • LNR
Excellence in Agricultural Research and Development

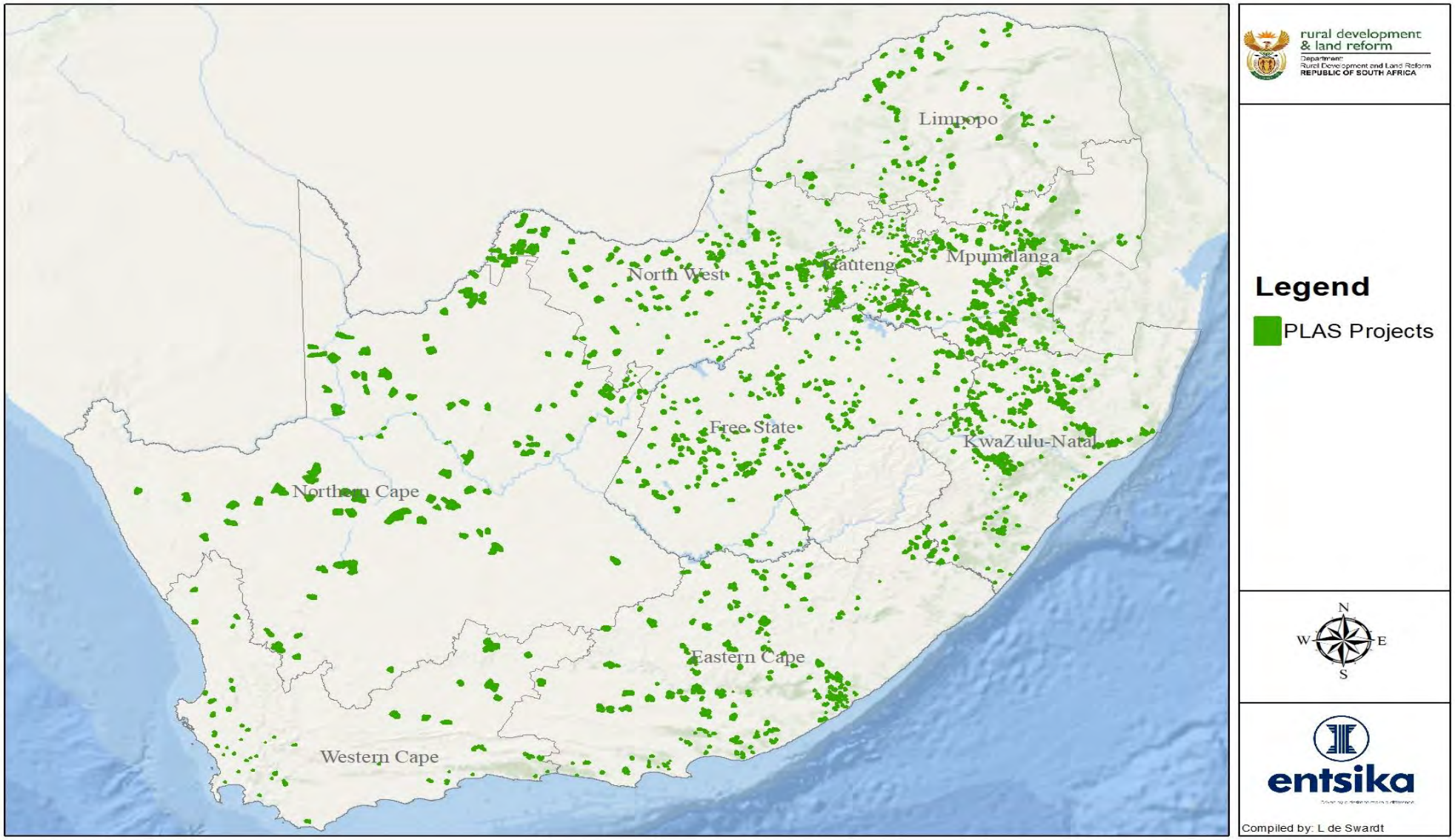
entsika
Driven by a desire to make a difference

SCOPE OF WORK

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

PLAS Facts:

- **Number of projects:** 2 21
- **Total hectares:** 2 248 650
- **Total Assets:** 16 026
- **Price Paid (Ha):** R11 bil
- **Price Paid (Assets):** R2 bil



MANDATE AND OBJECTIVE

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

Mandate of the PMU:

- To establish potential and performance on PLAS projects
- Identify high potential crop projects for planting during the summer season
- Identify other commodities – “quick wins”
- Identify infrastructure needs linked to increasing production

Objective:

- Assist PLAS farms to reach their optimal potential
- To increase work opportunities
- To increase production, national food security & economic growth

ARC • LNR
Excellence in Agricultural Research and Development

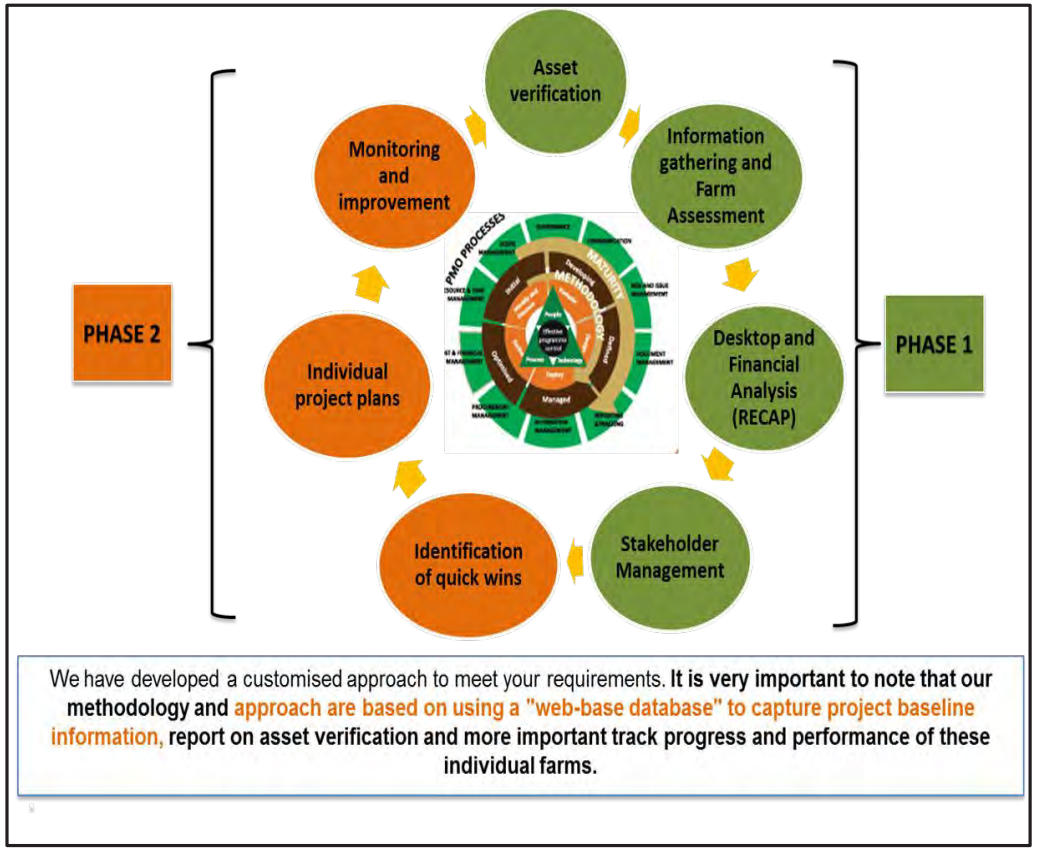
entsika
Driven by a desire to make a difference

PMU APPROACH

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

The approach as per diagram demonstrates the delivery model of the entire project, however this presentation will focus on giving feedback on:

- Farm assessments completed (physical farm visits)
- Farm analysis completed (panel)
- Presentation of panel results
- Identification of quick wins
- Proposal of implementation plans – 262 Commercially viable projects



ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

FACTORS FOR SUCCESSFUL FARMING

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

Aim: Create a cohort of black commercial farmers contributing to agricultural GDP



Beneficiary	Human capability or capacity / ability of a beneficiary to sustainably manage the project in accordance with the PLAS objectives
Land	Availability of land; suitability of land for a particular commodity; natural resources available on the land, etc.
Infrastructure & Equipment	Access to infrastructure, farming equipment, production inputs and operational requirements
Support	Support provided to the project by PLAS, such as accountants, extension officers, and mentors; Recapitalisation is also classified as support
Market	Referring to access to markets (formal / informal / supply agreements, etc.) and the tools required to take products to market (e.g. transport / logistics / storage / quality assurance)
Legal	Referring largely to the legal rights required for farming activities, e.g. water use rights, fire compliance, etc.

CRITICAL SUCCESS FACTORS

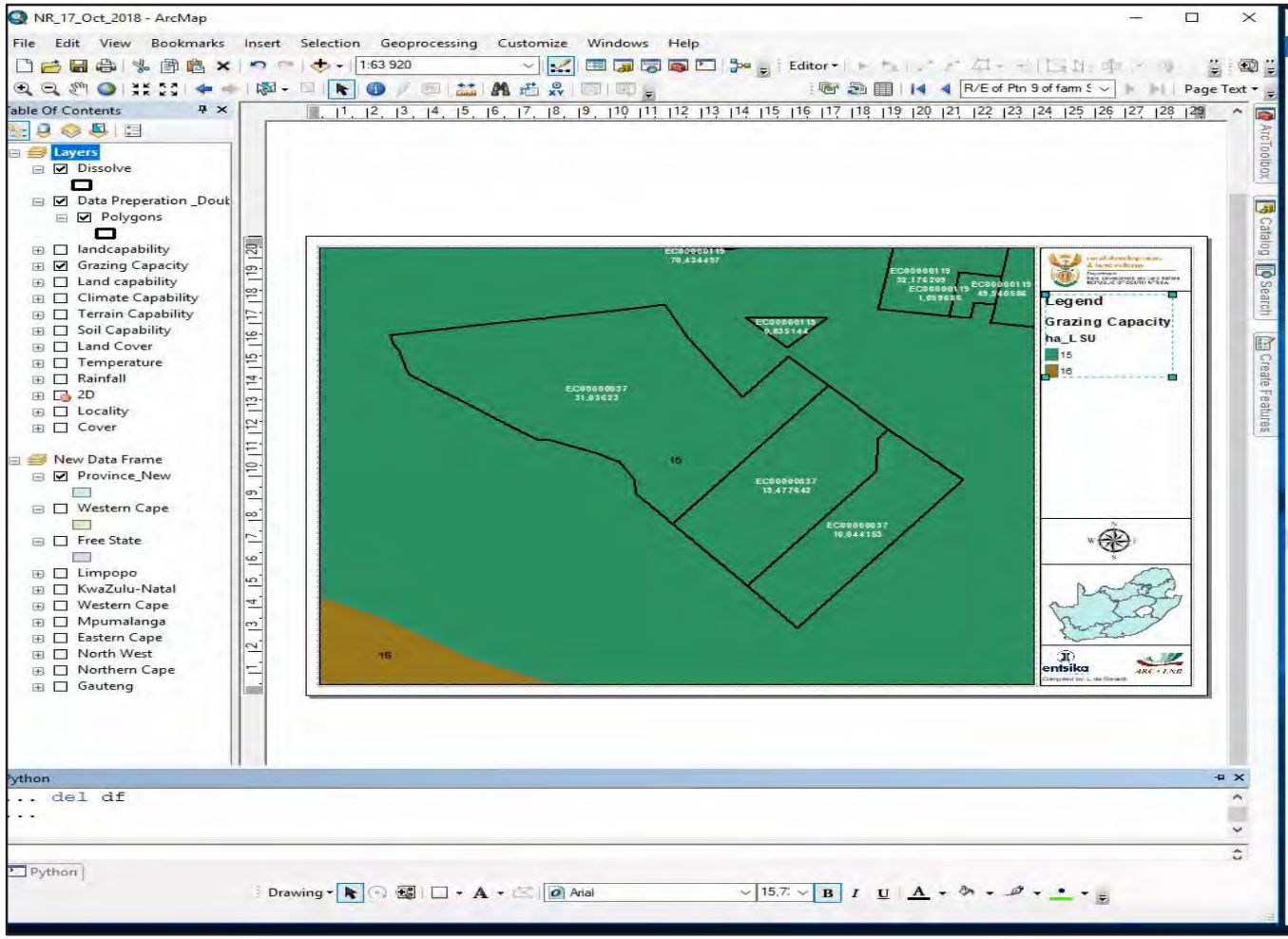
A farm's ability to produce to its potential is dependent on a number of inter-linked, inter-related factors

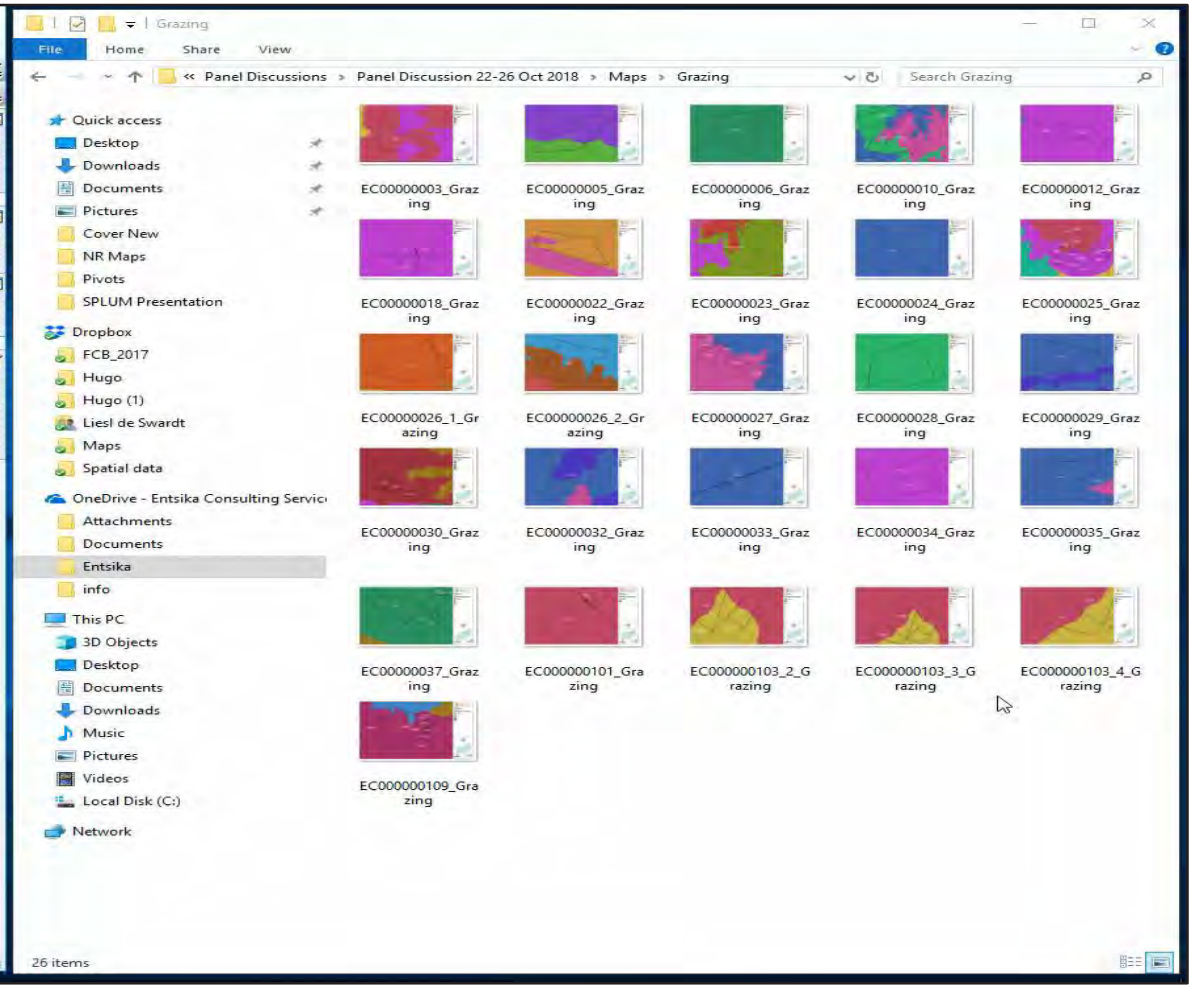
ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

GIS IMPLEMENTATIONS

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA





ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

PANEL ASSESSMENT

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

STEP 1	General description of project provides context – location, size, enterprises, beneficiaries, etc.
STEP 2	Scoring agro-ecological status – soil, climate, topography, water, suitability & degradation status
STEP 3	Potential productivity vs current productivity reported by beneficiary (net income)
STEP 4	Potential/actual productivity compared with investment (purchase price & recapitalisation); suggested annual rent based on 1% of purchase price / 5% of projected net annual income
STEP 5	Infrastructure quality & quantity – broad infrastructure status index Productivity, sustainability, farm condition & support utilisation; calculation in a compound index determines beneficiary capability
STEP 6	Define limitations (e.g. water, infrastructure, finance) & risks (e.g. security, fire, pests & diseases)
STEP 7	Project presented as spider graph, according to 5 criteria: potential, viability, infrastructure, beneficiary capability, and ROI & finally, categorise project, define risks & limitations, provide recommendations

CATEGORISATION OF A FARM – GIVEN POTENTIAL ENTERPRISES

- Farm categorisation is based solely on the aggregate panel score of farm's agro-ecological status and related viability of commodities, **potentially** produced, given the inherent natural resources of the farm:

Category 1	**Settlement/Non-viable for Farming**	**Unable to support substantial income above R 150 000 pa – insufficient resources**
Category 2	**Livelihood based farming**	**Able to provide income of R 150 000 – R 349 000 pa – supplementing other income**
Category 3	**Medium-scale viability**	**Provide income of R 350 000 – R 700 000 pa – with limited surplus**
Category 4	**Commercially viable**	**Net income above R 700 000 pa – extensive surplus production**

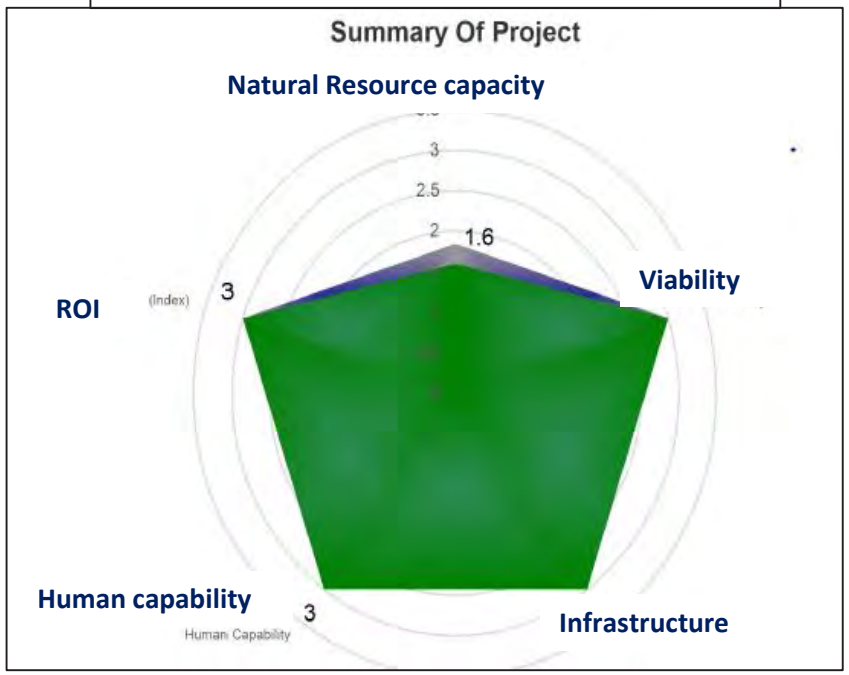
PANEL ASSESSMENT

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

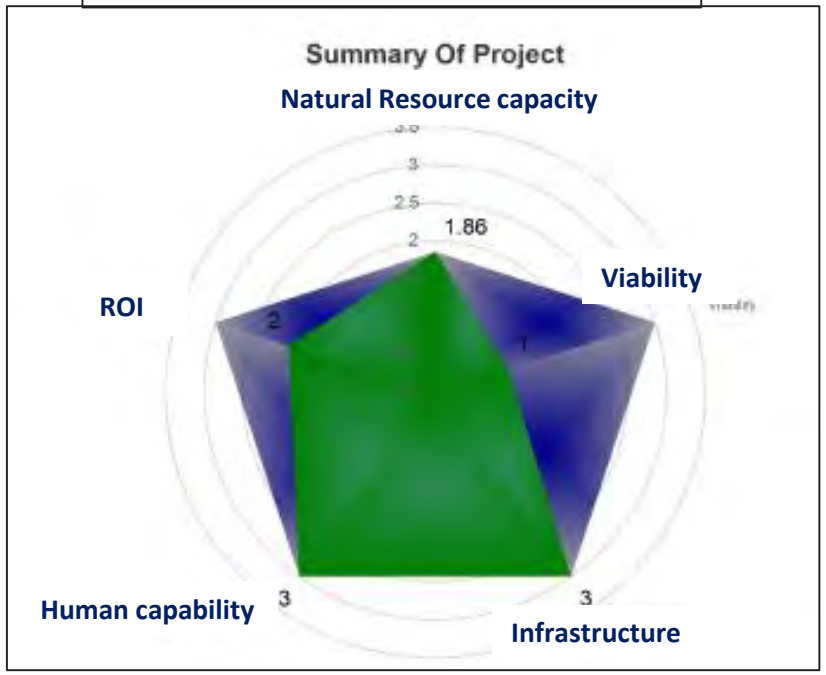
Examples of the dashboard's produced, as a result of the panel analysis

- Blue being potential
- Green actual achievements of the project as provided by the beneficiary

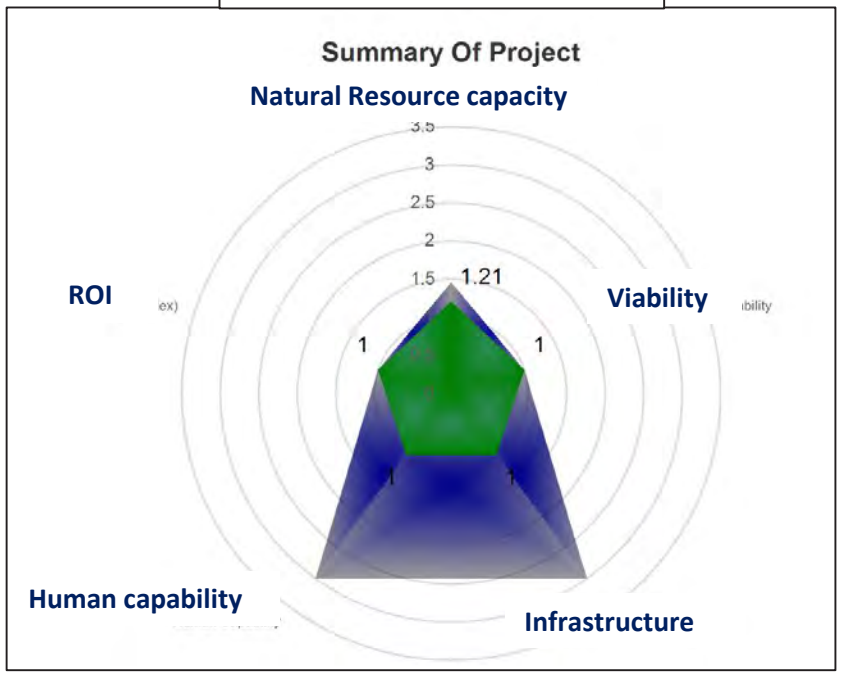
Commercially Viable Project



Commercially Viable Project



Non- Viable Project



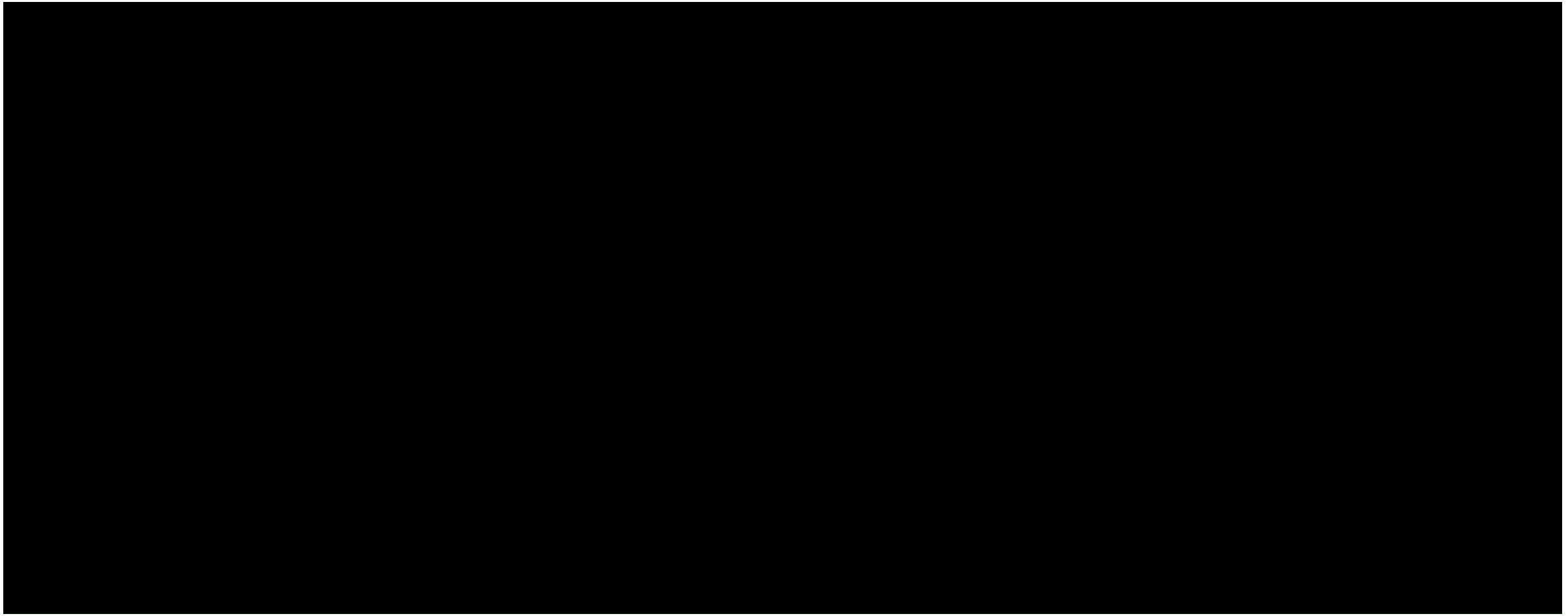
ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

PROCESS OVERVIEW: FS188 (EXAMPLE)

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

Farm Visit:



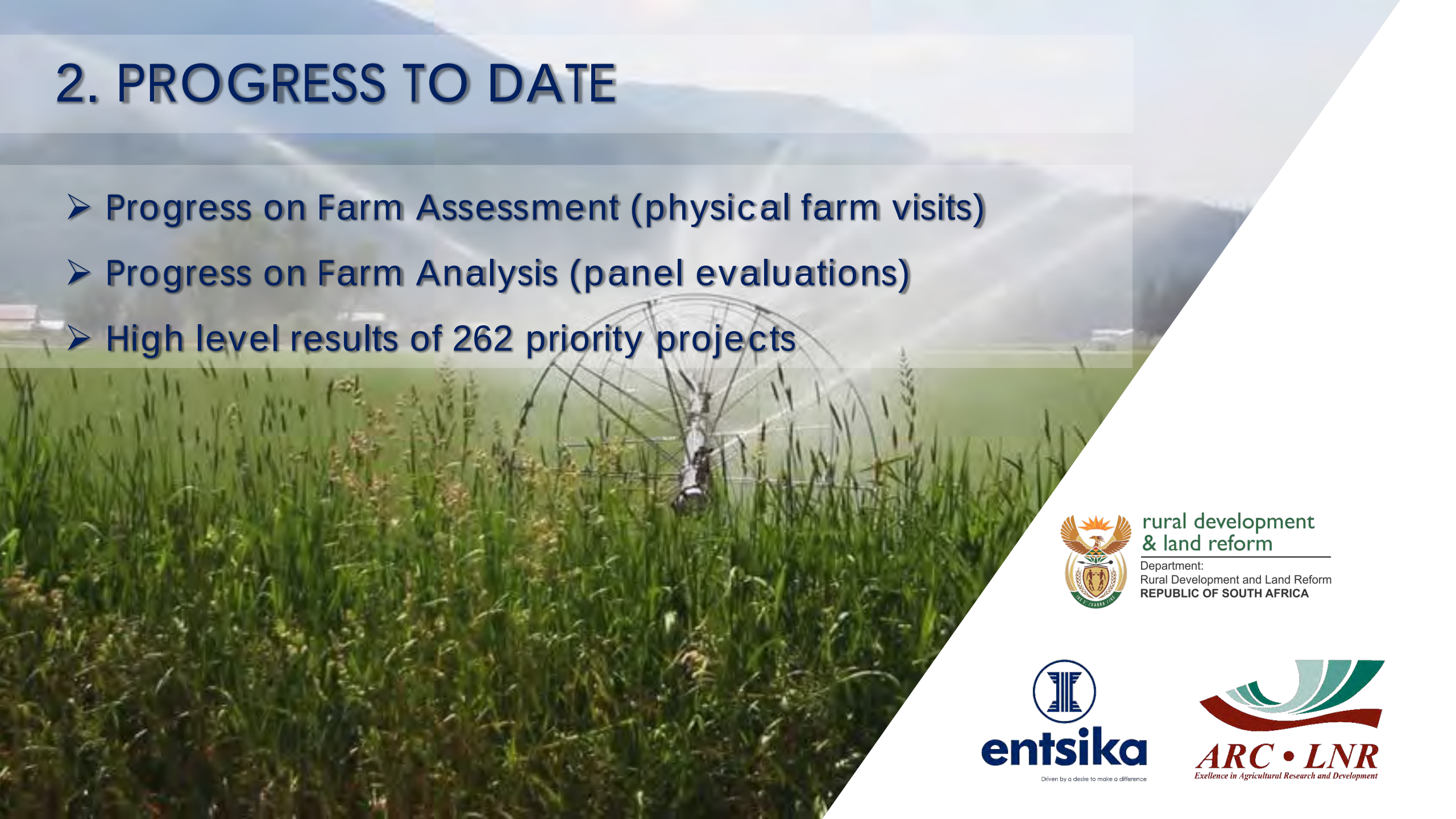
DETAIL ASSESSMENT BERLIN: EXAMPLE FS 188

ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

2. PROGRESS TO DATE

- Progress on Farm Assessment (physical farm visits)
- Progress on Farm Analysis (panel evaluations)
- High level results of 262 priority projects



rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

entsika
Driven by a desire to make a difference

ARC • LNR
Excellence in Agricultural Research and Development

PROGRESS TO DATE: 31 OCTOBER 2018

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

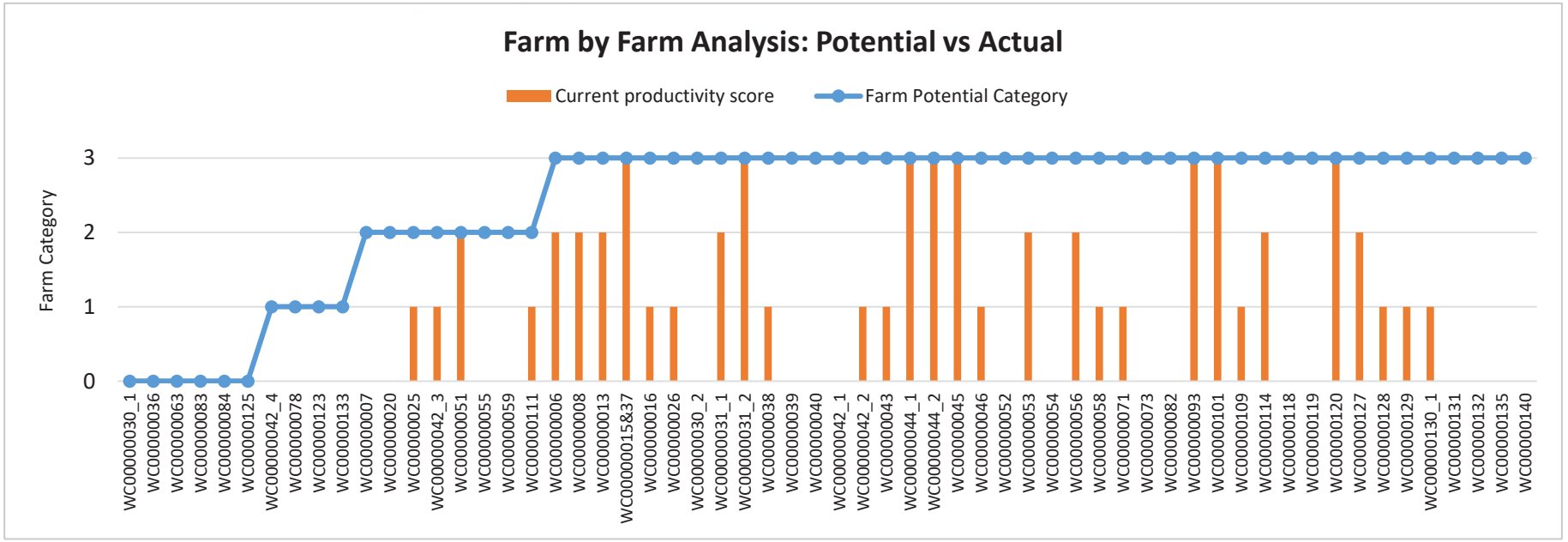
Physical farm visits:

Project analysis(panel):

Province	Total Planned Farm Visits	Completion until 31 October 2018	Completion % until 31 October 2018		Number of projects analysed by panel	% of total number of projects
Eastern Cape	291	230	79%		110	38%
Free State	312	282	90%		166	53%
Gauteng	214	194	91%		193	90%
KwaZulu Natal	341	271	79%		67	19%
Limpopo	144	136	94%		135	94%
Mpumalanga	391	330	84%		199	51%
Northern Cape	154	140	91%		76	50%
North West	296	240	81%		136	46%
Western Cape	67	64	96%		63	98%
Total	**2210**	**1745**	**85%**		1144	**52%**

RESULTS OF 110 EASTERN CAPE PROJECTS:
ACTUAL VS POTENTIAL

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA





HIGH LEVEL RESULTS OF 262 PRIORITY PROJECTS: PROGRESS TO DATE 31 AUGUST 2018

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

To date the panel has analysed 1144 projects. For the first round of implementation 747 projects have been prioritised as at the of August 2018. The prioritised projects are categorised as follows.

Category	Overall	Actual Nett Income	Total Potential Income	Variance	Recap	No Recap	Actual Nett Income	Total Potential Income	Variance
Commercially viable	426	R152 273 643	R937 225 778	-R784 952 134	164	262	R68 966 293	R522 541 107	-R453 574 814
Medium scale viability	186	R17 068 499	R96 022 556	-R78 954 057	50	136	R10 816 608	R69 648 844	-R58 832 236
Livelihood based farming	84	R9 983 081	R21 192 933	-R11 209 852	13	71	R7 185 175	R17 853 884	-R10 668 709
Non-viable for farming	51	R1 310 786	R3 099 874	-R1 789 088	5	46	R1 175 544	R2 665 734	-R1 490 190
Totals	**747**	**R180 636 009**	**R1 057 541 141**	**-R876 905 131**	**232**	**515**	**R88 143 620**	**R612 709 569**	**-R524 565 949**

Fact sheet of the 747 projects:

- 426 of the 747 projects are commercially viable
- Potential income of R937 million versus actual of R152 million
- 747 only 34% of the PLAS portfolio – extrapolate the potential to 100% - **Over R 2 billion.**

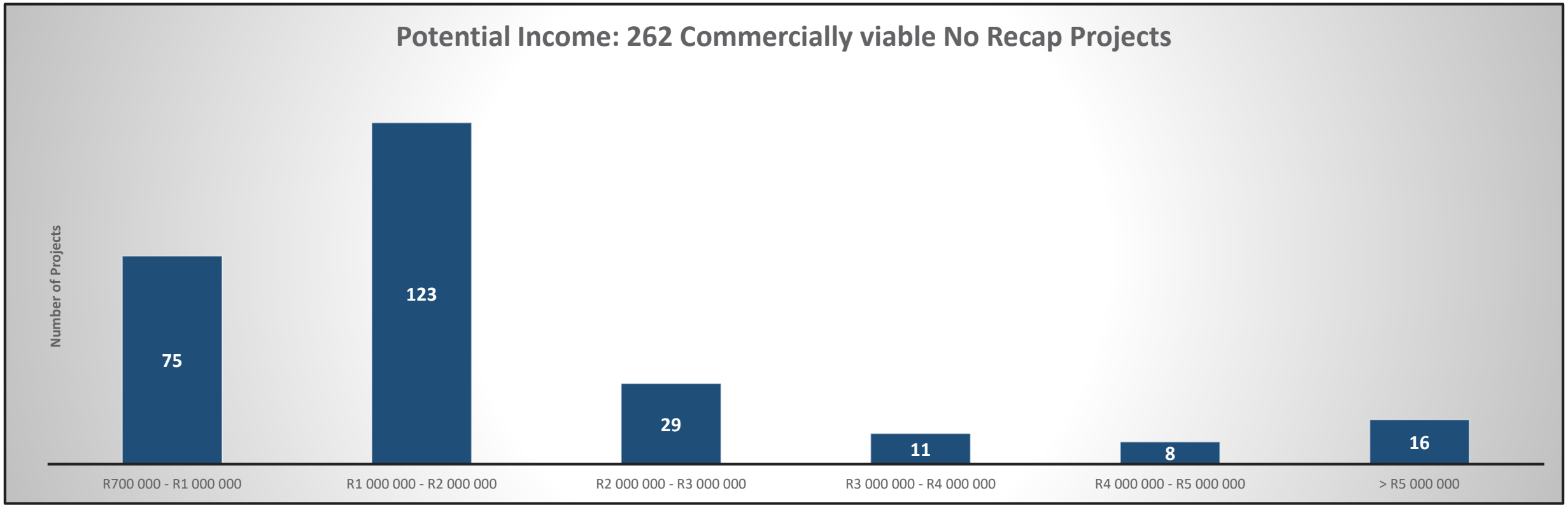
Fact sheet of the 515 projects, no RECAP received:

- 262 projects commercially viable and need intervention plans
- Potential income of the 262 projects – R523 million

NATIONAL DISTRIBUTION OF THE 262 PROJECTS:

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

Potential revenue distribution of the 262 commercially viable projects identified:



These projects have not received any RECAP and the team is working on interventions/implementation plans to increase production on this targeted group.

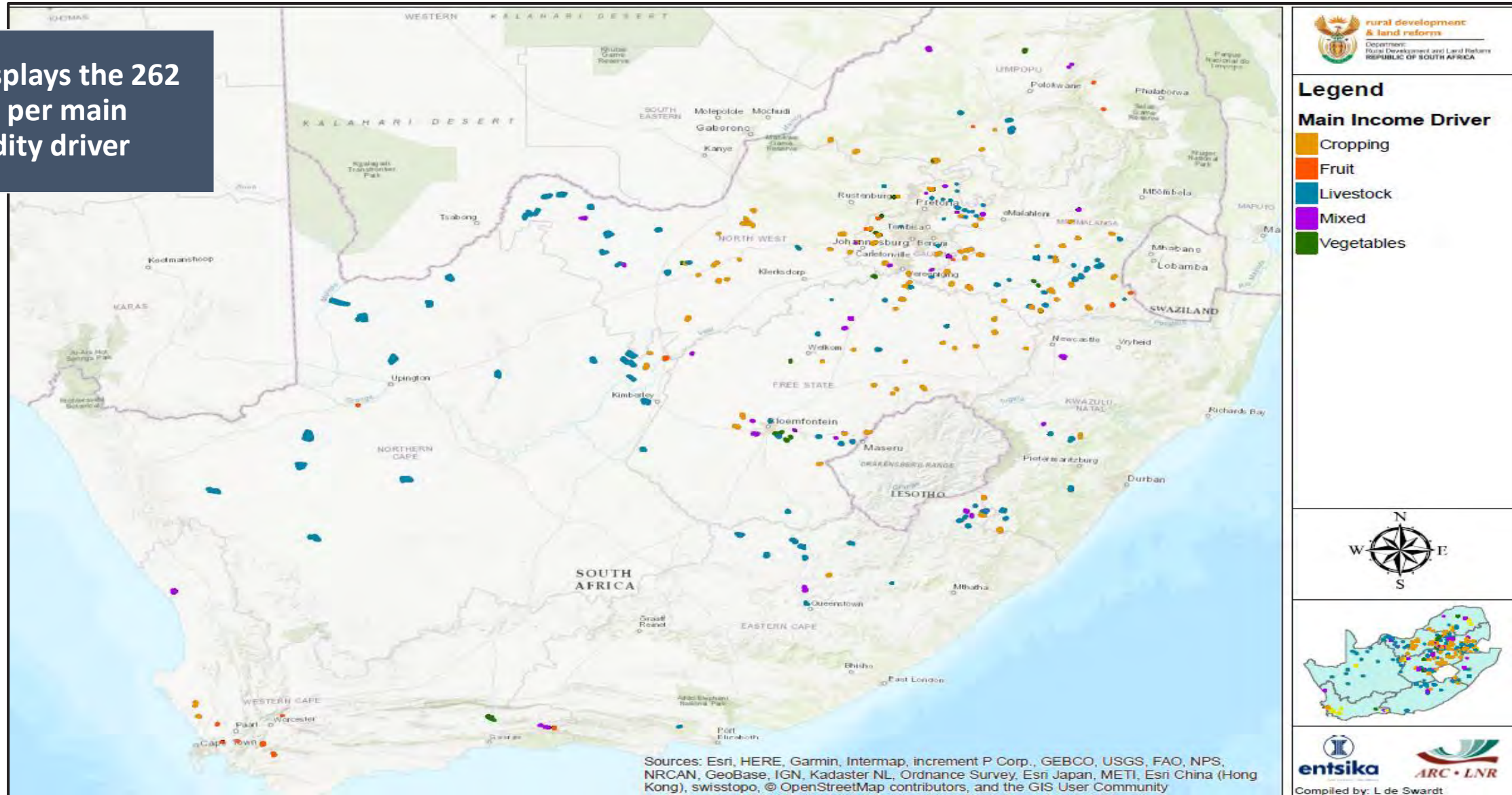
ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

NATIONAL DISTRIBUTION OF THE 262 PROJECTS:

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

The map displays the 262 projects per main commodity driver



3. RESULTS OF TECHNICAL REVIEW OF CURRENT PORTFOLIO AND FUNDING REQURIMENTS

3.1. Cropping

3.2. Livestock

3.3. Vegetables

3.4. Fruit



rural development & land reform

Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

entsika

Driven by a desire to make a difference

ARC • LNR

Excellence in Agricultural Research and Development

PORTFOLIO OF PLAS FARMS EARMARKED FOR INTERVENTION

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

Intervention on commercially viable projects which have not received RECAP/funding to date, the intervention population is as follows. The team is working on intervention/farm plans to implement to increase production on these projects within the 2018/19 financial year.

Category	Number of Projects	Actual Income	Potential Income	Potential Jobs	Recommended Beef	Recommended Sheep	Other Livestock Recommended
Cropping	16	R5 136 230	R24 186 015	160	1 000	351	5 020
Cropping/Fruit	2	R52 042	R5 372 850	46	220	0	0
Cropping/Livestock	39	R10 966 414	R75 767 642	324	7 035	7 224	1 385
Cropping/Vegetables	1	R8 200	R999 000	45	0	0	0
Fruit	16	R8 942 518	R78 971 015	2 289	138	150	50
Fruit/Cropping	1	R375 500	R952 500	40	0	0	50
Fruit/Livestock	4	R314 219	R5 645 697	146	0	260	7 930
Livestock	91	R16 371 121	R105 557 729	613	12 588	29 339	12 664
Livestock/Cropping	36	R7 177 245	R66 871 038	392	6 305	10 007	4 164
Livestock/Fruit	2	R392 950	R5 639 074	53	100	897	0
Livestock/Vegetables	3	R560 266	R3 216 589	141	386	436	3 860
Mixed	10	R4 303 923	R33 169 200	936	1 774	3 825	590
Vegetables	6	R348 813	R9 220 612	941	257	225	110
Vegetables/Cropping	4	R1 311 257	R5 740 550	423	256	0	0
Vegetables/Livestock	9	R916 072	R15 405 562	957	770	1 128	2 740
Poultry	20	R11 704 347	R83 469 823	61	471	0	1 584 455
Fruit/Poulty	1	R31 500	R1 108 800	1	0	0	8 000
Poultry/Vegetables	1	R53 676	R1 247 413	1	50	150	6 000
Grand Total	**262**	**R68 966 293**	**R522 541 107**	**7 567**	**31 350**	**53 992**	**1 637 018**

FUNDING REQUIRED BASED ON 262 PROJECTS

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

The funding requires presented to you today is based on 262 projects identified/analysed to date this number will increase after each panel sitting.

INTERVENTION COST

Commodity	Input cost	Mechanisation	Infrastructure	TOTAL	2019/2020
Cropping	R 128 600 829	R 35 964 900	R 44 838 000	R 209 403 729	R 416 265 785
Livestock - Beef & Sheep	R 237 866 480	R 38 101 120	R 40 060 465	R 316 028 065	
Vegetables	R 49 151 577	R 5 532 000	R 12 600 000	R 67 283 577	
Fruit	R 129 042 000	R 6 065 600	R 22 970 000	R 158 077 600	
TOTAL FUNDS REQUIRED	R 544 660 886	R 85 663 620	R 120 468 465	R 750 792 971	R 416 265 785

ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

3.1. CROPPING



rural development
& land reform

Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

entsika
Driven by a desire to make a difference

ARC • LNR
Excellence in Agricultural Research and Development

FUNDING REQUIRED: CROPPING

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

Funding requirements related to the cropping projects proposed for the next 2 years. Most of the projects failed the minimum requirements on soil testing and therefor are recommended for rehabilitation. The estimated time – 2 years.

FUNDING REQUIREMENTS FOR THE CROPPING PROJECTS					
Commodity	**Input cost**	**Mechanisation**	**Infrastructure**	**TOTAL**	**2019/2020**
18 projects - cropping 4631 ha	**R 49 013 794**	**R 35 964 900**	**R 44 838 000**	**R 129 816 694**	
75 projects - Rehabilitation of soil 20 009 ha	**R 79 587 035**	***R 149 853 750***	***R 186 825 000***	**R 79 587 035**	**R 416 265 785**
(These projects will take 2 years to rehabilitate to mechanisation and infrastructure need funding in 2019)					
TOTAL FUNDS REQUIRED FOR CROPPING	**R 128 600 829**	**R 35 964 900**	**R 44 838 000**	**R 209 403 729**	**R 416 265 785**

POTENTIAL INCOME STATEMENT	
Gross Income:	**R 60 932 700**
Minus Cost:	**R 49 013 794**
Potential net income	**R 11 918 906**

ARC • LNR
Excellence in Agricultural Research and Development

entsika

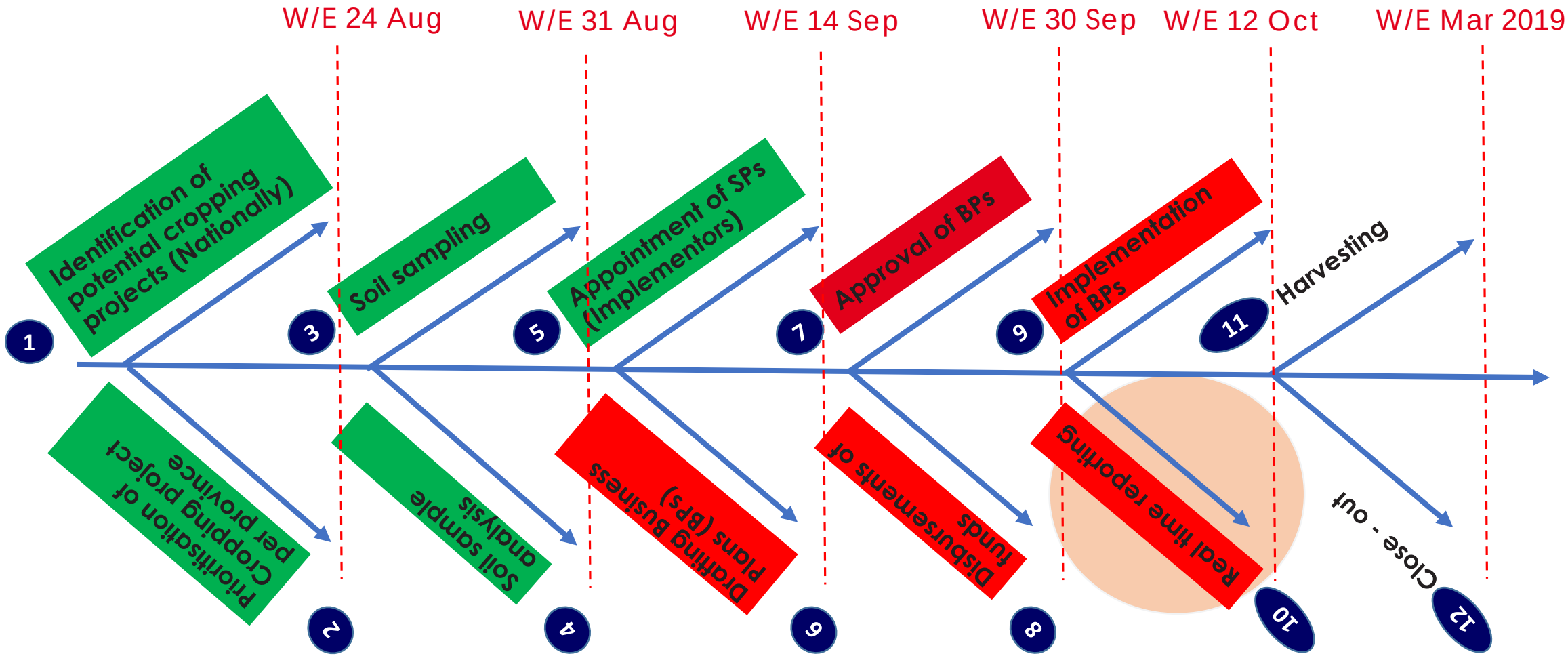
CROPPING OBJECTIVE

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

Assisting PLAS beneficiaries to plant 18 Summer Crop Projects hectares of summer crops: Approach and timelines

Complete

Deadline Missed



3.2. LIVESTOCK



rural development
& land reform

Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

entsika
Driven by a desire to make a difference

ARC • LNR
Exellence in Agricultural Research and Development

NATIONAL VIEW: LIVESTOCK PROJECTS

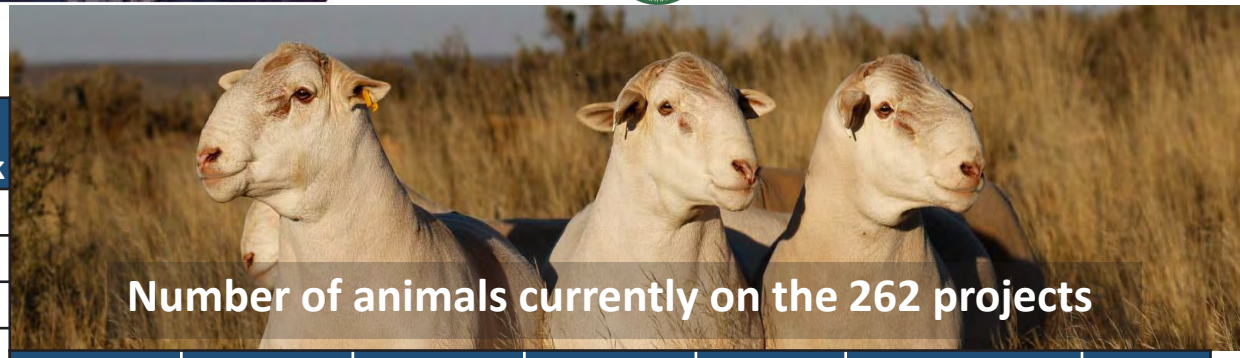
rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

The table indicates projects recommended for Beef & Sheep:

Category	Number of Projects	Recommended Beef	Recommended Sheep	Recommended Other Livestock
Cropping	16	1 000	351	5 020
Cropping/Fruit	2	220	0	0
Cropping/Livestock	39	7 035	7 224	1 385
Fruit	16	138	150	50
Fruit/Livestock	4	0	260	7 930
Livestock	91	12 588	29 339	12 664
Livestock/Cropping	36	6 305	10 007	4 164
Livestock/Fruit	2	100	897	0
Livestock/Vegetables	3	386	436	3 860
Mixed	10	1 774	3 825	590
Vegetables	6	257	225	110
Vegetables/Cropping	4	256	0	0
Vegetables/Livestock	9	770	1 128	2 740
Poultry/Livestock	20	471	0	1 584 455
Poultry/Vegetables	1	50	150	6 000
Grand Total	**259**	**31 350**	**53 992**	**1 628 968**

Fact sheet: projects with livestock

- 91 pure livestock projects – (Beef and Sheep)
- In Total 259 projects with both Beef and Sheep units



Number of animals currently on the 262 projects

Livestock	Actual	Actual Male	Actual Female	Actual Young	Recommended	Deficit
Beef	20 371	680	14 520	5 441	31 350	10 979
Sheep	23 179	886	16 528	5 509	53 992	30 813

Intervention plan

- Improve enabling infrastructure
- Increase livestock with the correct “breeds”
- Mentoring/Support to increase yields, production
- Management of stakeholders, commercialise the sector

ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

FUNDING REQUIREMENTS: BEEF AND SHEEP

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

FUNDING REQUIREMENTS FOR THE LIVESTOCK PROJECTS (Beef and Sheep)				
Commodity	**Input cost**	**Mechanisation**	**Infrastructure**	**TOTAL**
Live stock - Beef	**R 173 937 600**	**R 38 101 120**	**R 40 060 465**	**R 299 926 865**
Live stock - Sheep	**R 47 827 680**			
TOTAL FUNDS REQUIRED	**R 221 765 280**	**R 38 101 120**	**R 40 060 465**	**R 299 926 865**

POTENTIAL INCOME STATEMENT	
Income Statement: 1st production cycle: Beef	**R:**
Gross Income:	R 120 764 530
Minus Cost:	R 42 267 585
Potential net income	**R 78 496 945**
Income Statement: 1st production cycle: Sheep	**R:**
Gross Income:	R 72 744 138
Minus Cost:	R 25 460 448
Potential net income	**R 47 283 690**

ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

3.3. FRUIT



rural development & land reform

Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

entsika
Driven by a desire to make a difference

ARC • LNR
Excellence in Agricultural Research and Development

FUNDING REQUIREMENTS: FRUIT

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

- Fruit as a commodity with high potential income. The team is proposing a focus on fruit projects due to it's contribution to job creation and GDP contribution.
- Is a labour intensive commodity – Huge potential for job creation, on average 2 people per hectare

FUNDING REQUIREMENTS FOR THE FRUIT PROJECTS (17 PROJECTS)				
Commodity	**Input cost**	**Mechanisation**	**Infrastructure**	**TOTAL**
Fruit (17 projects)	**129 042 000**	**6 065 600**	**22 970 000**	**158 077 600**
TOTAL FUNDS REQUIRED	**129 042 000**	**6 065 600**	**22 970 000**	**158 077 600**

POTENTIAL INCOME STATEMENT	
Income Statement: 1 production cycle	**R:**
Gross Income:	R 208 076 000
Minus Cost:	R 129 042 000
Potential net income	**R 79 034 000**

ARC • LNR
Excellence in Agricultural Research and Development

entsika

FUNDING REQUIREMENTS: FRUIT

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

INPUT COST: FRUIT (No establishment cost only annual input cost)			
	Ha	Cost p/ha	Total input cost
Apples	100	R420 000	R42 000 000
Avocados	35	R95 000	R3 325 000
Bananas	50	R95 000	R4 750 000
Grapes	240	R187 500	R45 000 000
Litchis	20	R115 000	R2 300 000
Nuts	152	R54 605	R8 300 000
Mangoes	140	R90 000	R12 600 000
Citrus	37	R291 000	R10 767 000

TOTAL ESTIMATED INPUT COST FOR FRUIT	R129 042 000

MECHANISATION REQUIREMENTS

Requirements: Mechanisation	Per project	Total	Total assuming 40% requirements for 17 projects
Boom Sprayer	R45 000	R765 000	R306 000
Tractor (40 -50 Kw)	R787 000	R13 379 000	R5 351 600
Trailer	R60 000	R1 020 000	R408 000
Totals	**R892 000**	**R15 164 000**	**R6 065 600**

INFRASTRUCTURE REQUIREMENTS

Requirements: Infrastructure	Per project	Total	Total assuming 40% requirements for 17 projects
Irrigation system(Drip)	R50 000	R50 200 000	R20 080 000
Fencing: Electric (65000/KM)	R325 000	R5 525 000	R2 210 000
Specialised Equipment(Pruning, Harvesting & mulching)	R100 000	R1 700 000	R680 000
Totals	**R475 000**	**R57 425 000**	**R22 970 000**

3.4. VEGETABLES



rural development
& land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

entsika
Driven by a desire to make a difference

ARC • LNR
Excellence in Agricultural Research and Development

FUNDING REQUIREMENTS: VEGETABLES

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

- Fruit as a commodity with high potential income. The team are proposing more focus and an increase in the number of fruit projects due to the contribution of jobs, we also proposing to assist the projects which received RECAP.
- Is a labour intensive commodity – Huge potential for job creation
  - On average 2 people per hectare

FUNDING REQUIREMENTS FOR VEGETABLES				
Commodity	**Input cost**	**Mechanisation**	**Infrastructure**	**TOTAL**
Vegetables	**R 49 151 577**	**R 5 532 000**	**R 12 600 000**	**R 67 283 577**
TOTAL FUNDS REQUIRED	**R 49 151 577**	**R 5 532 000**	**R 12 600 000**	**R 67 283 577**

POTENTIAL INCOME STATEMENT	
Gross Income:	R65 535 436
Minus Cost:	R49 151 577
Potential net income	**R16 383 859**

ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

FUNDING REQUIREMENTS: VEGETABLES

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

INPUT COST: FRUIT (15 PROJECTS)

3 CYCLE PER YEAR BASED ON 15HA ON AVERAGE		**INPUT COST**
3 CROPS - 5 HA EACH ROTATION PER CYCLE		
15 ha x 15 projects		**R44 426 577**
TUNNEL: 9 per project		
9 tunnels @ R200 000 per project		
Input cost for 1 tunnel	R35 000	
Input cost for 9 tunnels	R315 000	
9 tunnels for 15 projects		**R4 725 000**
TOTAL INPUT COST FOR VEGETABLES		**R49 151 577**

MECHANISATION REQUIREMENTS

Requirements: Mechanisation	Per project	Total	Total assuming 40% requirements for 15 Projects
Fertiliser applicator	R30 000	R450 000	R180 000
Boom Sprayer	R45 000	R675 000	R270 000
Tractor	R787 000	R11 805 000	R4 722 000
Trailer	R60 000	R900 000	R360 000
Totals	**R922 000**	**R13 830 000**	**R5 532 000**

INFRASTRUCTURE REQUIREMENTS

Requirements: Infrastructure	Per project	Total	Total assuming 40% requirements for 15 Projects
Irrigation system(Drag lines)	R300 000	R4 500 000	R1 800 000
Tunnels	R1 800 000	R27 000 000	R10 800 000
Totals	**R2 100 000**	**R31 500 000**	**R12 600 000**

ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

4. ADDITIONAL PROPOSALS TO FOLLOW



rural development & land reform

Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

entsika

Driven by a desire to make a difference

ARC • LNR

Excellence in Agricultural Research and Development

ADDITIONAL COMMODITIES TO BE ADDED TO PRIORITISATION LIST

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

The team is still working of finalisation of implementation plans on the following commodities:

- Poultry: Broilers
- Poultry: Layers
- Pigs
- Goats
- Cotton

ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

4. MONITORING AND EVALUATION



rural development & land reform

Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

entsika

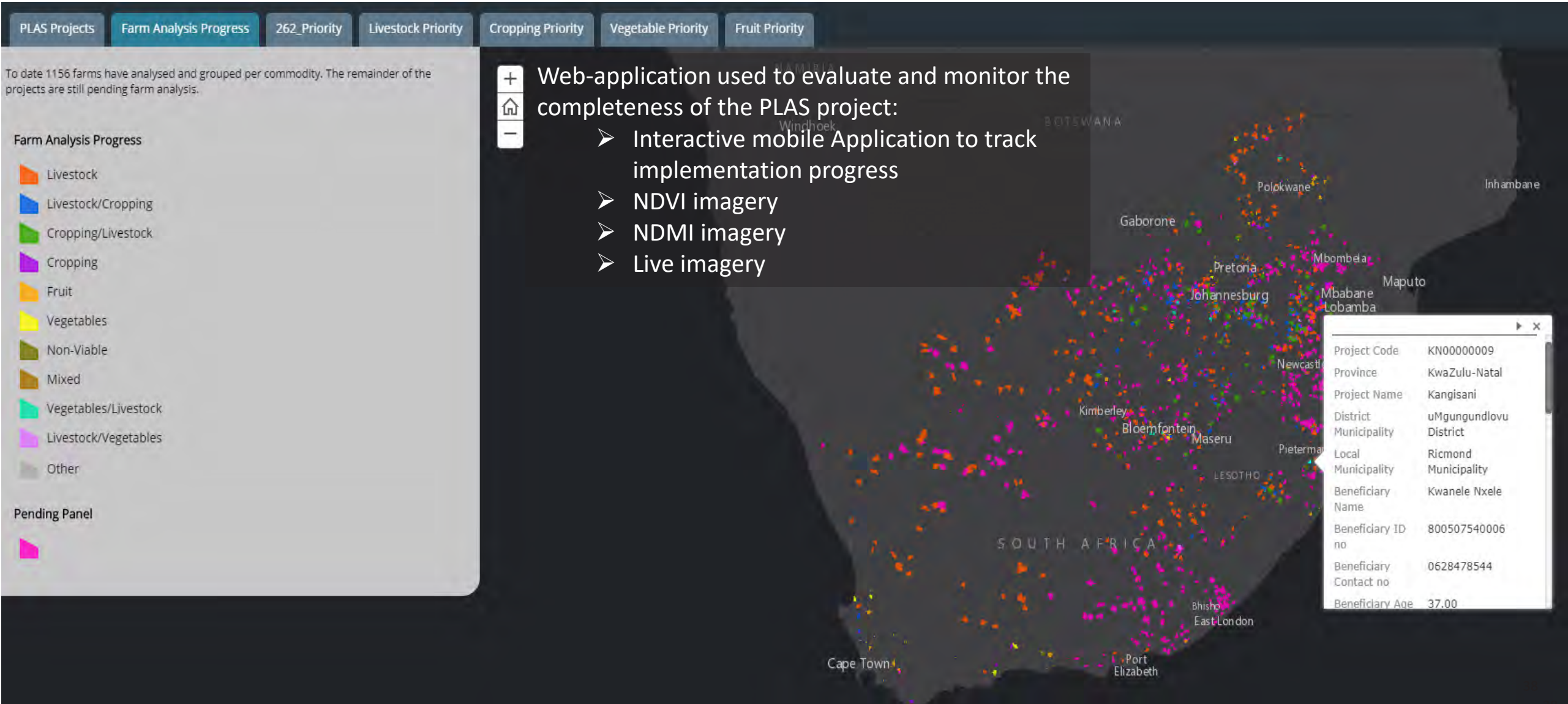
Driven by a desire to make a difference

ARC • LNR

Exellence in Agricultural Research and Development

MONITORING: WEB APPLICATION

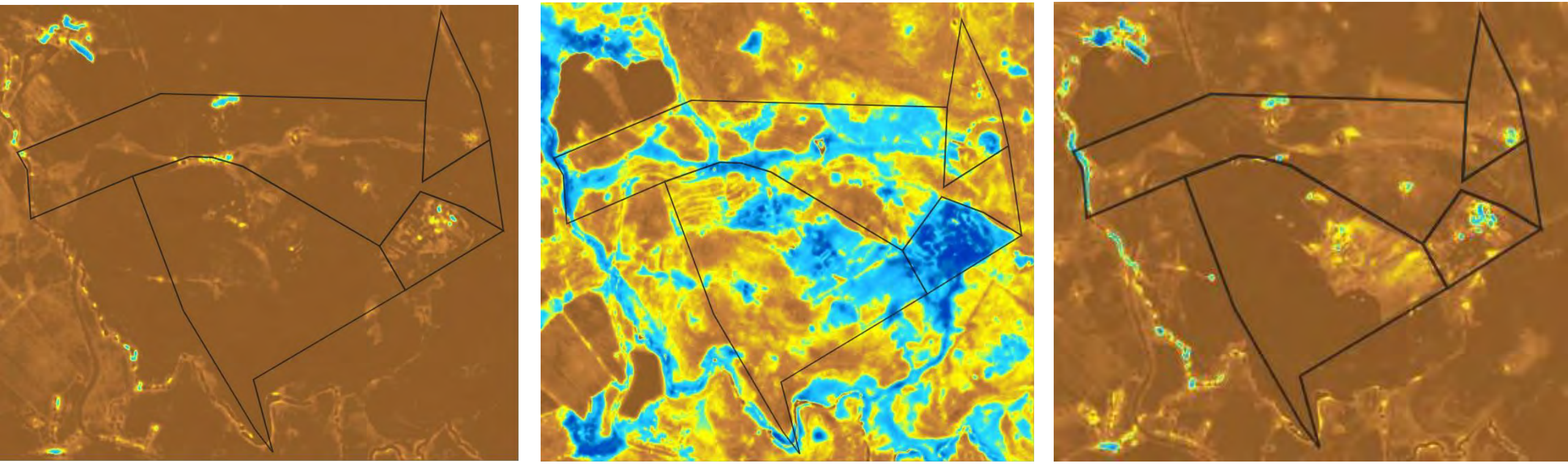
rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA



MONITORING: NDMI IMAGERY

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

24 September 2017 | 28 December 2017 | 31 October 2018



High water stress | Mid-High water stress | Average water stress | Mid-Low water stress | Low water stress

NDMI: Normalized Difference Moisture Index with color map. Wetlands and moist areas are blues, and dry areas in deep yellow and brown.

ARC • LNR
Excellence in Agricultural Research and Development

entsika
Driven by a desire to make a difference

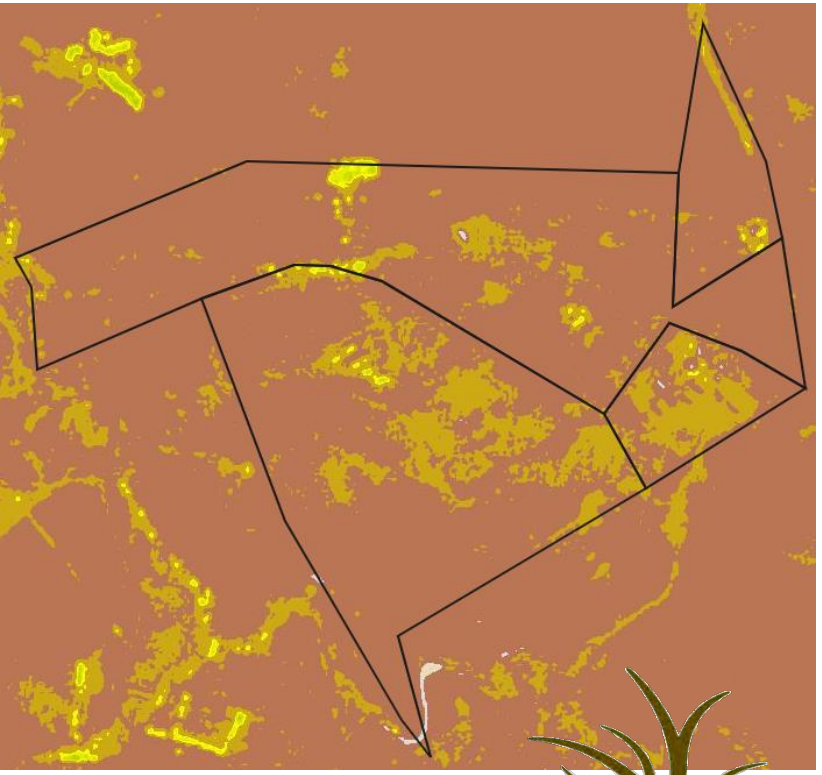
MONITORING: NDVI IMAGERY

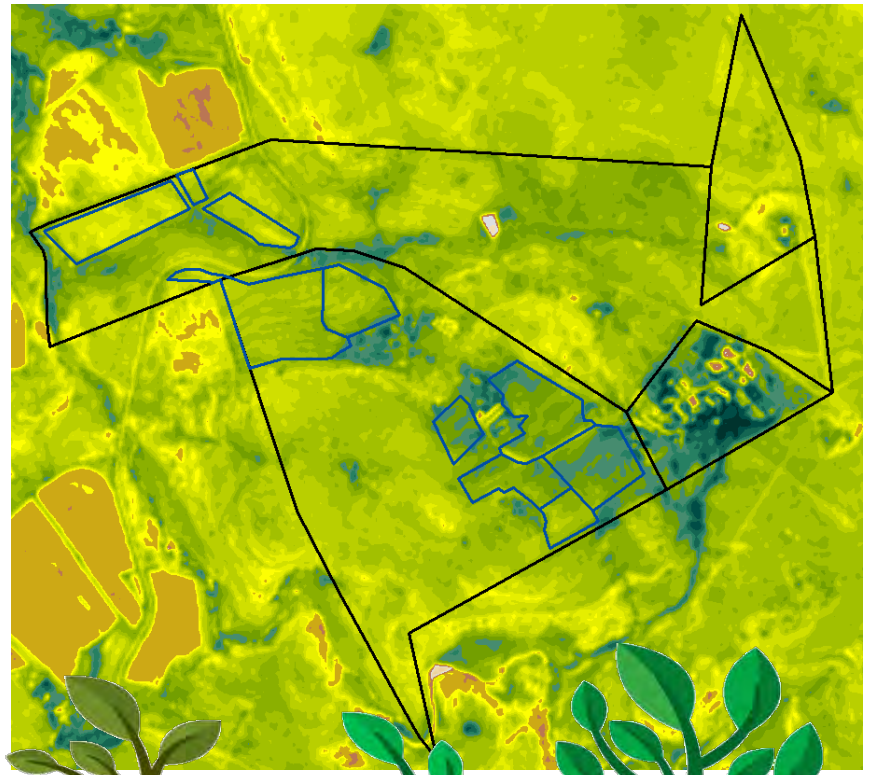
rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

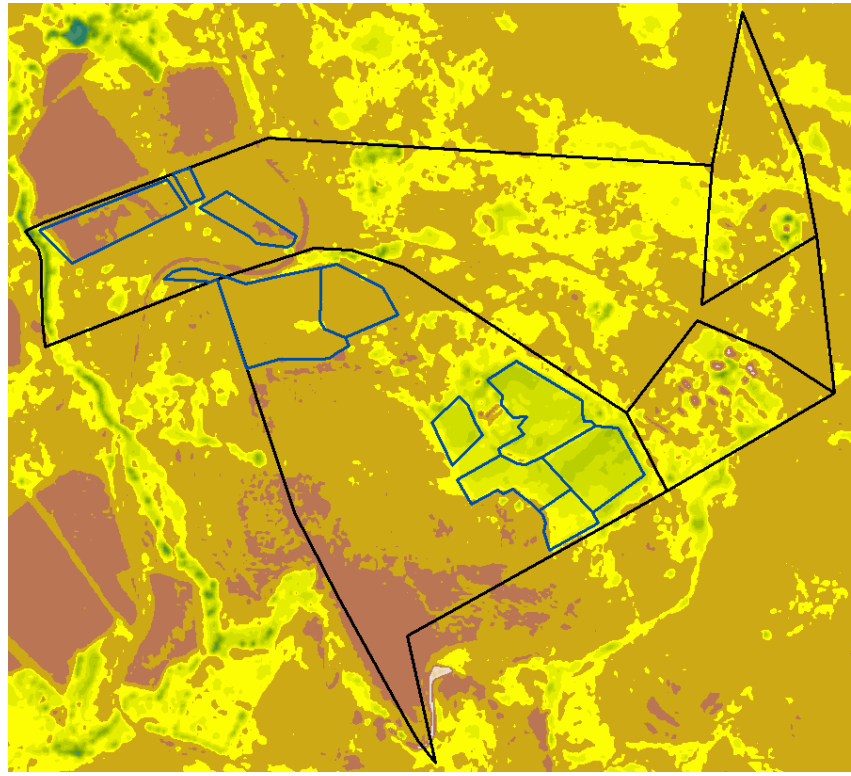
28 September 2017

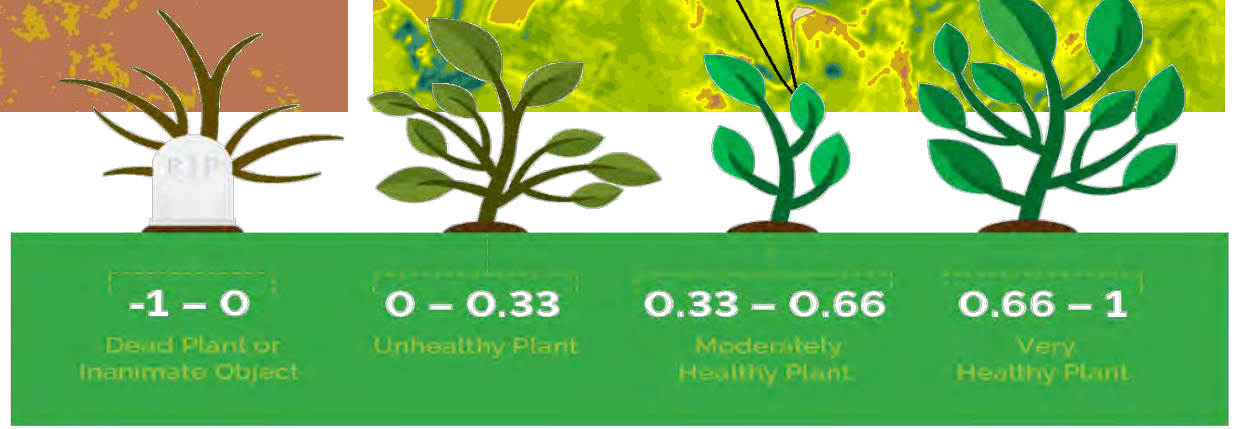
28 December 2017

31 October 2018









ARC • LNR
Excellence in Agricultural Research and Development

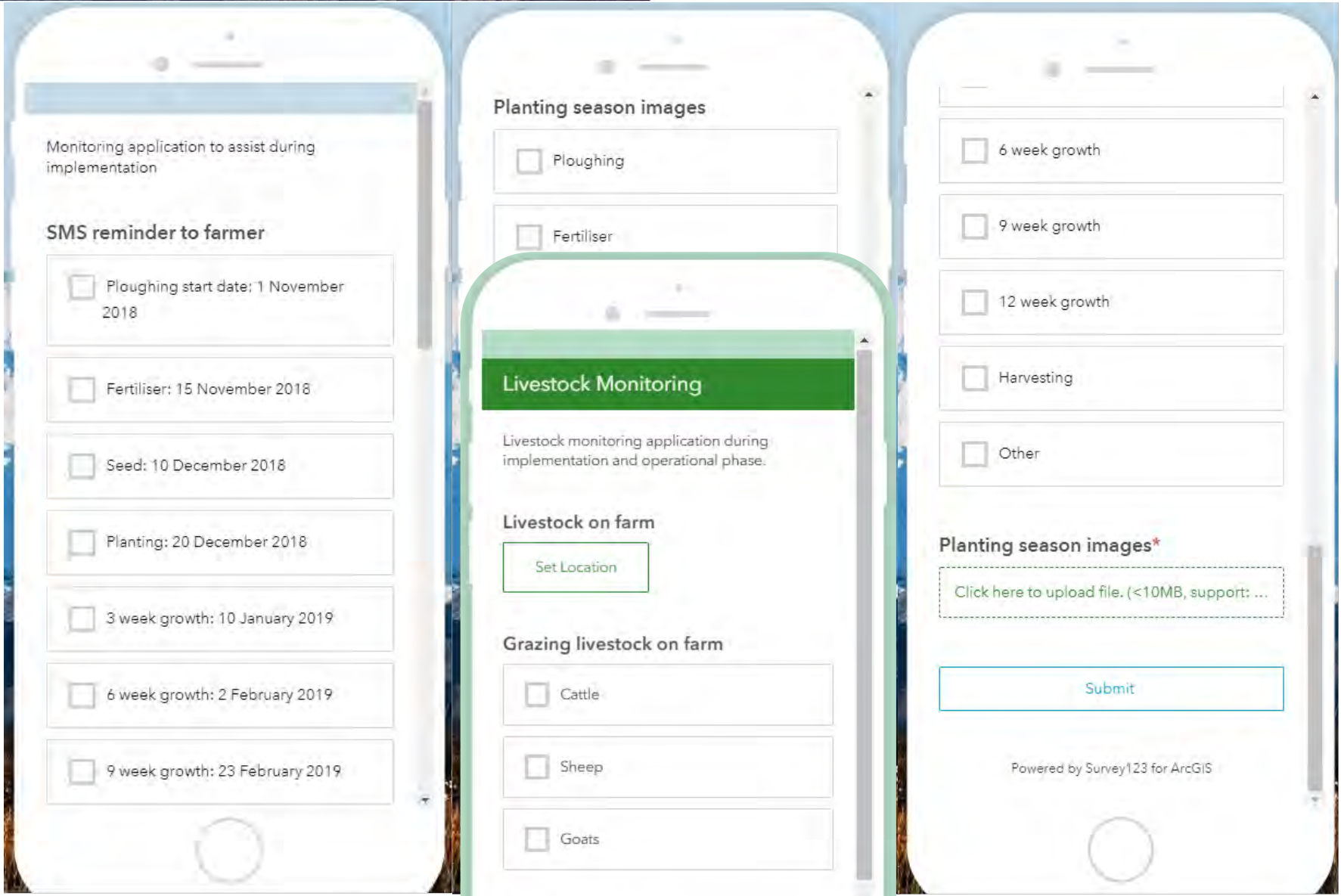
entsika
Driven by a desire to make a difference

EVALUATION: MOBILE APPLICATION

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

Dual purpose interactive mobile application:

- Allows beneficiaries and service providers to communicate and track progress with online surveys and live imagery.
- Allows the PMU to frequently communicate to beneficiaries.
- Regular PMU visit will be timeously controlled by the application to follow up on the progress of the implementation plan.



5. KEY FINDINGS IN TERMS OF THE CRITICAL SUCCESS FACTORS



rural development & land reform

Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

entsika

Driven by a desire to make a difference

ARC • LNR

Exellence in Agricultural Research and Development

KEY FINDINGS IN TERMS OF THE CRITICAL SUCCESS FACTORS

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA



Land

- > 55% of land bought is commercially viable
- Subdivision is a problem (splits)
- Water on high intensity farms (water rights)
- Default position- livestock- optimal commodity mix often not evident



Comment:
The farm Palmietfontein (MP00000089) was acquired as a single unit with 9 land portions/properties.

The farm was then split into 4 leasable projects at provincial level and allocated to 4 beneficiaries Listed below.

MP00000089_1: Simon Ngate Malebane
MP00000089_2: Victor Mhkize
MP00000089_3: Mbolofithi Albert Nkosi
MP00000089_4: Mthunzi Patrick Khumalo

Note: Each property code is linked to a particular beneficiary

ARC • LNR
Excellence in Agricultural Research and Development

entsika

KEY FINDINGS IN TERMS OF THE CRITICAL SUCCESS FACTORS

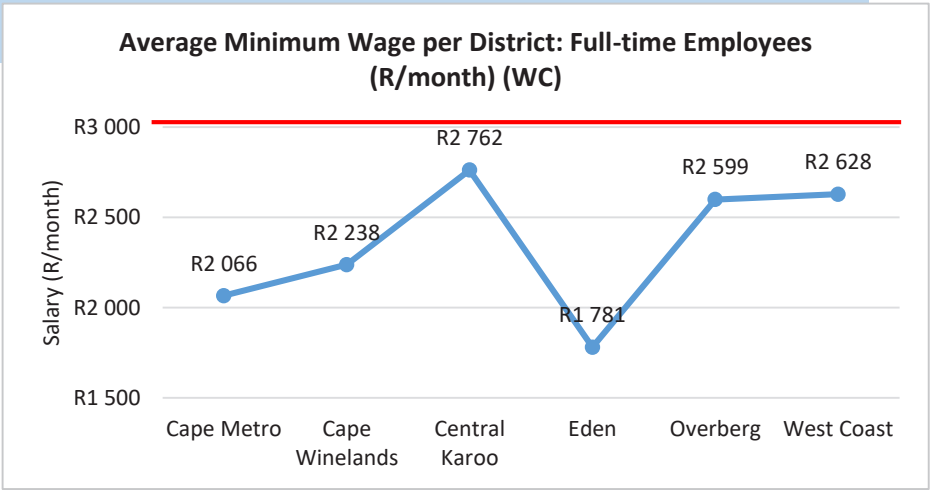
rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA



- No defined selection criteria – analysis results will inform selection criteria – no one size fit all – criteria per type of commodity/farm
- Dedication (Fulltime/part-time)
- Number of beneficiaries a problem in some cases – conflict
- Beneficiaries, e.g. Western Cape:
  - Women are largely unrepresented as beneficiaries (9%)
  - Average age of beneficiaries is high (65)
  - Youth (<35) unrepresented as beneficiaries (8%)



- Compliance with legislation and governance required
- Running the farm as a business legal entity
- Good Agricultural Practices (GAP) requirements – minimum wage, tax laws, water rights and biodiversity
- Lease agreements not signed/not implemented (not paid)
- Subleasing is evident in certain cases – illegal
- Both monthly and daily wages much lower than the minimum rates across WC PLAS projects



KEY FINDINGS IN TERMS OF THE CRITICAL SUCCESS FACTORS

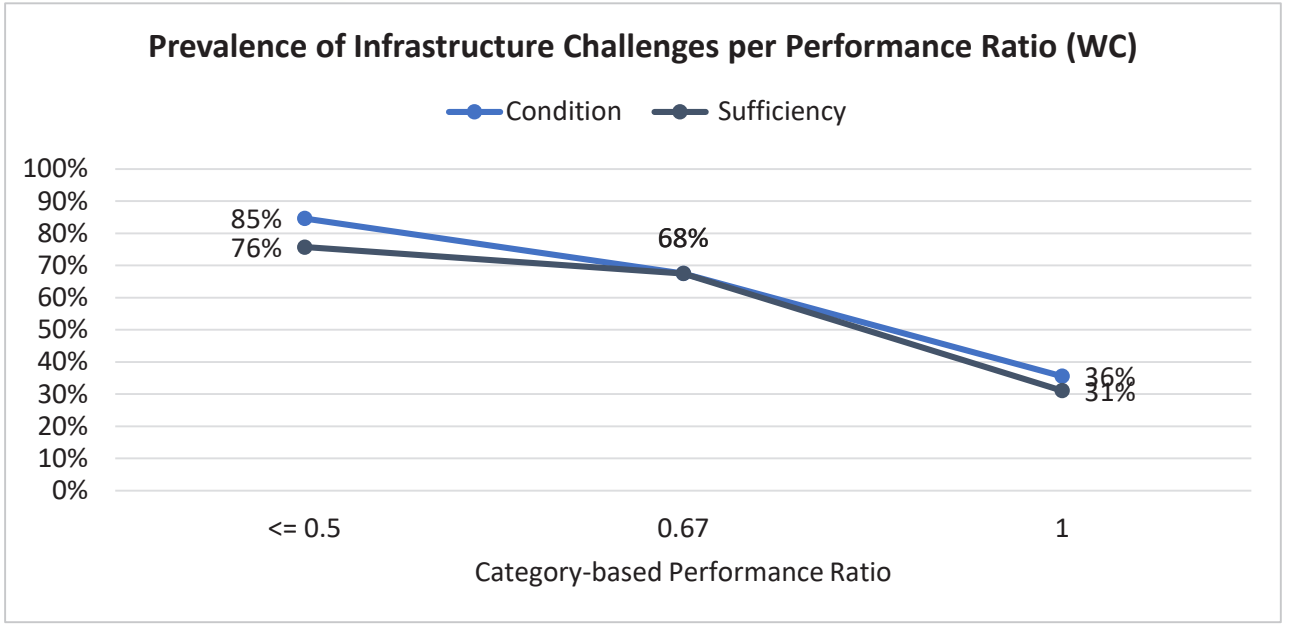
rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA



- Significant limitation – unavailability and lack of maintenance/utilisation and ownership
- Strong correlation with performance
- Equipment not linked to commodity mix of the farm (capacity and suitability of the infrastructure)

Examples

- Livestock – scale, handling facility, water reticulation and camps
- Vegetables – sorting and packaging, reliable water and electricity



- **More than 75% of poorly performing farms** (with a performance ratio ≤ 0.5) **have significant infrastructure challenges**, in terms of both the **sufficiency** and **condition** of existing infrastructure. This poses significant limitations on the ability of these farms to perform to their potential.
- Less than 40% of performing farms experience these challenges.

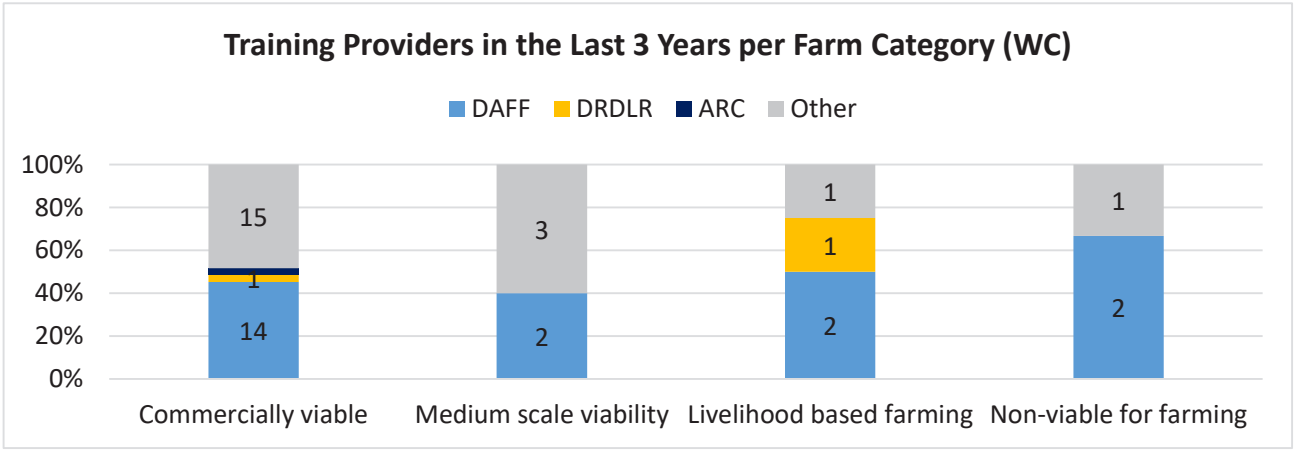
ARC • LNR
Excellence in Agricultural Research and Development
entsika

KEY FINDINGS IN TERMS OF THE CRITICAL SUCCESS FACTORS

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA



- Panel suggests this is a critical limitation
- Quality of public extension – urgent need to integrate public private partnerships – currently rare
- Access to services – timing
- Mentoring wildly misused – suitability, monitoring (selection criteria for the mentor)
- Management and monitoring of support
- Broader, more accessible training packages beyond production
- Training focused on production experience – lack of knowledge in other areas such as finance, logistics and management in general



- The majority of training has been provided by DAFF, with a **focus on production training**. A significant amount of training was provided by other sources (e.g. Two-A-Day).
- **Commercial training may be lacking.**

ARC • LNR
Excellence in Agricultural Research and Development

entsika

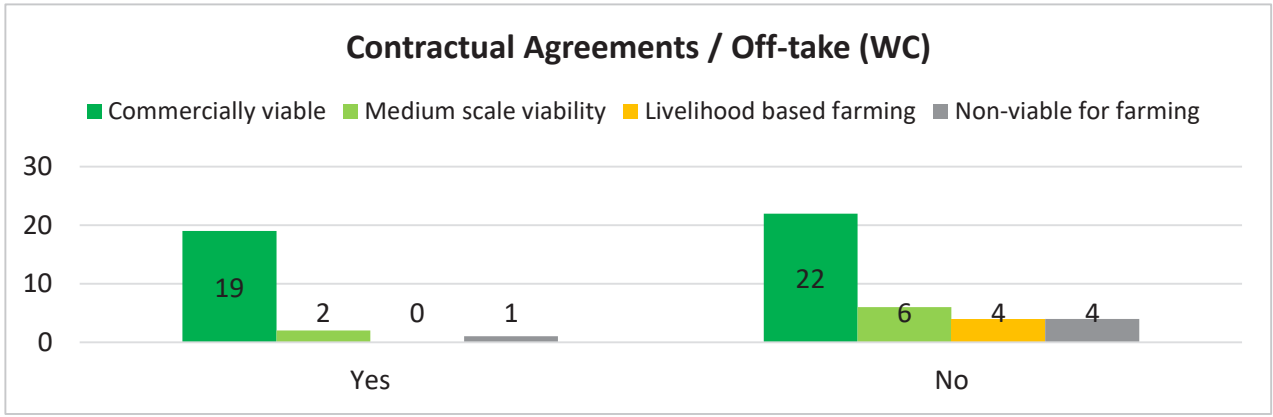
KEY FINDINGS IN TERMS OF THE CRITICAL SUCCESS FACTORS

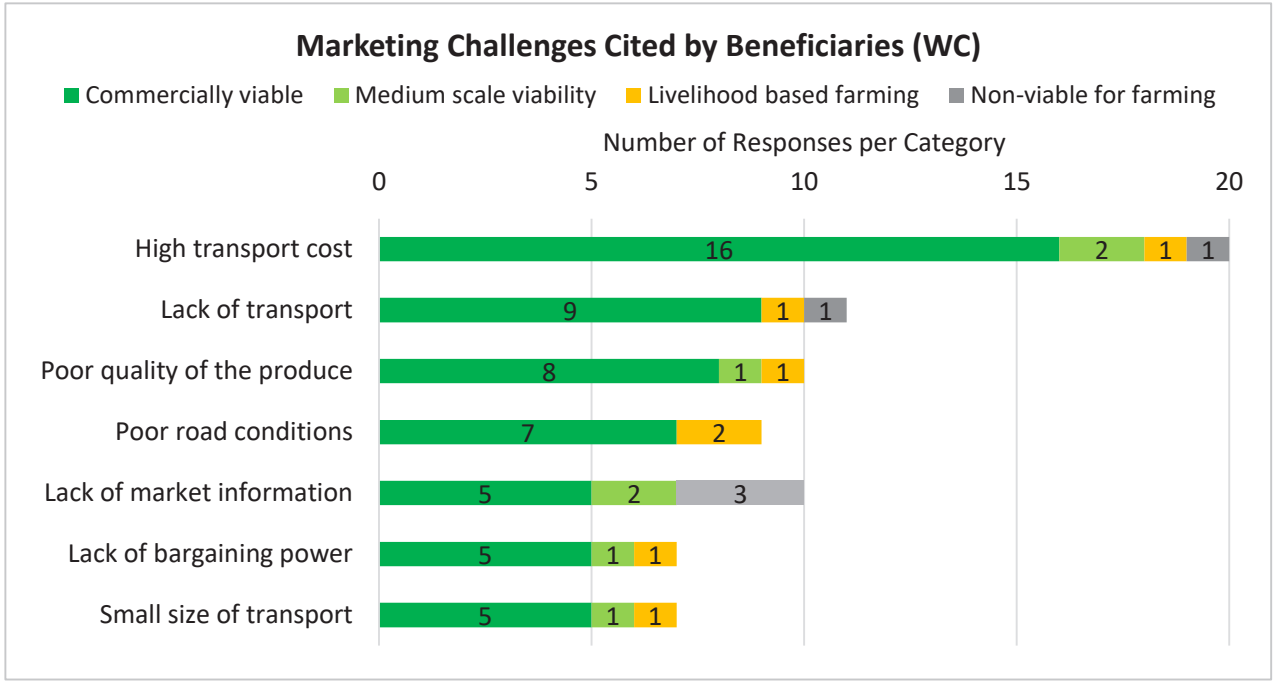
rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA



Market

- Where integration happens performance improves (sugar mills, offtake agreements) – being explored
- Ability to meet market requirements – quality packaging, handling, cold storage, macadamia)
- Agro-processing support – value add
- Many farms without off-take agreements / guaranteed sale





6. CLOSURE



rural development
& land reform

Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

entsika
Driven by a desire to make a difference

ARC • LNR
Exellence in Agricultural Research and Development

CONCLUSIONS

rural development & land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

- The evaluation of all PLAS farms across SA continue – simultaneously, specific high potential farms will receive targeted support for the growing season
- The selection of prioritised farms is based on a consistently applied, objective developed methodology
- Support for cropping farms is now extended to livestock, fruit & vegetable projects for implementation
- The success of this effort depends on the support of the Provincial department and its officials – to work in close liaison with the service providers and the PMU/ARC
- The approach – using a multi-disciplinary, multi-stakeholder approach that covers the full value chain is a rarity and should result in a high success rate

ARC • LNR
Excellence in Agricultural Research and Development

entsika



THANK YOU

CENTURION OFFICE | 262 Rose Avenue | River Falls Office Park | Bushwillow building | First floor | Dooringkloof | Centurion | 012 348 2307
POLOKWANE | Tobara Place Unit 3 | 9 Watermelon Street | Polokwane | 0699
NELSPRUIT | Collfin House | Unit/Module 5 | 11 Ferreira Street | Nelspruit | 1200 | 013 752 3983
www.entsika.co.za | info@entsika.co.za

ANNEXURE D

BELA-BELA and KOMGA LAND SUMMITS: SUMMARY OF MODELS PRESENTED

Background

The purpose of the summits were to present existing solutions to the land-reform and development challenges facing the country. Many farmers and other stakeholders in the agricultural sector are already successfully involved in sustainable alternatives and the summits offered them an opportunity to share their experiences with the industry. The wider focus areas addressed at the summits included the financing of land-reform and development, developing farmers in communal areas, joint ventures between commercial farmers and farm workers, regenerating restitution projects and mentorships.

JOINT VENTURES

Rietvlei farm

Christof Cloete of the farm Rietvlei in the Laingsburg district of the Western Cape has been a mentor and co-shareholder at Doornkloof for the past decade. His four farmworker co-shareholders own a 51% share of the business, manage the farm and also live on Doornkloof. The farm was bought in 2008 with financial support from Pioneer Foods and owns 40 ha of fruit-tree orchards of which 20 ha were planted in the past 10 y ears. All produce is delivered to the dried-fruit industry. Ellouise Volmink is a shareholder in Doornkloof BEE Farming and handles a large part of the day-to-day operations of the enterprise.

Matshibele Dairy Farm

Awardwinning dairy farmer Tshilidzi Matshidzula was born in Thohoyandou and completed his diploma in animal production at the Tshwane University of Technology, followed by a BTech degree in agricultural management at Unisa. In 2007 the 19year old Chilli, as he's known, started working as an intern at Little Barnet Trust in the Eastern Cape. Here he thrived under the mentorship of Walter and Jane Biggs. Today Chilli is coowner of Matshibele, which he farms in partnership with Walter and Jane Biggs, and where 800 cows are milked. He is also the winner of the prestigious Mangold Trophy for conservation agriculture and made history by being the first black farmer to be chosen as the Eastern Cape young farmer of the year.

Eden Agri Services

After working for Capespan for many years, Shaun Brown returned to his family farm at Blinkwater in the Fort Beaufort area, where he in 2010 established the Eden Agri Service's multi-million rand packhouse after identifying the need for additional packing facilities among emerging citrus farmers in the area. Brown's has always intended the participating growers to become business partners in the packhouse, and eventually assume ownership of the concern. This vision is now coming to fruition with five black farmers now owning 70% of the packhouse, largely funded by Shaun as the black farmers are unable to raise funding due to their insecure properties rights on communal land. The group intends to further involve local rural communities by providing technical expertise in developing more communal land along the Kat River for export citrus

production. Eric Nohamba, a citrus producer for 26 years, is chairperson of Eden Agri Services.
Witzenberg Partners in Agri Land Solutions (Pals)

Arguably the most visionary land-reform approach in the country, Pals' framework is based on sound business principles and legal structures that address the shortfalls of many previous land-reform models. The ground-breaking initiative, initiated by local lawyer Gerrit van Vuuren, started in the Ceres Witzenberg valley, and has as its main goal to develop black farmers in partnership with commercial farmers, limiting the state's role to a facilitatory function such as providing water rights. Pals always strives to involve a whole community, and key elements include compulsory mentorship, sustainable black ownership and upliftment, and it has already elicited millions rands of investment from farmers. Pals has also extended its reach beyond its traditional footprint in Ceres. Examples include Schalk Viljoen from Riviersonderend starting a citrus business on 100 ha two years ago in collaboration with his workers. This project's business plan is based on Pals' principles, with Gerswin Louw serving as one of three black shareholders in Dasberg Farm, the BEE division of Viljoen's business. www.pals.org.za

FARMWORKER EMPOWERMENT

Agri Dwala

As a former farm manager, Kosie van Zyl was given the chance to own land of his own when a local farmer recognised his potential and helped him buy his farms. Kosie never forget his good fortune, and soon started a second farming operation in collaboration with his farm workers in the form of Agri-Dwala in 2006, today one of the best-known and visionary economic-empowerment projects in the Overberg. Serving as mentor to the concern, Kosie has seen Agri-Dwala grow into an established commercial farming operation over the past 12 years that now owns two farms, as well as leasing municipal land. It also manages a wedding venue. Today Agri-Dwala has once again paid forward it's good fortunate, by mentoring Riedewaan Marcus from Napier in the Western Cape.

Grasslands Development Trust

Christo Joubert is the CEO of Grasslands Agriculture, the commercial milking operation of leading dairy farmer Trevor Elliot, which established the Grasslands Development Trust in 2004, arguably South Africa's oldest farmworker empowerment scheme. The trust benefits 49 former and current Grasslands Agriculture employees with the aim of contributing to successful land-reform through transferring production and title deeds to beneficiaries and paying dividends from proceeds. The trust bought the dairy farm, Schoonfontein, with a 35%-grant and a 65%-private loan. Grasslands Agriculture is the source of all working capital, including implements and cows, and receives 50% of all milk-sale revenues. Ownership has been transferred to the beneficiaries. Sabelo Magagamela is the chairman of Grasslands Agriculture.

Forbes Athole farm

Dr Colin Forbes from Forbes Athole farm runs a mixed-farming operation on 4000ha in Mpumalanga. Recognising the need for land reform and the role experience plays in managing a commercial farm, he up-skilled his farm workers and gave them an area equivalent to 10% of his farm to be developed as an "agri-village" where they hold secure tenure. Profits from cash crops on 87 ha are divided among the beneficiaries. Colin provides tractors and implements

free of charge and signs surety for the annual production loan.
Limpopo Dairy

Zolarity Investments (Pty) Ltd is a partnership between Limpopo Dairy and its workers' trust. This partnership bought a neighbouring farm with the view of supplying the dairy with milk, and so engineered a true winwin solution.

Heuningkrans

Eddie Prinsloo is a leading Merino farmer from Heuningkrans near Smithfeld in the Free State. In an innovative farm-workers scheme he transferred land to nine workers who received a majority shareholding in Heuningkrans' neighbouring 1 500 ha farm Donkerhoek. Negotiations with the Department of Rural Development and Land Reform lasted two years. An association for communal land ownership is now being established for the new owners before Government transfers the land to them. On conclusion of the transfer, Eddie and the workers will manage the farm in terms of a cooperation agreement.

COMMUNAL AREAS

Ncera Macadamia Farm

This project came into being in 2005 on land leased from a local chieftainess for 80 years. Today a world-class macadamia tree nursery is in operation that is accredited by the Association of Southern African Macadamia Growers. The Ncera community owns 51% of the Ncera Macadamia Farm, and also holds rights of first refusal for jobs that become available. Grant Simpson, CEO of the TKG Farming Group, is the strategic partner. Grant is also a board member of East Cape Macadamia, which specialises in the development of plantations in partnership with rural communities, skills transfer, the design of macadamia business models to suit prevailing land-tenure limitations, the establishment of and investment in macadamia processing plants, as well as the marketing of macadamias. East Cape Macadamia is currently establishing new orchards at Ncera.

Amadlelo Agri

The visionary Amadlelo Agri, under the able leadership of legendary dairy consultant Jeff Every, has established successful dairies on communal land for some of South Africa's largest dairy farmers. Amadlelo's vision is to place milking operations in the hands of black farmers, under black management, in the poorest parts of the Eastern Cape and KwaZulu-Natal. The group is also part of the Seven Stars Trust, a collaboration with the community of Keiskammahoek in the Eastern Cape, and the provincial department of agriculture, which aims to bring 750 ha of irrigable land into production and to milk 2 000 cows. Amadlelo was created by 70 commercial dairy farmers from the Eastern Cape and KwaZuluNatal and in 2007 they established the Fort Hare Dairy Trust, their first modern, profitbased farm, which the highly talented Leonard Mavhungu has been running since its inception.

Wiphold

Wiphold, a women's empowerment company, under the able leadership of the inimitable Gloria Serobe, has established a successful cropping operation on communal land at Centani

in the old Transkei delivering commercial yields from dryland maize and soya beans. Today the operation plants about 2 000 ha, with community members as the main beneficiaries of the project, which is managed on profit-share basis. However, it took years of negotiations with about 45 tribal chiefs and community members to establish this highly innovative business. Bit by bit people's confidence and dignity were restored to a point where they now speak the language of commercial responsibility and ownership.

NWGA

The National Wool Growers' Association of South Africa's (NWGA) visionary wool-upliftment programme in the former homelands has helped tens of thousands of communal wool farmers in the former Transkei and Ciskei to dramatically improve their profits. The NWGA concerns itself with building relationships and gaining perspective on the challenges faced by emerging wool farmers by providing extension services, communal shearing sheds and superior animals genetics through its network of commercial Merino stud farmers. Funding by the department of land reform makes it all possible. The project has helped emerging wool farmers increase production from 222 610 kg in 1998 to 4 462 089 kg in 2016, bring millions of rands to formerly poverty stricken areas. The project proves the value of plugging small-scale farmers into a highly profitable, export-driven value chains, where agribusinesses have a real stake in securing the agricultural product being produced. www.nwga.co.za

Mdukatshani Rural Development Programme

Rauri Alcock has headed up the Mdukatshani Rural Development Programme since 2005. This followed 12 years as manager for the Mdukatshani's Land Reform and Agriculture Programme. Rauri leads a R80 million Goat Agribusiness Project with the HPSA, the Department of Agriculture, Forestry and Fisheries, and the Department of Rural Development and Land Reform. The aim is to increase goat farmers' productivity, to convert 7 000 female rural farmers into commercial producers, and to formalise the indigenous goat market. www.mdukatshani.com

Ntinga Ntinga Ntaba kaNdoda

Mazibuko Jara is the executive director of Ntinga Ntaba kaNdoda, a rural development organisation in the Eastern Cape's Keiskammahoek area that supports agriculture and land reform in communal areas to achieve food security.

RESTITUTION FARMS

Besters Project

The Weenen project in Kwazulu-Natal is an example of where assistance is provided by commercial farmers to beneficiaries on struggling restitution projects. Roland Henderson is a fifth-generation farmer in the Besters district in KwaZulu-Natal. His experience with land reform began 15 years ago when the Besters Farmer's Association in a ground-breaking move proactively identified land in their district that was handed over to labour tenants and farm workers for farming purposes. Not without its challenges, Roland through this process helped to develop new solutions for failed land restitution and redistribution projects, mostly based on a study of 83 000 ha transferred in the Weenen district.

Mahela Group

Pieter Vorster is director for corporate and development matters at the Mahela Group, who have been in partnership with the Rietfontein Homeless People Trust since 2015, whereby Mahela leases and cultivates citrus on land which was expropriated in the 1990s and fell into disrepair.
Komati Fruits

Komati Fruits is the largest private citrus exporter in South Africa and has been actively involved in black economic empowerment for the past 13 years, including a workers' trust where participants paid off their debt in 2015. The group also launched a 50-50-ownership model in 2015 on restitution farms that had fallen into disrepair, leasing the land from local communities on which citrus was planted and produced while building infrastructure in a mutually beneficial relationship.

MENTORSHIPS AND TRAINING

Agristart

Agristart, headed up by farmer Cois Harman, focusses on the development of around 5000 black commercial farmers. Agristart offers a range of services that include improving land tenure through evaluating, training, supporting, mentoring and reporting. Cois Harman's success was underlined when his mentee Kleinjan Gasekoma was honoured as Voermol's Commercial Cattle Farmer of the Year – that first time in the country's history that a black farmer won this prestigious accolade.

Vumelana Advisory Fund

The Vumelana Advisory Fund is a non-profit organisation dedicated to helping communities that participate in land reform to develop their land. The fund provides financing to land-reform beneficiary communities to acquire the skills they need to be successful, and also supports the development of viable partnerships between these land owners and investors.
www.vumelana.org.za

The Co-op

The Co-op, formerly the Humansdorp Co-operative, is unique in offering comprehensive financing to hundreds of emerging farmers as well as making the services of its agronomists, agricultural economists, irrigation specialists, and veterinary services available to emerging farmers.
www.humkoop.co.za

VKB

VKB's Developmental Agriculture Division has a wide footprint in the Free State and Limpopo and focusses on developing new farmers, as well as managing development projects. VKB is involved in programmes with 51 new farmers in the Free State and 108 in Limpopo.

Frontier Bonsmara

Justin Stirk, a fourth-generation farmer, runs a mixed-farming concern at Grahamstown in the Eastern Cape. The Stirks are well-known Bonsmara breeders and participate annually in the Frontier Bonsmara sale in Grahamstown. Following a visit to the Sernick Group in 2016 to learn more about corporate social investments, Justin decided to start empowering emerging farmers. He does this without any government assistance.

Little Barnet Dairy Farm

Walter Biggs is a successful dairy farmer on the farm Oakleaf near Alexandria in the Eastern Cape. He and his wife, Jane, have moved mountains in their efforts to support black economic empowerment projects through their family farm, often at great personal financial expense. Their mentorship, training and support strongly contributed to Tshilidzi Matshidzula being chosen as the first black Eastern Cape Young Farmer of the Year. Walter despises paternalism, and Tshilidzi is not the only young, black farmer he and Jane have supported. "There are many other young, black people who can be just as successful. We just have to go find them," Walter says.

Future Farmers

Judy Stuart's visionary Future Farmers Foundation helps to develop aspiring farmers and top-level farm managers from some of the most disadvantaged children in the country. Through local and international on-farm internships, the Future Farmers Foundation has produced top managers for some of our biggest commercial operations. Interestingly, it's often international farmers in America and Australia who are first to appreciate the extraordinary talent that Judy has an uncanny ability to recognise, and who plead for the opportunity to retain this talent after the completion of their internships. Judy, however, has a strict policy that all candidates need to return to South African, "to make a contribution here".

Kaap Agri Academy and Farmer Development Programme

Barend Sulvester is Kaap Agri's transformation manager and was instrumental in establishing the Kaap Agri Academy in 2008. This is where a new generation of emerging farmers and farm workers follow practical and relevant academic programmes and short courses. More than 400 farm workers have completed courses at the academy, which is AgriSETA-accredited, since 2010. It currently offers three learnership programmes and 16 short courses. More than 340 emerging farmers have also completed Kaap Agri's Farmer Development Programme, and three of the programme's top students were also awarded the AgriSETA Best Skills Learner Excellence Award over the years. www.kaapagri.co.za

Grain SA

Jannie de Villiers has been Grain SA's chief executive officer since 2011, and under his visionary leadership Grain SA has pioneered the support of black farmers across the spectrum, from developing commercial grain farmers, to development in deep rural areas. Today, with the help of over 100 commercial farmer mentors, Grain SA successfully supports 8 000 subsistence farmers, 685 small-scale farmers, 268 potential commercial farmers, and 142 commercial grain farmers. The organisation's Farmer Development Programme also offers various projects,

including its Schools Programme, a partnership between the Maize Trust, Winter Cereals Trust and the AgriSETA, as well as accessible field trials. But for Jannie one of the most impressive results of his pioneering program has how these efforts have transformed the commercial farmers who act as mentors. "When driving to visit these projects, I make a point of driving with these commercial farmers and then I ask them how their being a mentor to less fortunate South Africans has changed their hearts. They then just pulled off the road, stop, and the tears run down their cheeks." www.grainsa.co.za

MD Foundation

After several setbacks, a group of Christian farmers amalgamated their farms into the MD Foundation project, which is almost a variant of a kibbutz model, where all profits are ploughed back into the business. The group's mission is to "create the Kingdom of God on Earth". The operation currently manages an award-winning 1 200-cow dairy herd, 1 200 beef cattle, as well as cropping 4 000 ha, the profits of which finance a hospice, clinic, school and after-care facilities for township children.

Jakes Gerwel Technical School

A diverse group of Bonnievalers made a huge contribution towards improving the future of the district's children by harnessing agriculture and conceptualising and building the Jakes Gerwel Technical School, a R120 million investment. Standing on 18 ha of vineyard donated by Philip Jonker of Weltevrede, this modern, mainstream technical, agricultural and life-skills school charges no fees and intends to maintain a 100% pass rate, while offering education to 1 200 learners who will become agricultural scientists, architects, engineers and tradespeople. A rural miracle, if there ever was one.

Annexure E

Conceptualising the Case for an Agency for Agricultural Development for South Africa

Presented by Malcolm Ferguson
Leona Archary

DAFF, 14th February, 2019

Background : History

- South Africa's first land reform program from 1913 onwards
  - Decisions taken by successive 'white' governments until 1970's :
    - to set limits on black ownership of land
    - remove blacks from designated land
    - Deliberate intention to limit black involvement in agriculture and
    - policies and structures used agriculture as a means of white (and particularly Afrikaner) economic upliftment and development

Background : History

- This resulted in
  - Creation from the 1930's onwards of single channel state administered and subsidised agricultural marketing boards as well as a state subsidised agricultural credit system
  - These continued to operate until final phasing out by government by the late 1990's.

Background : History

- This structure, remained intact and largely unchanged (except for some minor changes) for approximately 60 years
- Had a dramatic effect on South African agriculture
- “Policy certainty and low cost finance on a sustained basis built white farming in South Africa.” Dan Kriek, President AgriSA 3rd October, 2018

Background : History

- Focus of Land Reform from 2000 onwards (LRAD/PLAS policy) - to create successful black farmers
- Disappointingly, this process has failed dismally with many reasons identified for this
- A multiplicity of reasons cited in the HLP (Motlanthe) Report – Nov. 2017
- Many of those which are not emphasised however, are also of crucial importance

Background : History

- Many reasons for failure - some are
  - A lack of appropriate skills transfer
  - Decline in the system of agricultural education and research - reduced budgets; systemic neglect
  - Ineffective agricultural extension services
  - Limited access to agricultural credit - lack of title
  - High cost of agricultural credit
  - Lack of integration into agricultural marketing value chain – a crucial condition for sustained commercial viability – so subsidies and dependence
  - Agricultural policy formulation has not been data driven
  - Lack of “on the ground” farmer focussed practical experience - bad policy choices made

Why a Development Agency?

- Persistent failures for over a decade and a half - require a new successful model
- International best practice reveals very successful examples elsewhere
- Especially in Latin America and to a lesser extent Asia and Africa
- Dedicated Development Agencies set up from the late 1970's onwards

Why a Development Agency?

- Established in numerous countries in Latin America, Asia and Africa. Countries as diverse as Peru, Bolivia, Ecuador, El Salvador, Guatemala, Ghana, Nigeria, Uganda, Tanzania, India, Pakistan, Thailand.
- One of the most celebrated is FUSADES - (Fundación Salvadoreña para el Desarrollo Económico y Social) in El Salvador
  - founded in 1983 after a brutal civil war fought over land rights.
  - a prize winning institution

Why a Development Agency?

- All have common operational features; they
  - have been agricultural and/or rural development facilitators - project implementation
  - were always structured to assist government to develop best practice/policy on agricultural/rural development
  - conduct research identifying best practice
  - undertake benchmarking audits to create a data-base for informed decision making
  - place a primary emphasis on rural poverty alleviation; and
  - are independent - but with close linkages to government and the private sector

Does South Africa need a Development Agency?

- past failures suggest the need to look beyond existing structures in South Africa
- the Agency model is identified as an International Best Practice
- there has been a process of broad based consultation about creating an Agency as one solution to land reform failures
- research reveals widespread and growing consensus that an Agricultural Development Agency is an urgent necessity for South Africa
- many experts in the agricultural sphere have made similar proposals over the past 5 years

Consultation about the Concept

- High level Mission of the Agency : It must...
  - Address consequences of historical injustice and inequitable land distribution.
  - Contribute to restore the dignity of black SA'ns
  - Ensure land reform is a means of empowerment and rural wealth creation for historically disadvantaged people and communities
  - Enhance national and rural domestic food security
  - Be a driver of rural employment creation
  - Improve economic sustainability of rural communities through small scale family farming
  - Transform the national agricultural sector by increasing the number of black commercial farmers

Consultation about the Concept

- Why a policy origination and advisory role to government?
  - Macro-scale involvement in agricultural and rural development, leads to insights about positive and negative trends
  - Policy advice to improve developmental performance - crucial to enhance future success of land reform
- Advisory role to government requires a formalised role for those farming the land in governance and policy structures of Agency - vital to future success
- Government must play a role in governance and policy structures of the Agency to ensure effectiveness of support for government objectives.

Consultation about the Concept

- Policy Origination and Advice (cont.)
  - Helps to define crucial success factors for land reform
  - Creates a project data base of best practice contributing to most productive use of land coming into production
  - Helps to determine success factors for
    - development of commercially successful black farmers and
    - small scale family farmers.

Consultation about the Concept

- Policy Origination and Advice (cont.)
  - Enhances role definition for all three levels of government to achieve better coordination with the agricultural sector
  - Improves subsistence farming yields through training and enhanced production techniques
    - Audits the effective use of funding and training on productive outcomes
    - Ensures linkage into market value chains to enhance the sale and best pricing of surpluses produced through these programs

Consultation about the Concept

- Role in promotion of Education and Research
  - Define most effective ways to revive and re-vitalise agricultural colleges
  - Fund bursary schemes to train black youth from school level to encourage farming as a career
  - Identify individuals at school level who have an aptitude and passion for farming and agricultural development
  - Cooperate with foreign governments to identify skills development opportunities for black farmers at foreign training institutions
  - Cooperate with foreign governments to identify foreign agricultural development best practices applicable to South Africa
  - Assist government with skills development of officials

Consultation about the Concept

- Role in promotion of Education and Research (cont.)
  - Commission studies to define the critical success factors for agricultural development eg
    - access to the full agricultural value chain;
    - differentiated financing needs;
    - infrastructural requirements such as storage, packhouses; logistics; on and off-farm infrastructure etc
    - on-going training;
    - standards compliance;
    - food safety requirements;
    - access to genetic materials etc

Consutation about the Concept

- Role in promotion of Education and Research (cont.)
  - Determine how best to ensure integration of commercialising black farming enterprises into market value chains so as to ensure sustained financial viability
  - Commission studies to determine whether the retail sector either inhibits and limits or promotes accelerated market access for the black agricultural sector
  - Determine the value of BBB-EE scorecards in promoting such objectives.

Consultation about the Concept

- Develop a Land and Water Use Database
  - Undertake a Land and Water Audit as a basis for informed decision making about land and rural economic development by
    - commissioning studies and research by academic institutions working in close collaboration with StatsSA, the Department of Rural Development and Land Reform, identified government entities and specialised property and water law practitioners
    - ensure the regular updating of such studies in order to benchmark progress achieved with land reform targets set by government

Consultation about the Concept

- Land Reform and Rural Development
  - Develop and apply best practice models for commercial partnerships to support developing and commercialising new generation farming enterprises.
  - Develop consultation mechanisms focussed to provide post settlement support to commercialising black farmers, small scale family farmers and black communities which are beneficiaries of land reform programs to ensure that
    - land provided to beneficiaries remains commercially viable
    - suitable anchor investors are identified and linked to these projects
    - appropriate linkage into the farming value chain takes place

Consultation about the Concept

- Land Reform and Rural Development
  - Establish an agricultural development fund, which can sustainably provide low/no cost funding to maximise the development of new generation commercial farming enterprises
  - Negotiate and enter into a contractual relationship with the Land Bank focussed on
    - Complementing the bank's primary role as the funder of agricultural development
    - Developing a basis for successful developmentally focussed lending
    - Develop best practice financing models using cash flow, existing agricultural assets eg. live stock, biological assets, crops or approved off-take agreements, as a basis to secure lending

Consultation about the Concept

- Land Reform and Rural Development (cont.)
  - Develop processes in support of the Land Bank to manage lending and credit extension to developing and commercialising black farmers and agricultural enterprises
  - Determine, in consultation with the Land Bank, the most appropriate financing methods for developmental farming projects
  - Cooperate with the Land Bank to define best practice agricultural development financing methods

Consultation about the Concept

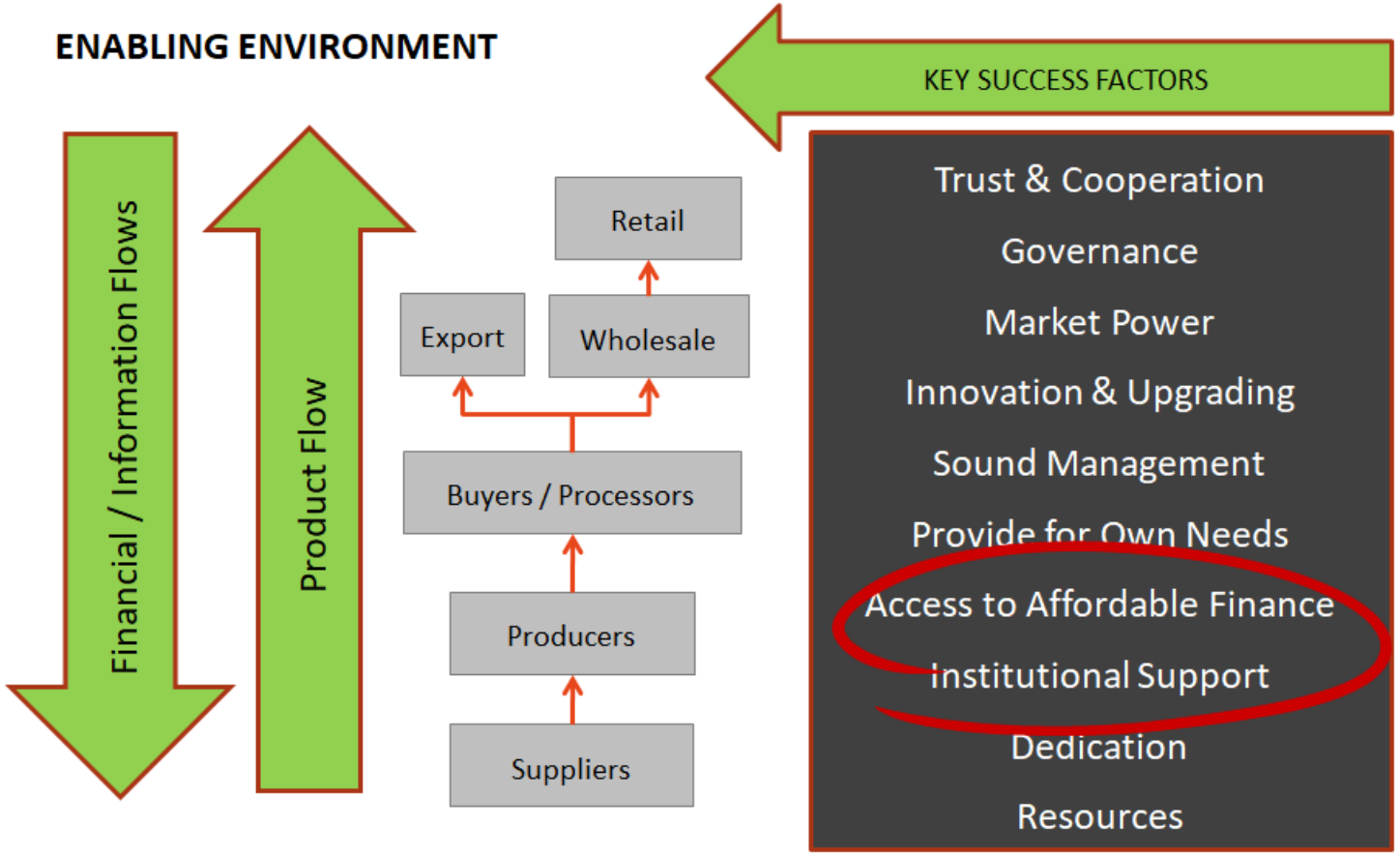
FUND OBJECTIVES

Sustainable Development Through Agricultural Transformation

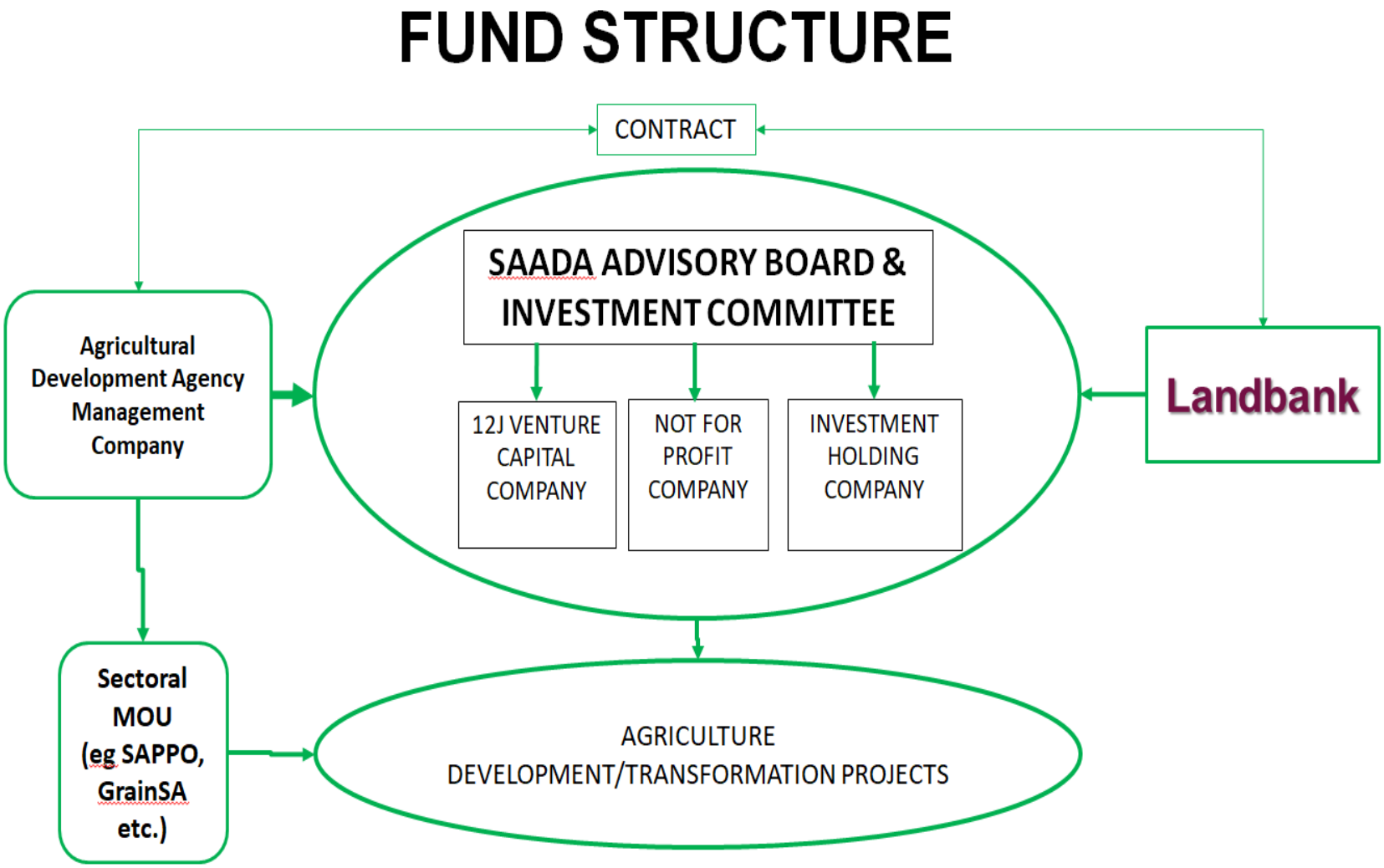
- Commercially Bankable
- Financially Sustainable
- Developmentally Positive

Consultation about the Concept

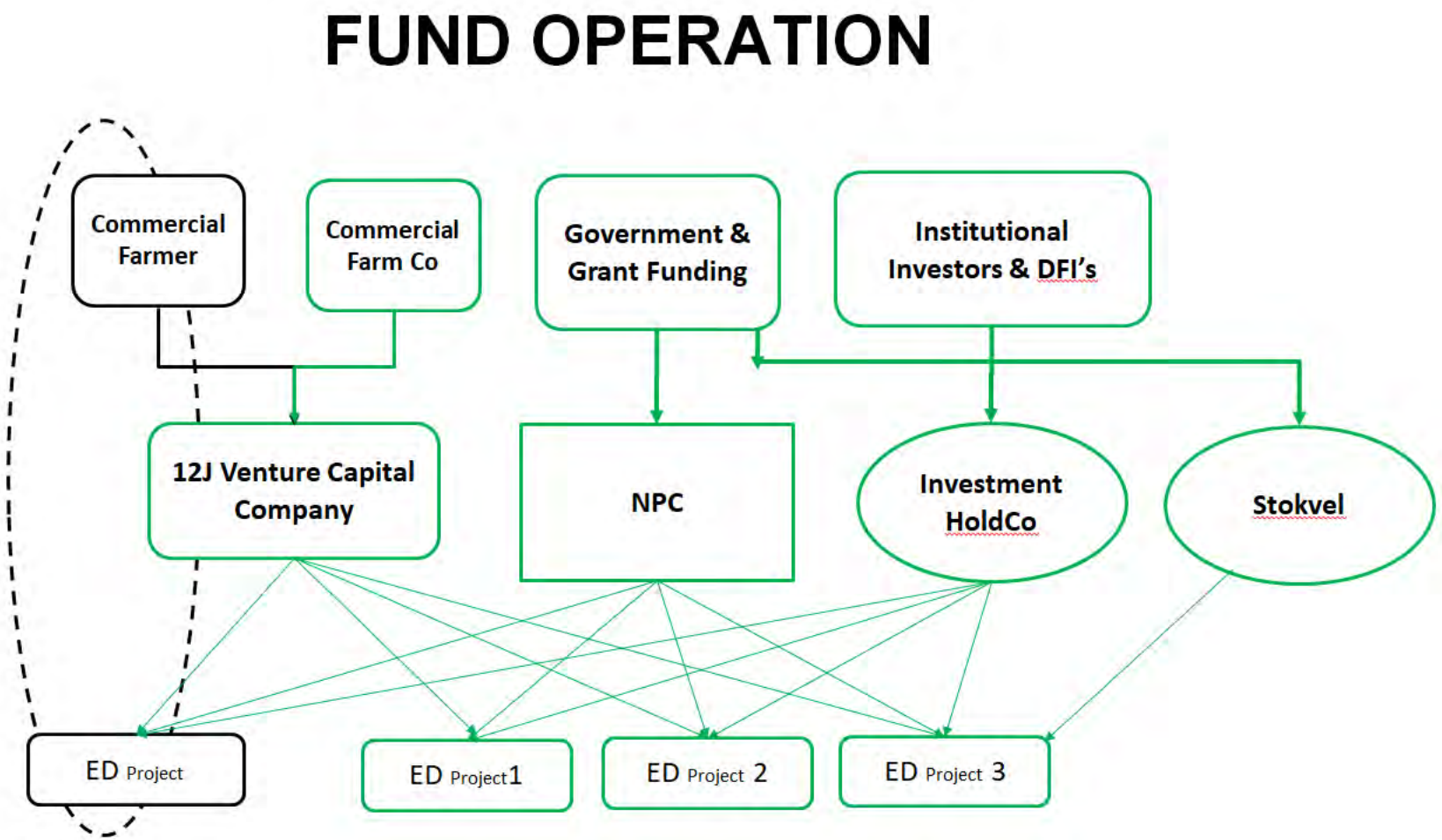
VALUE CHAIN APPROACH



Consultation about the Concept



Consultation about the Concept



Consultation about the Concept

MANAGEMENT SERVICES Provided by AgDev Manco

Fund Raising	Investment Process	Implementation	Monitoring
• Marketing • Road Shows • Closing	• Project Development • Due Diligence • Financial Structuring • Credit Approval	• Contracts • Project Management	• Financial Accounting • Budgeting • Reporting

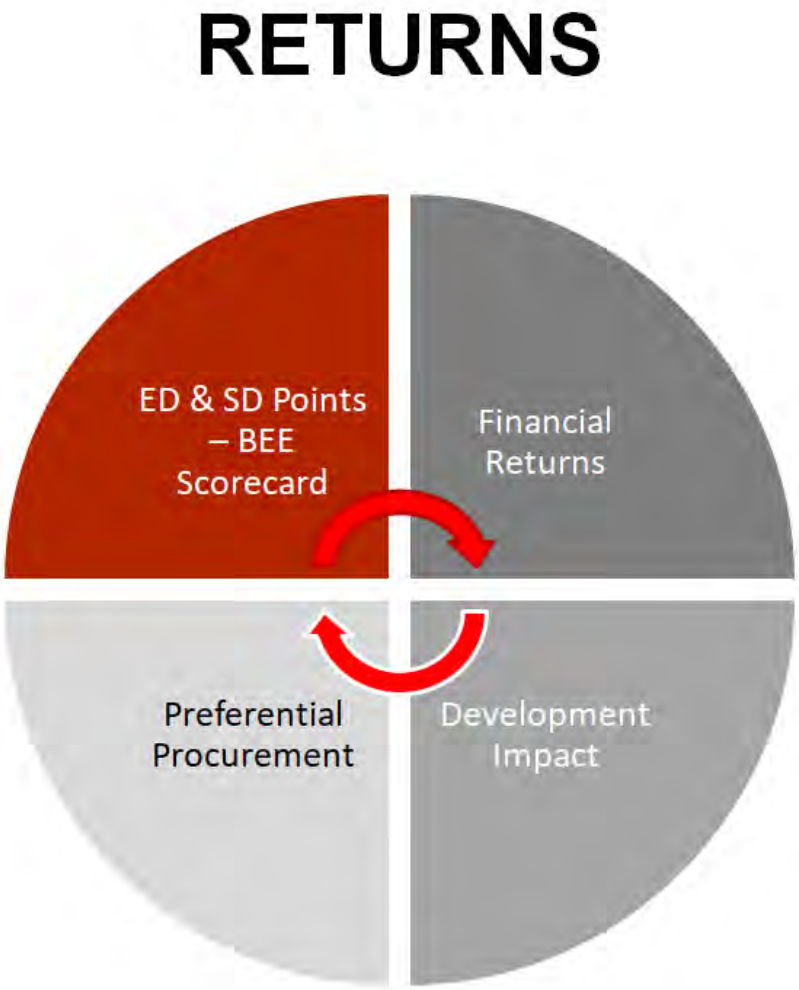
Consultation about the Concept

SECTORAL MOU

To be concluded between AgDev Manco and each Sectoral Organisation eg. SAPPO, GrainSA etc

Services	Representation
• Training • Mentorships • Project Development • Environmental Impact Assessment • Technical Evaluation	• Sectoral Advisory Board • Investment Committee • Investee Company Board of Directors

ITI's thinking about the Concept



ANNEXURE F

COMPENSATION FOR EXPROPRIATION IN THE CURRENT CONSTITUTIONAL FRAMEWORK: OPTIONS

Prof Elmien du Plessis, NorthWest University, Faculty of Law

1 INTRODUCTION

1.1 Property and democracy

There is a view that the point of equality is to on the one hand end oppression (that is socially imposed) and on the other hand to create a community in which people stand in relations of equality to others.[1] This "democratic equality" seeks to construct a community of equals where people meet as equals regardless of where they come from or where they are going. In this lies freedom. But one's freedom cannot lead to the subjugation of another, there cannot be a hierarchy of freedoms.

This view integrates the principles of distribution with the concurrent demands for equal respect that ultimately links with freedom. In the context of compensation for expropriation it shows that it is people who create oppressive hierarchies, and it is only people who can dismantle these hierarchies. In South Africa, this is important in the land context. Dismantling hierarchies does not mean creating new ones.

In South Africa we committed ourselves to this dismantling of hierarchies based in the Constitution. Our founding provisions in article 1 state, *inter alia*, that

> [t]he Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.

[1] Anderson 1999 *Ethics* 288.

> (d) Universal adult suffrage, a national common voters roll, regular election and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The Constitution declares itself the supreme law of the Republic,[2] calling for all law and conduct to be consistent with it, framing the conversations around compensation for expropriation. By declaring it supreme law, the Constitution established one system of law,[3] there to develop an "algorithm of post-apartheid South African law".[4] In this thinking, problems do not have quick fixes, and the answers are not simple or easy. Rather, every change should be approached tentatively, and requires a great deal of reflection when things don't go according to plan. We are arguably at such a moment with regards to compensation for expropriation that forms part of the complexity of land reform.

Complex problems don't have simple solutions.

In this new system of law, property rights are not insignificant, but they will not necessarily always win. The central goal of the Constitution is found in the preamble and the founding provisions – it is not the protection of property rights, it is to achieve certain constitutional goals. The purpose of a property clause is to ensure that legislatures and administrators act within their constitutional powers when trying to attain these goals.[5] A limited focus on section 25 in seeking to achieve these goals, without taking cognisance of the whole body of law and how this provision interacts with the whole body of law, might miss the point.

Nevertheless, the Constitution brought about a radical change in property rights. It asks from us "that property rights must reflect, and must be accountable to, the fundamental choices we have made in favour of living in a democracy characterised by dignity and equality".[6] Property rights are thus shaped by the demands of a

---

[2] Section 2.
[3] See below. This is based on *Pharmaceutical Manufacturers Association of South Africa and another: In re Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) par 44.
[4] Van der Walt *Property and Constitution* 23-24.
[5] Van der Walt 2014 *JL Prop & Soc'y*.
[6] Van der Walt 2014 *JL Prop & Soc'y* 102.

democratic society – our democracy is the condition that guarantees our property rights. Burdens imposed on existing property rights (such as expropriation of property) to achieve a non-property constitutional goal (such as equality and human dignity), needs to comply with constitutional requirements, and other statutory and common law rules and principles – such as administrative justice in the context of expropriation.

While the bulk of this piece will focus on expropriation and compensation, it is important to remember the bigger interpretative framework in which section 25 operates.

1.2 Expropriation: the rules, the problems and the framework for addressing the problem

When property is expropriated, it must be done in the Constitutional framework. There is normally an authorising statute (such as the Restitution of Land Rights Act[7]) with the Expropriation Act of 1975[8] setting out the procedure to be followed and how compensation will be calculated. In the land reform context, the Property Valuation Act[9] also plays an important role, and will be referenced to where necessary.

In the context of compensation for expropriation the following problems have been diagnosed, and some preliminary observations are made:

1. The interpretation of section 25 in the land reform contexts in the lower courts have placed an undue emphasis on section 25(3)(c), by placing market value central to the compensation question instead of being guided by the "just and equitable" principle.[10] The Constitutional Court did not have a chance to rule on the matter yet, and as such could not provide guidance. Early case law[11] adhered to a fairly generous interpretation. This got translated into state practices.[12]

---

[7] *Restitution of Land Rights Act* 22 of 1994.
[8] Soon to be replaced with the *Expropriation Bill* 2019.
[9] 17 of 2014.
[10] Du Plessis *Compensation for Expropriation under the Constitution*
[11] *Khumalo v Potgieter* 2002 2 All SA 456 (LCC), for instance.
[12] See the departmental guidelines 4.3.

2. The state has failed to utilise expropriation as a tool of acquisition of property for land reform purposes.
3. Administratively it seems as if the state struggles to make definite decisions. The High-Level Panel report[13] and other research shows that the state has a capacity problem in negotiating reasonable prices, and to use its expropriation powers.
4. Outdated legislation in the form of the Expropriation Act 1975 governs expropriation procedure and the calculation of compensation. This does not reflect the constitutional values.
5. The current Constitutional framework is not an impediment to the effecting land reform. It allows for some instances where "just and equitable" compensation can amount to R0. The courts' current interpretation of section 25(3) makes this a slight possibility, but the legal possibility remains. Legislative guidance in the form of an interpretation clause in Expropriation and other legislation can guide the courts. We need jurisprudence to clarify this matter.
6. Expropriation of property without compensation as a default position will be against international law, unless it is done to nationalise resources. International law, however, does not require full market value compensation. The challenge therefore recalibrate expropriation law to comply with the standard of just and equitable compensation, that will lie on a continuum of R0, to full market value and in limited instances even more than market value compensation.
7. Foreign jurisprudence can provide useful guidelines on how an expropriating authority should exercise their discretion where on this continuum "just and equitable" compensation will fall in specific, concrete situations.
8. The Expropriation Bill of 2019 is useful insofar as it gives guidance for when compensation can be nil. It is imperative that the interaction between the Property Valuation Act and the Expropriation Bill be clarified. It is also important to provide some direction of the competencies and powers of the various role players involved in the process.

[13] Report of the High Level Panel on the assessment of key legislaiotn and the acceleration of fundamental change in of 2017; Analytics *Implementation evaluation of the Restitution Programme*.

9. As part of a framework for understanding this, there should be a clear distinction between who determines value, and who determines compensation.

With these specific problems in mind, this piece focusses on the Constitutional framework and legislation applicable to the calculation of compensation in order to give advice on how to approach the issue of compensation in general, but also specifically in the land reform context.

Firstly, this piece sets out the structure of section 25 of the Constitution and pays particular attention to the requirement of compensation, with reference to the current Expropriation Act and Bill, and other legislation where applicable, to determine compensation.

Secondly, the piece sets out a comparative study on compensation practices in international law and other jurisdictions.

Thirdly the piece provides an overview of the Expropriation Bill with some comments that might impact on the compensation element of expropriation.

The piece concludes with the lessons that can be learned from the research, as well as suggestions for a way forward.

2 Compensation for expropriation

2.1 The larger constitutional framework

The Constitution brought a single-system-of-law, shaped by the Constitution.[14] The Constitution requires that existing rights be protected, but it also requires certain reform measures. In transforming, the Constitution requires that both the existing rights and the reforms must promote the spirit, purport and objects of the Bill of Rights in line with section 39(2). Existing rights can only be protected insofar as they are

[14] Van der Walt *Property and Constitution* 20, quoting *Pharmaceutical Manufacturers Association of South Africa and another: In re Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* par 44.

consistent with the Bill of Rights.[15] If the protection of existing rights conflict with reformation, then the Constitution requires a balancing of these rights.

In Port Elizabeth Municipality v Various Occupiers[16] the court noted that:

> In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. […] The judicial function in these circumstances is […] to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.[17]

This shows that protection of vested rights and transformation orientated reforms does not have to stand opposite each other, but rather that respecting exiting rights and promoting transformation are interlinked and "form part of one single legal constitutional goal".[18]

What is important of such an understanding of property law is that vested rights are not protected by private law, and new rights promoted by the Constitution. The private law notion of property (and therefore ownership) is part and parcel of this new Constitutional concept of "property".[19] The law (pre-1994 legislation such as the Expropriation Act as well as common law) protecting vested rights is still valid, but only insofar as it is reconcilable with the Constitution.[20]

One of the effects of the Constitution on existing private property is that

> property rights that were acquired prior to the new constitutional dispensation may be subjected legitimately to new or more stringent restrictions under the Constitution, even to the extent that the scope and nature of the private right may be affected quite dramatically.[21]

This has important implications for the payment of compensation for expropriation, and speaks to the dismantling of hierarchies of rights where property rights will always trump. Property rights can be limited in circumstances provided for in the Constitution,

---

[15] Van der Walt *Property and Constitution* 21.
[16] 2005 1 SA 217 (CC).
[17] Par 23.
[18] Van der Walt *Property and Constitution* 22.
[19] Van der Walt *Property and Constitution* 120.
[20] Van der Walt *Property and Constitution* 121.
[21] Van der Walt *Property and Constitution* 125.

in order to attain our Constitutional goals. But this also implies that any limitation of property rights must be done in terms of the Constitution. This has implications for the payment of compensation at expropriation.

What the Constitution requires is a move away from the common law reasoning that ownership as the most complete real right a person can have to a thing, which requires, as a rule, full market value compensation at expropriation. The Constitution requires a goal orientated approach with a purposive and contextual logic, where the determination and the payment of compensation is regarded as part of a larger Constitutional and democratic goal. Constitutional reasoning requires us to start with the Constitution, and to interpret the law, including the payment of compensation, through the lens of the Constitution. That lens is the Constitutional compensation standard of "just and equitable".

This process of moving away from the pre-constitutional reasoning has been slow, and case law seems to be stuck to the pre-constitutional rationale for the payment of compensation. In *Du Toit v Minister van Transport*[22] it was held that the expropriatee must be put in the same position he would have been in, but for the expropriation. In *City of Cape Town v Helderberg Park Development (Pty) Ltd*[23] it was held that an owner may not be better or worse off because of the expropriation and that a monetary award must restore the *status quo ante. Khumalo v Potgieter*[24] stated that compensation is paid to ensure that the expropriatee is justly and equitably compensated for his loss, while *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood*[25] ruled that the expropriatee is compensated for the loss of the property. This sentiment was echoed in *Ex Parte Former Highlands Residents,*[26] where it was found that the interest of the expropriatee requires full indemnity when expropriated, and therefore it is possible to pay *more* than market value.

---

22 *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 22.
23 *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 1 SA 1 (SCA) para 21.
24 *Khumalo v Potgieter* para 22.
25 *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 1 SA 1030 (LCC) para 15.
26 *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) paras 34-35.

In *Haakdoornbult Boerdery CC v Mphela,*[27] the court ruled that for compensation to be fair it must recompense. To the court, compensation must put the dispossessed, insofar as money can do it, in the same position the person would have been in had the land not been taken. This compensation might not always be market value, but might be something *more*:

> [b]ecause of important structural and politico-cultural reasons indigenous people suffer disproportionately when displaced and Western concepts of expropriation and compensation are not always suitable when dealing with community-held tribal land. A wider range of socially relevant factors should consequently be taken into account, such as resettlement costs and, in appropriate circumstances, solace for emotional distress.[28]

More recently, the court in *Mhlanganisweni Community v Minister of Rural Development and Land Reform*[29] relied on several foreign dicta to show that the purpose of compensation is to recompense. The court regarded market value as an important circumstance to take into account when determining compensation.

In *Florence v Government of the Republic of South Africa*[30] the Constitutional Court, in the context of a restitution claim, opted for the "generous construction [rather than] a merely textual or legalistic one to afford claimants the fullest possible protection of their constitutional guarantees".[31] The focus moved on recompensing to constitutional guarantees. When calculating compensation, the court warned that the burden on the fiscus was an important consideration, as compensation claims are paid from taxpayer's money and therefore need to advance a public purpose.[32] The court acknowledged the proportionality, or the balance, that is required between the interest of the individual and that of the public.

The bulk of these justifications for the payment of compensation place "property" in the centre of the inquiry, without focussing much on the competing claims. Despite the focus on recompensing the individual, the central principle should remain that the

---

27 *Haakdoornbult Boerdery CC v Mphela* 2007 5 SA 596 (SCA) para 48.
28 *Haakdoornbult Boerdery CC v Mphela* para 48.
29 *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 .
30 *Florence v Government of the RSA* 2014 6 SA 456 (CC).
31 *Florence v Government of the RSA* para 48.
32 *Florence v Government of the RSA* para 71.

amount of compensation should reflect an equitable balance between the public interest and the interests of those affected. This balance must be established with reference to the relevant circumstances. It should focus on the democratic ideals, rather than the property itself, and without disregarding the role that property rights can play in achieving the democratic ideals. It requires a careful balancing of interests to determine what is just and equitable.

This requires looking at each case individually with regard to the individual property interest that might, or might not, stem from the pre-constitutional era, and the constitutional framework with its legitimate reform efforts. A decision on what is just and equitable cannot be made in the abstract without due regard to the context of the expropriation, but should take into account the broader scheme of the Constitution.[33] It is within this broader scheme that the specific rules operate. With this broader scheme and the balancing of competing interests in mind, the specific rules will be discussed next.

2.2 Section 25

2.2.1 Introduction

Section 25 of the Constitution (the "property clause") both protects holders of rights in property (section 25(1) – (3)), and initiates reformist imperatives (section 25(5) – (8)). In the one-system-of-law view, the two parts don't stand opposite each other, but form part of the same Constitutional goal and should as such be read together.

Section 25(1) requires that a deprivation takes place in terms of a law of general application and that no law may permit arbitrary deprivation. Deprivation does not require compensation.

Section 25(2) allows for expropriation in terms of law of general application, for a public purpose (or in the public interest, most notably reform interests) and subject to compensation.

---

33 Van der Walt *Constitutional property law* 509.

The reformist imperatives in section 25(5) – (8) allow the state to infringe on existing property rights.[34] The power to infringe on private property rights (as warranted by section 25(1) & (2)) developed from a specific historical context in South Africa, and seeks to redress. This historical context and redress should be kept in mind when interpreting the property clause, or where the state limits private property. The reformist imperatives stand alongside the protection of existing private property.

2.2.2 What is property?

The Constitution itself does not define property. In the *FNB* case the courts regarded it "judicially unwise to attempt a comprehensive definition of property for purposes of section 25".[35] For purposes of the Constitution, the definition of property is therefore fairly wide. This is now echoed in the Expropriation Bill that states that the definition of "property" is "property contemplated in section 25 of the Constitution". Where property is limited to land in the Bill,[36] it is indicated as such.

In terms of the Constitution, property should also be understood in its specific historical land social framework.[37]

The current conversation surround the amendment of the Constitution focusses largely on land, presumably because the motion adopted by parliament has a narrow focus on land.

2.2.3 Deprivation or expropriation?

The distinction between deprivation and expropriation is not always clear, but there are some characteristics that can indicate that an infringement in property is rather an expropriation than a deprivation.[38] The distinction is important, as deprivation does not require compensation, but an expropriation does. The distinctions are:

---

[34] Du Plessis *Compensation for Expropriation under the Constitution* 78.
[35] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a/ Wesbank v Minister of Finance* 2002 4 SA 768 (CC) par 51.
[36] *Expropriation Bill*.
[37] *Reflect-all 1025cc v MEC for Public Transport, Roads and works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) par 32.
[38] Van der Walt *Constitutional property law* 209 – 211.

- The source of the power differs. Deprivations stem from the state's regulatory power, while expropriations stem from the state's power of eminent domain.
- The purpose or intention of the infringement, which stems from the source mentioned above is also an indication. Deprivation of property is usually for health and safety reasons, while expropriation is for a public purpose, as stated in the authorising act.
- The impact of the infringement on the property holder. This is more important in the difficult cases, where the distinction is not so clear. In the case of deprivations, the burden of the regulating property is spread widely and fairly throughout society, and the general use is restricted. In the case of expropriation, the property is either acquired or totally destroyed.
- The acquisition of property. While this is not decisive, when property is acquired it usually amounts to expropriation, while non-acquisition does not necessarily restrict it to deprivation.
- A permanent loss or physical invasion usually indicates an expropriation.

The distinction is important for two reasons: firstly, a deprivation doesn't require compensation, and secondly, the fact that an expropriation is regarded as a subset of deprivation means that any expropriation must comply with the requirements of a deprivation too.

2.2.4 Deprivation

Section 25(1) prohibits the state to deprive property except in terms of a law of general application, and that no law may permit arbitrary deprivation of property. Deprivation is a "sacrifices that holders or private property rights may have to make without compensation".[39]

Deprivation refers to uncompensated, regulatory restrictions on the use, enjoyment and exploitation of property.[40] This is the regulatory or the police power of the state.

[39] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) par 48.
[40] Van der Walt *Constitutional property law* 192.

Most interferences will lead to some loss in value of the property, and some interferences can even lead to substantial loss.

It will not attract compensation if it serves important public purposes in protecting public health and safety, when landowners are more or less equally affected and when the benefits are reciprocal.[41] When deprivations are too burdensome on the property holder, either the Act authorising the deprivation or the act of deprivation itself may be declared unconstitutional.[42] In South Africa, we don't compensate a deprivation.

The courts have defined deprivation on a number of occasions. In the *FNB* case the court stated that "any interference with the use, enjoyment or exploitation of private property" is a deprivation.[43] Such interference must be a "*substantial interference* or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society" (own emphasis).[44]

There are two explicit requirements for a deprivation to comply with the Constitution. The first is that it must be done in terms of a law of general application, and the second that it may not be arbitrary. If it is found to be arbitrary or not done in terms of a law of general application, such a limitation must pass the general limitation in section 36. But, if it is found to be not in terms of a law of general application, or if it is arbitrary in terms of the section 25(1) inquiry, there is little chance it can still be saved by the general limitation clause, section 36(1), since the wording and requirements of the two sections largely overlaps.[45]

The requirement that it must be done in terms of a law of general application is relatively unproblematic. It ensures that the state authorises such a deprivation (through legislation), and that it does not single out a specific owner. It is important

---

[41] Van der Walt *Constitutional property law* 197.
[42] Van der Walt *Constitutional property law* 197.
[43] Par 57.
[44] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng, (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005(1) SA 530 (CC)*; *Reflect-all 1025cc v MEC for Public Transport, Roads and works, Gauteng Provincial Government* par 35; *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd 2011 (1) SA 293 (CC).*
[45] Van der Walt *Constitutional property law* 219.

that the law must apply generally, and not be aimed at infringing a single or specific person's property right.

Arbitrariness is an enquiry into the relationship between the law in question and the ends it wants to achieve and the impact of the restrictions on the use and enjoyment of the property.[46] This enquiry can require either a low level of scrutiny (rationality) or a substantive inquiry (proportionality), depending on the facts.[47]

It is important to add here, as a caveat, the relationship with the Promotion of Administrative Justice Act[48] and section 36 of the Constitution. Both requires that the expropriation be reasonable. A section 36 reasonableness test requires a proportionality analysis, where the importance of the project will be balanced against the importance of the expropriated right (eg ownership).

Severe deprivations require an enquiry into whether the deprivation is proportional to the aim it wants to achieve. It requires sufficient reasons for the deprivation, and that the deprivation is procedurally fair.[49] In terms of the *FNB* case, it requires an enquiry into the "complexity of relations" including the relationship between the means employed and the ends sought, the purpose of the deprivation and the person whose property is affected and the purpose and the nature of the property coupled with the extent of the deprivation. When the deprivation is severe, the purpose needs to be more compelling.[50] In the context of expropriation with little or no compensation, this is important.

Marginal deprivations will require a rational connection between the interference and the purpose.[51] More severe interference requires proportionality. With reference to the comments made earlier, this means that in the case of expropriation (which is a fairly severe interference with property rights), expropriation without compensation,

---

[46] *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* par 49.
[47] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a/ Wesbank v Minister of Finance* par 243.
[48] *Promotion of Administrative Justice Act* 3 of 2000 s 6(2)(h).
[49] *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* par 48.
[50] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a/ Wesbank v Minister of Finance* par 100.
[51] *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* par 49.

for instance, will probably not be possible if it cannot be shown that the owner benefitted directly from Apartheid, for instance, or if they make productive use of their land.[52]

There might be cases where the courts do not delve into the question of deprivation, but this seems to be in cases where the parties agreed that the requirements for section 25(1) was met, and that the focus should therefore be on section 25(2).[53] Parties will have to decide whether it makes strategic sense to acknowledge a deprivation in line with section 25(1) when making a case. Either way, with expropriation regarded as a subset of deprivation, it needs to pass the deprivation test, and any inquiry into the constitutionality of an expropriation therefore needs to pass the section 25(1) requirements.

The *AgriSA* case[54] dealt with the question whether certain deprivations, namely deprivations caused by a regime change in rights in certain resources, amounted to an expropriation – a sort of no-person's land between deprivation and expropiration. This will be discussed in detail in the next paragraph.

2.2.4.1 Regime changes that are deprivations not expropriations

An aspect that often comes into the spotlight is whether a state must compensate property owners who are affected by regime changes in property. In South Africa, these regime changes took place mostly in the context of water and mineral rights.

The Water Services Act 108 of 1997 and the National Water Act 36 of 1998 brought about institutional regime change in the water law. The Services Act sets up a regulatory framework with norms and standards for water service providers. In the preamble, the state is the custodian of the nation's water resources. The National Water Act, however, had a much bigger impact on water rights, where the old system of water rights was replaced with a totally new regime. Prior to the Act, water rights were regulated by common law and the 1956 Water Act, where it was possible to hold

[52] See Hoops 2019 *SALJ*.
[53] *Agri South Africa v Minister for Minerals and Energy* . As discussed in 2.2.3
[54] *Agri South Africa v Minister for Minerals and Energy*

private property rights (including ownership) of water. It also distinguished between private and public water. In both instances, but more so in the private ownership instance, landowners enjoyed a privileged access to water resources. It is this inequality that the Water Act of 1998 tried to address,[55] by abolishing private ownership in water completely and replacing it by use rights. This meant that the acquisition, allocation and enjoyment of these rights are all subject to the Act, and must be exercised in terms of the Act. Owners who were individually affected by this regime change, is entitled in terms of section 22(6) to claim compensation for financial loss.

In terms of property law, the question is whether such a regime change is a mere deprivation, or if it amounts to a compensable expropriation. And while the loss in section 22 is framed as compensation for financial loss, the question is whether this cannot be framed as compensation for expropriation?

Section 24 of the Constitution places a similar obligation on the state with regards to "secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".[56] It is within this framework that the Mineral and Petroleum Resources Development Act 28 of 2002 was promulgated.

Mineral and mining rights have previously been held to be private property rights and as such protected by the Constitution.[57] In 2002 the extensively regulated scheme based on private ownership was replaced by a licence-based regime.[58] This had the implication that mineral and petroleum resources were declared part of the common heritage of all South Africans and that the state is custodian of the minerals to the benefit of all. It regulates, control and administer these the issuing of these rights, but it does not reserve the right to do these things to the state itself.[59] The state also

---

[55] The Act therefore brought about an overarching regime change to achieve the policy goals of control over and access to the use of water, in order to fulfil the state's Constitutional obligation with regards to reform (in sections 25(8) and 27(1)(b)).
[56] Section 24(a)(iii). See Van der Walt *Constitutional property law* 403.
[57] Hoops 2019 *SALJ* para 74.
[58] Van der Walt *Constitutional property law* 404.
[59] Van der Walt *Constitutional property law* 404.

does not own the rights, although some commentators are of the opinion that the effect is an implicit reservation of these rights to the state.[60]

The question in this regard is whether such a change is a deprivation or expropriation of existing rights and can therefore be constitutionally challenged. The old system of private property holdings was replaced by a new system that recognised existing rights and interest, but at the same time opened up access to the same rights to others. It also subjected the new rights to more stringent regulation.[61] In these cases, there are institutional changes (private property to state regulation) that have impacts on individual cases. The question is then raised whether a regime change on institutional level is justified and legitimate.[62] The individual issue on the individual level raises questions about the impact that such a regime change has on individual property rights, that might be lost or weaker as a result of such a change.[63] This is an important distinction, as Van der Walt explains[64]

> Constitutionally, the legitimacy and validity questions raised by the two issues are entirely different. Criticism of the institutional reform cannot be based on individual injustices, nor can criticism of individual injustices be based on rejection of the systemic, institutional reform.

Institutionally the question is whether one can, in terms of the constitution, abolish a whole system of existing private rights and replace it with a state-controlled system of rights. Since the constitution authorises (maybe even orders) transformation of the old system of inequality and injustice, in line with the constitutional goals of ensuring equal sustainable use of scares natural resources, such a change will be permissible as long as it happens in a manner that is permitted by the Constitution. This includes that the scheme must be "rationally legitimate and procedurally just".[65] Underlying policy reasons as justification for such a change then becomes important.

---

[60] Badenhorst and Moster 2003 *Stell LR* 383.
[61] Van der Walt *Constitutional property law* 411.
[62] Van der Walt *Constitutional property law* 411.
[63] Van der Walt *Constitutional property law* 412.
[64] Van der Walt *Constitutional property law* 412.
[65] Van der Walt *Constitutional property law* 413. This is in line with German jurisprudence.

In this sense, from a purely institutional level, the abolition of private property rights in a natural resource is not per definition unconstitutional as long as the reason for doing so is legitimate and convincing.[66] This will not be an expropriation. The legitimacy of such a change will depend on procedural fairness provisions, and whether compensation is provided for individual losses. In short, an institutional change of a specific property regime (such as minerals or water) might be constitutional if 1) there are sound and legitimate policy reasons for such a change, it 2) is authorised by the Constitution or a law, and 3) if it is implemented in a way that does not conflict with the principles of natural justice or just administrative action. The effect of such a regime change, is another inquiry.[67]

Even if such a regime change is in line with the Constitution, the effect can be that it can still have disproportional effects on individuals. If the regulatory scheme unfairly places a disproportional burden on one individual or a small group of people, and it does not provide for some form of compensation (whether for damages or framed in terms of expropriation language), it will be unconstitutional in South Africa, since we don't compensate regulatory interferences.[68] This regulation, in line with the normal regulatory powers of the state, needs to be done for purposes of effecting control over scares, important or dangerous property or resources, and needs to apply fairly and equally.[69]

Legislation that therefore results in a regime change of a particular resource (such as water), that sets out and delineate the rights appropriately, that has a legitimate aim in line with legislation and the Constitution, that does not conflict with the principles of natural justice or just administrative action and that provides for the payment of compensation (financial loss or otherwise) if it affects individuals harshly, should pass the Constitutional muster as a deprivation that does not require compensation.

---

[66] Van der Walt *Constitutional property law* 416.
[67] Van der Walt *Constitutional property law* 418.
[68] Van der Walt *Constitutional property law* 419.
[69] Van der Walt *Constitutional property law* 421.

2.2.5 Expropriation

A rich definition of expropriation is flexible and looks at a combination of characteristics to determine whether there was an expropriation in a specific case or not. It is usually accepted, especially in more complex cases, that not all the characteristics should be present, and that the matter is better approached holistically. The characteristics were discussed in 2.2.3.[70]

Expropriation is an original method of acquisition, meaning, it is brought about by unilateral state action and does not require the co-operation of the owner. It involves a loss of property for the former owner (whether total or partial, permanent or temporary). Expropriation, unlike deprivation, usually targets a specific property for the benefit of the public.[71]

On the other side of the coin, expropriation mostly implies that the state acquires something. If done for a public purpose or in the public interest, the consequence is that compensation is due. What sets an expropriation apart from a mere deprivation (including a confiscation) is the fact that compensation must be paid.

Expropriation is done in terms of a statute that authorises the expropriation, coupled with an Expropriation Act that sets out the procedures and method of calculation. In Land Reform contexts, it is possible to transfer the land to a private beneficiary.[72]

The *Expropriation Bill* of 2019, as discussed later will bring expropriation practices in line with the Constitution and the demands of administrative justice. The Bill in this sense ties the strings together and streamlines the laws applicable to expropriation.

---

[70] Van der Walt *Constitutional property law* 344 – 346.
[71] Van der Walt *Constitutional property law* 197.
[72] In the land reform context it is not clear whether the property must first transfer to the state (as in all other expropriations), and then the state transfers it to the beneficiary, or whether it is possible to transfer the property directly from one private person to another, provided that it is done in terms of legislation. The first is legally more pure, while the latter will be more practical.

When property is expropriated, compensation must be paid. Compensation must be "just and equitable". What is "just and equitable" is a contextual question that will depend on the facts.

Despite "just and equitable" being the compensation standard, market value still enjoys centrality because it is deemed practical and a quantifiable factor.[73] This is problematic, and is one of the issues that will be addressed in the conclusion.

The Expropriation Bill 2019 now echoes the Constitution's wording, but it is not clear if this will, in practice, mean a move away from the centrality when going to courts. Parliament will be wise to include interpretative guidance in the Bill, in the form of an "interpretation clause", in order to guide courts on how to go about interpreting the Expropriation legislation.

2.2.6 Compensation

Section 25(2)(b) sets out the requirement that compensation is due upon expropriation. Section 25(3) determines that at the time of expropriation the compensation amount and the time and manner of payment must be just and equitable,[74] striking an equitable balance between the person whose property is expropriated and public interest.[75] All relevant circumstances must be considered, including the factors listed in section 25(3)(a)-(e). The Harvey case[76] ruled that compensation need not be determined at expropriation, but can be determined afterwards, if it is just and equitable to do so.[77]

---

[73] Du Plessis 2015 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1726.
[74] Gildenhuys, *Onteieningsreg 2nd ed* (Butterworths Durban 2001) 163. Procedurally, this has been construed to mean that the plaintiff who relies on the Constitution must aver it the particulars of claims, as in *De Villiers v Stadsraad van Mamelodi* 1995 (4) SA 347 (T) 35.
[75] S 25(3) of the Constitution.
[76] *Harvey v Umhlatuze Municipality* 2011 (1) SA 601 (KZP).
[77] In terms of clause 17 (1) of the Expropriation Bill, the holder is entitled to payment of compensation "by no later than the date on which the right to possession passes". Clause 17 (3), however, makes it clear that a dispute about the payment of compensation will not prevent the passing of the right to possession.

The compensation can be agreed to by those affected, or it can be decided or approved by a court. When there is no agreement, the Constitution provides the court with the principles in section 25(3) that should be used when calculating compensation.

The central principle is that the amount of compensation must reflect an equitable balance between the public interest and the interests of those affected. This balance must be established with reference to the relevant circumstances, including, but not restricted to, the list of factors in section 25(3). This requires looking at each case individually with regard to the individual property interest that might stem from the pre-constitutional era, and the constitutional framework and its legitimate land reform efforts. A decision on what is just and equitable cannot be made in the abstract without due regard to the context of the expropriation. When determining compensation, due regard should be paid to the broader scheme of the Constitution too.[78]

The aim of compensation under the constitutional dispensation seem to be not to let the individual carry the burden of something that is in the public benefit on its own, as in pre-constitutional expropriation. However, the Constitution aims to do this by balancing the interest of the public with the interest of those affected (the individual), and this might not always mean paying market value. This way of regarding compensation was brought about under the Constitution, which means that it needs it requires a new way of thinking, that at times were met with some resistance. This is one of the challenges for lawyers: to move to a new way of thinking about expropriation. Care should therefore be taken to ensure that the Expropriation Act[79] or the new Bill[80] is interpreted in line with the Constitution, with special caution not to over-emphasise the market value. As will be discussed later, this will become important when we distinguish between "value" and "compensation".

---

[78] Van der Walt *Constitutional property law* 471.
[79] *Expropriation Act* 63 of 1975.
[80] *Expropriation Bill*.

2.2.6.1 The list in section 25(3)

The first factor in section 25(3)(a) provides that the current use of the property[81] can be a relevant circumstance that can influence the compensation amount. This subsection seems to justify cases where scarce resources, like agricultural land, might be expropriated for land reform because it is not otherwise used productively and can be used for housing or the establishment of new farmers. For example: where labour tenants apply to become owners of land[82] it should be borne in mind that the owner did not have use of the land.[83] It might be possible, therefore, that the owner's loss is not substantial. This might mean that the owner should not necessarily receive full market value of the property. It is argued that this factor cannot be used as a punitive measure as that would be against the public purpose.[84]

The history of the acquisition in section 25(3)(b) includes cases where the state expropriated property and sold it well below market value during apartheid.[85] In many of these cases the state made land available to white farmers well below market value.[86] If such an owner is now expropriated for land reform purposes, it would be unfair to offer full market value compensation. Such an owner should not be allowed to benefit twice from apartheid.[87] The question is whether, when an owner that benefited from a reduced price transfer the land to a *bona fide* third, this factor is still applicable. The general feeling is that such a buyer should not be penalised because of the initial history of acquisition. It is also not sure whether the fact that farms were

---

[81] Regulation 1 in Gen Not 1322 in GG 42064 of 30 November 2018 speaks of "current use value" as "the net present value, as at the date of valuation, of cash inflows and outflows, or other benefits and costs that the subject property generates for the specific owner in perpetuity or, in the case of a lease, to lease expiry, under lawful use, and without regard to its highest and best use, or the monetary amount that might be realised upon its sale". It is unclear if it is supposed to give effect to this section, or whether it means something different.
[82] S 1 of the *Land Reform (Labour Tenants) Act* 3 of 1996.
[83] Budlender 1998 *Budlender G, Latsky J and Roux T Juta's New Land Law (Juta Cape Town 1998) Chapter* 1 – 59. See Expropriation Bill clause 12(3)(a).
[84] Van der Walt *Constitutional property law* 512. Contrast this, for instance, with the position in Brazil, where unused land can be expropriated to transfer to small farmers.
[85] Du Plessis and Olivier 1997 *BPLD* 11. See also Van der Walt *Constitutional property law* 513.
[86] Budlender 1998 *Budlender G, Latsky J and Roux T Juta's New Land Law (Juta Cape Town 1998) Chapter* 1-59.
[87] Budlender 1998 *Budlender G, Latsky J and Roux T Juta's New Land Law (Juta Cape Town 1998) Chapter* 1-59.

inherited or often sold symbolically to transfer the property to a child before death, for example, should also be taken into account.[88]

Section 25(3)(c) lists market value as a factor to consider when calculating just and equitable compensation. Market value in section 25(3)(c) probably has the same meaning as market value in section 12 of the Expropriation Act,[89] although market value is not the main consideration in section 25(3). Where market value plays a central role in the calculation of compensation according to section 12 of the Expropriation Act,[90] market value is listed as just one factor amongst many to be considered when determining constitutional compensation under section 25(3)(c). The Expropriation Bill mimics the wording of section 25, with no specific reference or emphasis on market value.

Section 25(3)(d) refers to the instances where the acquisition by the person expropriated and the capital improvement made to such property was made to the land with the assistance of the (apartheid) state.[91] The rationale underlying this subsection is that the (current) state should not compensate an owner for improvements that they made with (apartheid) state subsidies, as it will not be just and equitable to do so.[92] Budlender is of the opinion that it is only direct subsidies that should be taken into account.[93] A possible area of contention in the future will be the question whether beneficiaries that acquired properties through redistribution (SLAG or LRAD funds, for example) would also fall in this category.

Section 25(3)(e) requires the court to have regard to the purpose of the expropriation. It is not clear whether this means that if land is expropriated for land reform purposes the owner should be happy to accept a lower price than where property is expropriated

---

[88] Gildenhuys *Onteieningsreg 2nd ed* 172 for a detailed explanation of how compensation will be calculated in such cases. See also Badenhorst 1998 *De Jure* 261.
[89] 63 of 1975. Badenhorst 1998 *De Jure* 262
[90] 63 of 1975.
[91] This only applies to direct subsidies in respect to the property. See clause 12(3)(e) of the Exportation Bill also in this regard.
[92] See Van der Walt *Constitutional property law* 513. Claassens 1993 *S Afr J on Hum Rts* 424.
[93] Budlender 1998 *Budlender G, Latsky J and Roux T Juta's New Land Law (Juta Cape Town 1998) Chapter* 1 – 65.

for non-land reform public purposes,[94] or whether it merely confirms the reformist agenda of section 25. It is possible that in cases where expropriation is for land reform purposes, compensation can be less than market value, especially if linked with section 25(8).[95] This is in line with foreign law as will be discussed later. It is, however, important not to interpret this section too widely to include non-land reform purposes as in the *Du Toit* case.[96]

The purpose is sometimes disregarded due to a provision in the Expropriation Act[97] (that is also now in the Expropriation Bill[98]) that states that when compensation is calculated, the reason for the expropriation must be disregarded. The rationale underlying this section is that "an appreciation or depreciation in the value of the property which…is a by-product or spin-off of the expropriation is to be ignored".[99] This is the so-called *Pointe-Guarde* principle. It is seen as a principle of equity that it should not be compensated.[100]

In the *Khumalo* case, the court preferred to apply this rule of compensation, ignoring certain factors, even though the constitutional legislation (Restitution Act) expressly required the court to consider these factors. The result in *Khumalo* was that the court's preferred interpretation focussed on fully indemnifying the expropriatee with no regard to the historical or social context of the expropriation. This meant that an owner who, under the apartheid, benefited from lower land prices and the protection of property, benefited once again by receiving market value compensation for the expropriation of the property in question. This shows that owners may receive disproportionately more compensation than what constitutionally they are entitled to. Existing ownership was thus protected at the expense of land reform.

---

[94] For Gildenhuys *Onteieningsreg 2nd ed* 178 this interpretation would not be just.
[95] du Plessis "The public purpose requirement in the calculation of just and equitable compensation", Badenhorst 1998 *De Jure* 263.
[96] *Du Toit v Minister of Transport* 2003 (1) SA 586 (C); *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA); *Du Toit v Minister of Transport* .
[97] Section 12(5)(f).
[98] Clause 12(2)(f).
[99] *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) 679.
[100] For a thorough discussion of what "scheme" entails and how value must be determined, see Gildenhuys *Onteieningsreg 2nd ed* 259 – 267.

The purpose of the expropriation in section 25(3)(e) is further complimented by section 25(4), which states that public interest includes the nation's commitment to land reform. Section 25(4) therefore clarifies the content of public interest, while section 25(3)(e) is about the role that public purpose plays in compensation. This should also be distinguished from section 25(3) that states that the expropriation must be in the public interest or for a public purpose, therefore public interest and public purpose as requirements for the expropriation.

2.2.6.1.1 How these factors influence compensation

Subsections (a) – (e) are not all applicable in all cases, and it might be that in certain circumstances a particular subsection is more relevant than others are. However, it is important that *all* relevant circumstances be considered in every case, including those circumstances or factors that might be relevant but not listed in section 25(3).

The courts were left to interpret how these factors interact with one another, and in *Ex Parte Former Highlands Residents*,[101] Gildenhuys J formulated a two-step approach when calculating compensation. Gildenhuys J concluded that market value plays a central role in other jurisdictions, even in those with a property clause in the Constitution. Therefore, when calculating compensation, the courts first determine the market value of the property (since it is easily quantifiable),[102] and then, based on the list in section 25(3), adjust the amount either upwards or downwards.[103] Market value was thus elevated to a central or starting position in determining compensation.

The Constitutional Court in *Du Toit,*[104] relying on *Ex parte former Highlands Residents*, acknowledged that the Constitution provides for considerations other than market value, but restricted the influence of the other factors by confirming that one should

---

[101] *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) pars 34 – 35.
[102] Budlender 1998 *Budlender G, Latsky J and Roux T Juta's New Land Law (Juta Cape Town 1998) Chapter* 1 – 60. See also the discussion on the Department's guidelines below.
[103] *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* pars 34 – 35.
[104] *Du Toit v Minister of Transport* pars 25 – 28.

proceed by first determining market value and then adjusting that amount to fit the constitutional list.[105]

The duty to consider the public purpose in section 25(3)(e) implies that one should be sensitive to the context within which the property rights are affected by expropriation. Compensation can be less than market value. That does not imply, however, that compensation *should* in all cases of expropriation be adjusted downwards to reflect the legitimacy of the public purpose they serve. This might not be just and equitable. In *Du Toit,* the owner was expected to carry a more onerous burden for a national asset from which the public as a whole benefit.[106]

A better approach is that section 25(3)(e) should only be applicable if there is a unique purpose or value in the Constitution that is applicable. For instance, the reference to the context and history in section 25(3) places the emphasis on land reform as a purpose, and this is highlighted by the fact that the Constitution explicitly states in section 25(4) that "public interest" includes the nation's commitment to land reform. This means that the public purpose and interest can have an influence on the compensation amount in exceptional circumstances.[107]

In the courts, market value still plays a central role in the calculation of compensation. In the conclusion I will allude to this problem, suggesting that the concepts of "value" and "compensation" be clearly distinguished where "compensation" involves questions of justice and equity, dependant on judicial discretion. What is needed is a new methodology of interpreting expropriation legislation, where the focus is on just and equitable compensation and not just on market value. This can be done either through court jurisprudence or clear guidelines in legislation (such as an interpretation clause), or both.

---

[105] See also *Khumalo v Potgieter*.
[106] Van der Walt 2005 *S African LJ* 772.
[107] Van der Walt 2005 *S African LJ* 772 – 3. See also *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA)) where the Constitution was likewise applied to an expropriation for the purpose of canalisation storm water. See 2.2.6.1 above and du Plessis "The public purpose requirement in the calculation of just and equitable compensation".

2.3 Expropriation in the land reform context

2.3.1 Legislation authorising the expropriation

Legislation must authorise the state to expropriate property for land reform purposes. Legislation provide the public purpose (or public interest) for the expropriation. Most of the legislation find their grounding in sections 25(5) – (9) of the Constitution.[108]

It is important to distinguish between the validity of the expropriation and the consequences of an expropriation. An expropriation is valid if it is done in terms of authorising legislation, and 9 00undertaken for a public purpose or in the public interest. The consequence is that compensation is due. It can be argued that this consequence, or duty to pay compensation, is an integral part of expropriation. It is therefore impossible to talk about "expropriation without compensation", as compensation is a consequence of an expropriation.[109]

In the land reform context, the following legislative measures provide explicitly for expropriation for land reform and housing purposes:

- Sections 10, 10A and 12 of the Land Reform: Provision of Land and Assistance Act 126 of 1993;
- Section 26 of the Extension of Security of tenure Act 62 of 1997;
- Sections 22, 35, 42A, 42C and 42E of the Restitution of Land Rights Act 22 of 1994;
- Section 3 of the Land Reform (Labour Tenants) Act 3 of 1996;
- Section 9 of the Housing Act 107 of 1997;
- Clause 26 of the Regulation of Agricultural Land Holdings Bill of 2017.

Expropriation of property for purposes of land reform, authorised by legislation, will be valid in terms of the requirements of the Constitution.

---

[108] *Constitution of the Republic of South Africa,* 1996.
[109] Iyer 2012 *SPECJU*

In the absence of authorising legislation, expropriation will not be valid. Since expropriation is such a great inference with rights, there needs to be a clear authorisation for an expropriation, and a clear indication of the public purpose that the expropriation aims to serve.

But the validity of the expropriation cannot be attacked because the compensation is not sufficient according to the owner. The validity of the expropriation can only be attacked if it is not authorised in legislation, if it did not comply with the procedures or if it is not in the public interests or for a public purpose. An owner dissatisfied with the amount of compensation is free to approach the court for relief in terms of section 25(2)(b).

2.3.2 Section 25(8)

Section 25(8) specifically states that

> [n]o provision in this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that the departure of the provisions of this section is in accordance with the provisions of section 36(1).

This means that deprivations, expropriations, and the determination of compensation (or the compensation requirement itself), in the cases of land reform, will warrant a more tolerant review because of the provisions in section 25(8). A deprivation, for instance, in terms of section 25(1) that might ordinarily be arbitrary, might be subject to lesser scrutiny, although it must still be reasonable and justifiable in terms of section 36(1). In this context, a discussion of section 36(1) and its interaction with section 25 becomes important.

2.3.3 Section 36(1)

Constitutional rights are not absolute, and can be justifiably limited for, for instance, social concerns. The specific criteria that a limitation must comply with is set out in section 36. Section 36(1) of the Constitution[110] states that

---

[110] *Constitution of the Republic of South Africa,*

> The rights in the Bill or Rights may be limited only 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, taking into account all relevant factors including –
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and the extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.

This is a general limitation clause that applies to all the sections in the Bill of Rights. Our courts follow a two-step approach in determining whether a limitation on rights is justifiable. If it is found that there was indeed an infringement of a right (step one), the state then moves to ask whether such an infringement can be justified in terms of section 36 (step two).[111] Should there be no payment of "just and equitable" compensation, this would be a violation of section 25(2). Such a violation will only be possible if it complies with section 36(1).[112]

In *S v Manamela*[113] the court stated that

> In essence, the Court must engage in a *balancing exercise* and arrive at a global judgment on *proportionality* and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question *is one of degree* to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected. (own emphasis)

Section 36 therefore clearly aims at balancing interests in order to avoid a zero-sum game, and to ensure that constitutional values are protected.

There is no clear judicial guideline in South Africa on how section 25, section 36 and administrative law (section 33) will influence the rationality of the expropriation itself – in other words, how expropriation will be judged as furthering an important reform

---

[111] Currie and De Waal *The bill of rights handbook* 153.
[112] Currie and De Waal *The bill of rights handbook* 562.
[113] *S v Manamela* [2000] ZACC 5 par 32.

purpose in terms of section 25(8), within the confines of the laws.[114] The reasonableness test in section 36 requires a proportionality analysis, balancing the relative importance of the project against the relative importance of the expropriated right.[115] In terms of section 33 and PAJA, the reasonableness standard is not fixed. The severity of the infringement will determine whether the inquiry is a rationality, or a proportionality requirement. With expropriation being a sever limitation of a person's right, the test will probably be a proportionality test.[116] If courts review a decision made by the expropriating authority in this regard, it will examine whether the decision cross the boundaries of what can be regarded as reasonable. It is during this reasonableness inquiry that the payment of compensation can play a role.[117]

For example, it is possible that the absence of compensation, or substantially reduced compensation, will influence such a weighing process. With the owner's interest is substantially affected, this will require a compelling reason or justification for the land reform measure. This is regardless of an amendment to section 25, since the administrative action of expropriation will still have to comply with PAJA and section 33, as well as the general limitation clause of section 36(1). There is also an argument that any constitutional amendment that interferes with this proportionality inquiry, might undermine the rule of law (as proportionality forms the basis of the rule of law), and since the rule of law is a founding value of the Constitution, such an amendment will require a three-quarter majority of the National Assembly and six provinces from the National Council of Provinces.[118]

In terms of section 25(8) the state must be able to show that sections 25(1) and (2) indeed is an impediment to land reform. This might be challenging in light of the damning Special Investigation Unit[119] report showing large scale corruption, the High-

[114] Hoops 2019 *SALJ*.
[115] Hoops 2019 *SALJ*.
[116] Hoops 2019 *SALJ*.
[117] Hoops 2019 *SALJ*.
[118] In terms of section 74(1) of the Constitution. See Hoops 2019 *SALJ*.
[119]Anonymous *Special Investigation Unit Report in respect of the National Departmnet of Rural Development and Land Reform.*

Level Panel report[120] that explicitly said that sections 25(1) and (2) are not impediments, and various other reports[121] and court cases[122] that gives clear diagnoses of the impediments to land reform.

What does become important in the context of compensation is that an infringement of section 25(2), for instance, for land reform purposes, when being balanced, can be saved from being too intrusive based on the compensation paid. If the compensation is zero, or absent, then the infringement into section 25(2) will be fairly extensive, which will require the public interest in that specific land reform project to be fairly significant. This is subject to the rules of section 36 (and section 33 dealing with just administrative action).

This proportionality analysis will still be present, even if a Constitutional is amended to provide for zero compensation to be just and equitable.[123]

An even further argument is possible: proportionality is an integral part of the "rule of law".[124] Section 1 of the Constitution makes the rule of law one of the founding values of the Constitution. If a Constitutional amendment interferes with the proportionality analysis, then it will affect a founding value and require a 75% majority.

3 Comparative approach to compensation for expropriation

3.1 Introduction

Section 39 of the Constitution states that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum […] (b) must consider international law and (b) may consider foreign law". This section will therefore sketch the international law outline, and some foreign jurisdictions.

---

[120] Reference Report of the High Level Panel on the assessment of key legislaiotn and the acceleration of fundamental change in of 2017.
[121] Analytics *Implementation evaluation of the Restitution Programme*.
[122] *Mazizini Community v Minister for Rural Development and Land Reform* [2018] ZALCC 5.
[123] Hoops 2019 *SALJ*.
[124] van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* 182.

3.2 International law

In terms of section 232 of the Constitution, customary international law is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament. There is also a presumption in favour of an interpretation in line with International law (rather one that conflicts with it).

When it comes to the interpretation of the Bill of Rights, which includes the property clause, then section 39 obliges a court (or tribunal) to consider international law[125] and provide that a court may consider foreign law.[126]

In the international sphere, South Africa also has some (limited) obligation in terms of bi-lateral (BITs) and multi-lateral investment treaties.

3.2.1 Requirements for an expropriation in terms of International law

3.2.1.1 Introduction

States have a sovereign right in terms of international law to expropriate property of nationals and aliens, either through nationalization or expropriation. Expropriation can be for economic, political, social and other reasons. For such an expropriation to be lawful under international law the property must be taken for a public purpose, on a non-discriminatory basis, with a due process of law and accompanied by compensation.[127]

If a state arbitrarily confiscates property belonging to an alien, and does not pay compensation, then it violates the international minimum standard.[128]

Where an unlawful expropriation occurred, art 31(1) of the UN ILC Articles on State Responsibility of 2001 provides for full reparation when international law was violated.

---

[125] S 39(1)(b).
[126] S 39(1)(c).
[127] Nations *Expropriation* 1. Kriebaum and Reinisch 2012 *The Max Planck Encyclopedia of Public International Law*.
[128] Dugard *International Law: A South African perspective* 225.

This can be done in terms of restitution on damages, which damages is calculated by replacement value (limited to actual damage).[129]

3.2.1.2 Public purpose

While the courts usually defer the "public purpose" question to States, tribunals have ruled that the taking of property as an act of political retaliation does not qualify as a public purpose.[130]

3.2.1.3 Non-discriminatory

If the expropriation only targets certain groups of people on political or other grounds, such expropriation have been found unlawful.[131] *GAMI Investments v Mexico*[132] ruled that when property is taken to insure that an industry remains solvent and thereby target a specific business, that such a measure is plausibly connected with a legitimate goal. It was not found to be discriminatory. On the other hand, measures that treated foreign investors differently from the national counterparts, can be discriminatory.[133]

3.2.1.4 Due process

Processes are usually governed by domestic legislation, and needs to comply with internationally recognized rules. In this regard it is important that an affected investor have an opportunity to have the case reviewed before an independent and impartial body. An expropriation can also, in terms of process, not be arbitrary. It must respect the due process of law. [134]

---

[129] Kriebaum and Reinisch 2012 *The Max Planck Encyclopedia of Public International Law*..
[130] *BP Exploration v. Libyan Arab Republic* (53 ILR 297) 1973.
[131] *Banco Nacional de Cuba v. Sabbatino* 376 US 398 (1964); *BP Exploration v. Libyan Arab Republic*.
[132] *GAMI Investments, Incorporated v Mexico* Final Award, IIC 109 (2004).
[133] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* ICSID Case No ARB/03/16.
[134] Nations *Expropriation* 36.

This requires the that there is a legal basis for expropriation, in other words, a law that order the expropriation, recourse to courts and that the State not conduct itself in an abusive manner.[135]

3.2.1.5 Compensation

3.2.1.5.1 Introduction

For an expropriation to be lawful, it must be accompanied by compensation. The question is what level of compensation must be paid, to make it a lawful expropriation. Since this requirement is the focus of this paper, it will be discussed separately in more detail in the next paragraph.

The effect of non-payment of compensation is not clear: does the non-payment render the expropriation unlawful, or does it form the basis of a claim to compensation? The general consensus seems to be that the payment of compensation is one consideration as to the lawfulness of the expropriation, but not automatically render the expropriation unlawful.[136] In other words, if an expropriation is unlawful on other grounds such as being arbitrary or not for a public purpose, the payment of compensation would not make it a lawful expropriation.[137] The other side of the coin means that just because compensation was not paid, it does not render the expropriation unlawful.[138] In that sense, the payment of compensation is a consequence of a legal exercise of a right of the State. While in most times the payment of compensation is met from the beginning, it is also possible to meet this requirement only after litigation.[139]

---

[135] Nations *Expropriation* 37.
[136] Nations *Expropriation* 43.
[137] Nations *Expropriation* 44.
[138] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* ICSID Case No ARB/96/1; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* ICSID Case No ARB/84/3.
[139] Nations *Expropriation* 44.

3.2.1.5.2 The Hull Formula

Upon an expropriation of an alien's property in a foreign country, the payment of compensation is due. Compensation is determined in terms of the Hull Formula,[140] that requires for prompt, adequate and effective compensation, usually taken to be market value, but not necessarily. While there is a debate whether what must be paid is market value or something less,[141] the consensus is that at least some compensation must be paid. Dugard makes the argument that the compensation standard is "appropriate", which means something less that "prompt, adequate, and effective" but a context specific inquiry.[142]

The Hull formula was contested by the Mexican government at the time of its land reform programmes. It was also questioned by the then Soviet Union and other communist regimes, alongside developing countries. These countries wanted an unrestricted right to expropriate property, and that the compensation payable only be done in terms of national laws.[143] This led to some discussions in the United Nations General Assembly under the heading of Permanent Sovereignty over Natural Resources.

3.2.1.5.3 Resolution on Permanent Sovereignty over Natural Resources

A Resolution on Permanent Sovereignty over Natural Resources[144] weakened the requirement for prompt, adequate, and effective compensation to "appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty". It also states that where the matter of compensation

---

[140] *United Nations General Assembly Resolution: Permanent sovereignty over natural resources* 1803 (XVII) (1962); *Charter of Economic Rights and Duties of States* 3281 (XXIX) (1974).
[141] Or whether the formula is still applicable, see Dugard *International Law: A South African perspective*227, and *Banco Nacional de Cuba v. Sabbatino*. Schachter 1984 *American Journal of International Law*. Or whether the formula is still applicable, see Dugard *International Law: A South African perspective*227, and *Banco Nacional de Cuba v. Sabbatino*. Schachter 1984 *American Journal of International Law*.
[142] Dugard *International Law: A South African perspective* 228. Dugard *International Law: A South African perspective* 228.
[143] Kriebaum and Reinisch 2012 *The Max Planck Encyclopedia of Public International Law* Kriebaum and Reinisch 2012 *The Max Planck Encyclopedia of Public International Law*
[144] *United Nations General Assembly Resolution: Permanent sovereignty over natural resources* 1803 (XVII) (1962) par 4.

arises, the remedies in terms of the national jurisdiction of the state must first be exhausted.

In a second resolution eleven years later, affirmed that when States nationalize resources, the State itself is entitled to determine the amount of possible compensation and the mode of payment, and that disputes will be settled in terms of national legislation.[145]

3.2.1.5.4 Charter of Economic Rights and Duties of States

The Charter of Economic Rights and Duties of States[146] declares that each state has the right to "nationalize, expropriate or transfer ownership of foreign property", but requires the payment of appropriate compensation in accordance with the state laws.[147] Questions of compensation will be settled by the domestic law, unless otherwise agreed.

Voting on the Resolution and the Charter showcased the ideological differences between "developed" and "non-industrialised"[148] states. Dugard[149] reckons that these developments make it difficult to salvage the traditional rules from this.[150] Firstly, though there must be a proper public purpose, states have a discretion on whether they wish to nationalise or not.[151] Secondly, the requirements of non-discrimination remain part of customary international law, but this does not mean that if there are no national interest to expropriate, that the expropriation of foreign interest will

---

[145] *United Nations General Assembly Resolution on Permanent Sovereignty Over Natural Resources* A/RES/3171 (XXVIII) (1973).
[146] *Charter of Economic Rights and Duties of States* 3281 (XXIX) (1974) par 2(2)(c).
[147] Kriebaum and Reinisch 2012 *The Max Planck Encyclopedia of Public International Law* Kriebaum and Reinisch 2012 *The Max Planck Encyclopedia of Public International Law*
[148] Dugard *International Law: A South African perspective* 227. Dugard *International Law: A South African perspective* 227.
[149] Dugard *International Law: A South African perspective* 227. Dugard *International Law: A South African perspective* 227.
[150] Kriebaum and Reinisch 2012 *The Max Planck Encyclopedia of Public International Law* argues that due to the absence of law-making powers of the UN general assembly the probability that these resolutions changed the law is doubtful. Kriebaum and Reinisch 2012 *The Max Planck Encyclopedia of Public International Law* argues that due to the absence of law-making powers of the UN general assembly the probability that these resolutions changed the law is doubtful.
[151] See the *Amoco International Finance Corp v Iran* 1988 27 ILM 1314 par 116.

contravene this rule. Lastly, international law still requires the payment of compensation, but it is the exact standard that needs to be used that is unclear.

For instance, *Government of the State of Kuwait v American Independent Oil Company (Aminoil)* 21 ILM 976 (1982), looking at the question what "appropriate compensation" entails, stated that an arbitral tribunal, when determining compensation, needs to look into various relevant circumstances when trying to determine market value, rather than to fixate on one particular formula.

3.2.1.5.5 Conclusion and remarks on Compensation

If a country breaches customary international law, it speaks to the international responsibility of the state, which responsibility is governed by the relationship between one state and another (the "diplomatic protection" over nationals). Apart from the souring of international relations, not adhering to international law not only risks that compensation payments will have to be made, but it also poses the risk of making South Africa a less attractive place to invest.

When an alien's property is expropriated as part of a policy of nationalization of a resource (and when this happens on a grand scale), the law is not clear.[152]

3.2.2 Methods of valuation in international law

Some BITs provide specific guidelines for expropriation. NAFTA provides that the "valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value".[153] Most of these formulations gives only an indication of what is expected, but leaves the choice of the appropriate valuation method to the arbitrators.[154]

---

[152] Dugard *International Law: A South African perspective* 225. Dugard *International Law: A South African perspective* 225.
[153] Art 1110(2).
[154] Nations *Expropriation* 50.

There are treaties that refer to equitable principles, which gives the arbitrators the decision to determine what is fair in particular circumstances.[155]

The valuation methods used for determining market value of the investment is fairly standard.[156] The one method of determining the value will be determining market value by utilising the "willing buyer willing seller" principle.[157] This method looks at hypothetical transactions by studying and comparing similar transactions in the market. But there remains a degree of uncertainty.[158] Other values that might be used to determine the compensation is the discounted cash flow (DCF) value,[159] liquidation value,[160] replacement value,[161] and book value,[162] and so forth.

3.3 Foreign law

3.3.1 Introduction

Below is a selection of foreign jurisdictions who have different approaches to compensation. Some of the jurisdictions discussed has a proportionality aspect, while others provide full indemnification. The purpose is to show the range of options available. What is not discussed are the instances where no compensation was paid, since those were instances where property was nationalised.

---

[155] The Australian-Thailand Free Trade Agreement in of (2004) art 912(2) is one such example.
[156] Du Plessis 2015 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*.
[157] Nations *Expropriation* 117. Nations *Expropriation* 117.
[158] Nations *Expropriation* 117. Nations *Expropriation* 117.
[159] Nations *Expropriation* 118, useful if it is a going concern with a record of profitability. This method is "in essence a speculation about the future dressed up in the appearance of mathematical equations. The difficulty with this method […] is that while it may look objective and scientific when presented by experts using spreadsheet models, it does not provide objective and predictable outcomes" Wälde and Sabahi 2007 *Transnational Dispute Management (TDM)* 19. Nations *Expropriation* 118, useful if it is a going concern with a record of profitability. This method is "in essence a speculation about the future dressed up in the appearance of mathematical equations. The difficulty with this method […] is that while it may look objective and scientific when presented by experts using spreadsheet models, it does not provide objective and predictable outcomes" Wälde and Sabahi 2007 *Transnational Dispute Management (TDM)* 19.
[160] Nations *Expropriation* 119, for enterprises with a lack of profit.
[161] Nations *Expropriation* 119.
[162] Nations *Expropriation* 119.

3.3.2 Australian compensation law

The requirement in section 51(xxxi) that the Commonwealth can only acquire property on just terms refers to the interpretation presumption that the government does not intend to take away property without compensation, unless it is expressed in unequivocal terms.[163] In *Georgiadis v Australian and Overseas Telecommunications Corporations*[164] the court ruled that just terms means that when the government acquires property to serve the community, the owner should be fully compensated as owners cannot be expected to sacrifice their property for less than it is worth.

The Lands Acquisition Act 1989 provides for just compensation. In section 55(1) it explicitly states that the purpose of compensation is to justly compensate the person for the acquisition.[165] Sections 55 - 66 of the Lands Acquisition Act 1989 provide guidance as to how to achieve just compensation.[166] In *Grace Bros Pty Ltd v The Commonwealth of Australia*[167] the court ruled that the words "just terms", in a similar provision of the previous Acquisition Act, has the same meaning as just terms in section 51(xxxi).

The question is whether just terms requires a balancing of public and private interests or whether just terms requires full compensation. In *Georgiadis v Australian and Overseas Telecommunications Corporations*[168] where the court ruled that just terms does not entail the balancing of interests, but rather means that the owners of property whose property is compulsory acquired by government to serve the community are not required to sacrifice their property for less than it is worth. Therefore, just means full compensation.

An acquisition scheme does not have to include compensation itself, since just terms requires that such a scheme provides for adequate procedures to determine

---

[163] *Inglewood Pulp and Paper Co Ltd v New Brunswick Electric Power Commission* [1928] AC 492 498; *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400 406.
[164] *Georgiadis v Australian and Overseas Telecommunications Corporations* (1994) 179 CLR 297 .
[165] Brown and Fogg "The law of resumption in Australia" 291.
[166] Brown and Fogg "The law of resumption in Australia" 292.
[167] *Grace Bros Pty Ltd v The Commonwealth of Australia* (1946) 72 CLR.
[168] *Georgiadis v Australian and Overseas Telecommunications Corporations* 297.

compensation.[169] These procedures are also subject to judicial examination, as in *The Commonwealth of Australia v Tasmania.*[170] Parliament need not specify the amount of compensation, but must provide a procedure to be followed. If the procedure provided for determination of compensation is fair, the court will not invalidate it because it did not fulfil the requirement of just terms.

The owner receives compensation for the resumed land in order to put him/her in the same position as (s)he would have been if the land was not taken from him. The purpose therefore is that the owner should receive the full money equivalent of that which has been acquired from him.[171] Australian resumption law used to equate that to just market value, but later on recognised that market value might not be sufficient to place the deprived owner in the same position (s)he would have been, and that additional compensation for disturbance or a *solatium* over and above market value should be paid.[172]

Not only the owner, but all people who have been deprived of an interest or an estate in land are entitled to compensation.[173] The owner of each interest has a separate claim for compensation. The *Rosenbaum* principle[174] states that the court must consider each interest separately.[175]

3.3.3 Austria

In terms of the *Staatsgrundgesetz*[176] (Basic law) of 1867 (as incorporated by reference in the Constitution of 1929), article 5

---

[169] *Grace Bros Pty Ltd v The Commonwealth of Australia*.290 – 291.
[170] *The Commonwealth of Australia v Tasmania* (1983) 158 CLR 1. Also referred to as the *Tasmanian Dam* case.
[171] *Nelungaloo Pty Ltd v The Commonwealth of Australia* (1948) 75 CLR 495.
[172] Brown *Land Acquisition* 81.
[173] *Land Acquisition Act* s 52; *Rosenbaum v Minister for Public Works* (1965) 114 CLR 424; *SJR Investments Co Pty Ltd v Housing Commission of Victoria* [1971] VR 211; *Lensworth Finance Ltd v Commissioner of Main Roads* (1978) 5 QLCR 261.
[174] Rosenbaum v Minister for Public Works (1965) 114 CLR 424.
[175] Brown *Land Acquisition* 136.
[176] *Staatsgrundgesetz*

> [5.1] Property is inviolable. [5.2] Expropriation against the will of the owner can only occur in cases and in the manner determined by law.[177]

From the wording of article 5.1, property is not positively guaranteed, but rather an indirect protection of property.

Expropriation can take place both in terms of statute and in terms of administrative action. Such an action must transfer the property rights to the State (and not be a mere restriction).[178] The Constitutional clause, however, makes no mention of compensation.

The Railway Expropriation Act of 1954[179] sets out the procedure of expropriation and the determination of compensation for the building of railways, but is applicable to other types of expropriation as well. The duty to compensate in terms of the Act also extents to disadvantages suffered by beneficial owners with use rights and lessees.[180] When only part of the land is expropriated, the owner will be compensated for the part expropriated as well as the reduction in value of the remaining land.[181] The Act allows for the payment, and sets down a three year term in which the final determination of the compensation amount must be made.[182]

The entity that is responsible for the expropriation must put certain information in front of an authority that will determine the compensation amount.[183] The authority will allow for oral hearings of all the parties, including the municipality. During this hearing, expert valuers will assist the authority in determining a compensation amount. During this process the parties should try and reach an agreement on the amount of compensation.[184]

---

[177] Van der Walt *Constitutional property clauses: a comparative analysis* 74.
[178] Van der Walt *Constitutional property clauses: a comparative analysis* 80.
[179] *Eisenbahn-Enteignungsentschädigungsgesetz*
[180] § 5.
[181] § 6.
[182] § 9.2.
[183] § 12.
[184] § 17.

Once the authority made a determination of compensation,[185] no appeal is allowed, but parties are free to go to the court to determine the amount, within three months of the notification of the expropriation decision.[186] When the courts are approached, the administrative decision is suspended.[187] Once the amount of compensation is determined, it is payable within 14 days.[188]

This Act also allows for the restitution of the property if it is not used for the purpose expropriated (within one year).[189]

The Land Procurement Act[190] enables the state to acquire land[191] for small or medium-sized flats or home where there is a housing need in municipalities.

The federal legislations lay down the framework in which land can be acquired to build houses for seemingly vulnerable[192] people. The act is applicable to land that is used as a yard or a garden of a residential building, or as an operation area for a commercial building, and in "spatial relationship" with the building has an area that exceeds 2000m^2.[193]

§9 sets out the procedures to be followed while §10 allows the owner to object on the grounds that she herself would like to use the land for the purpose of building homes, or if there is another suitable site for the project, or that the municipality has property that can be used for this public purpose. When the property is expropriated for this

[185] § 18, and appeal against the decision is still allowed.
[186] § 10.5.
[187] § 10.5.
[188] § 33.
[189] § 37.1.
[190] *Bodenbeschaffungsgesetz*
[191] Excluded from the ambit in terms of §2 is land already in the hands of the state earmarked for another public purpose, land owned by a foreign state or organization that is earmarked for building diplomatic and similar missions or land that serve military purposes, road construction, mining, railways, shipping, aviation or water or energy supplies.
[192] Ledige, Schüler, Studenten, Lehrlinge, jugendliche Arbeitnehmer oder für betagte Menschen translating as singe persons, schoolchildren, students, apprentices, youth workers and undocumented people.
[193] §2.2.

purpose, compensation[194] is determined in terms of the Railway Expropriation Act of 1954, after obtaining the opinion a committee (in terms of §20).

The Act also sets out detailed guidelines on when the compensation must be calculated. It requires that the value at the time, one year prior to the decree to declare the land for the housing project, be used.[195] Added to this will be expenses that the landowner made to the property (compensation paid for time and value in present value). The increase in land value since that date will also be considered, using an average between the consumer price index and the average nominal interest rate. Compensation is to be paid within one month of the legally valid expropriation decision (in cash).[196]

The Austrian Constitution does not have a constitutional promise of compensation, and courts have also not recognised an inherent right to compensation, but the duty to compensation is deduced by the courts based on the proportionality principle. In this sense, compensation is due when a regulation or an expropriation benefits the public or a larger group of people, at the expense of one or a small group of people. Failure to pay compensation would be in conflict with the equality principle.[197]

The Constitutional Court recently ruled[198] that the duty to pay compensation is based on the principle of equity. As such, the court recently found that an expropriation without compensation is against the Constitution because it is disproportionate and subjective. The court also found this to be against international law. The court will accept that a regulation of the property is admissible, but not a complete withdrawal of the property.[199] As an asset, property infringement is limited to restriction allowed in terms of the Constitution (regulation or expropriation).[200] It is also the value of property that is guaranteed, which requires that expropriations are "adequately

---

[194] § 16.
[195] § 20.2.
[196] § 21.
[197] Van der Walt *Constitutional property clauses: a comparative analysis* 82.
[198] *AT:VFGH:2017:E1006.2017 Abweisung der Beschwerder einer Tiroler Agrargemeinschaft* § 2.1.5.
[199] *AT:VFGH:2017:E1006.2017 Abweisung der Beschwerder einer Tiroler Agrargemeinschaft* § 2.1.3.2.
[200] *AT:VFGH:2017:E1006.2017 Abweisung der Beschwerder einer Tiroler Agrargemeinschaft* § 2.1.7.1.a.

compensated".[201] The other requirement is that the interference with the property right should not affect property as a whole, but should be an individual restriction of ownership for a concrete public task, with the purpose of using that specific property in the public interest.[202]

3.3.4 Germany

Article 14.3 of the German Basic Law (the Constitution) states that compensation should be determined by a statute and that such compensation must reflect a just balance between the interest of the person affected and the public interest.[203] When deciding on compensation, the individual in societal context becomes the focus point. Individual property rights should be seen in the context that property is needed to protect personal liberty, the fundamental guarantee. Compensation is therefore paid, not to protect property as a market commodity, but property in the context of enabling the individual to lead a self-governing life.[204]

The courts distinguish between the constitutional principles of compensation and the calculation of compensation. The constitutional requirement for compensation in article 14.3.3 is that there must be an equitable balance between the interest affected (the interest of the owner) and the public interest.[205] This balancing requirement means that in certain circumstances compensation that is less than market value would be permissible.[206] Market value and loss is thus important, but the balancing process implies that it can be adjusted if the balancing act so requires.

This balancing renders the determination of the compensation amount flexible, and means that compensation less than market value is possible.[207] The calculation of

---

[201] *AT:VFGH:2017:E1006.2017 Abweisung der Beschwerder einer Tiroler Agrargemeinschaft* § 2.1.7.1.b.
[202] *AT:VFGH:2017:E1006.2017 Abweisung der Beschwerder einer Tiroler Agrargemeinschaft* § 2.1.7.1.c.
[203] Kleyn 1996 *SA Public Law* 442.
[204] Alexander 1999 *Property and the Constitution* 99.
[205] *BVerfGE (Hamburgisches Deichordnungsgesetz)* 24, 367 [1968] 419. Schmidt-Aßmann "Expropriation in the Federal Republic of Germany" 88.
[206] *BVerfGE (Hamburgisches Deichordnungsgesetz)*.
[207] Kleyn 1996 *SA Public Law* 442; Van der Walt *Constitutional property clauses: a comparative analysis* 151; *BVerfGE (Hamburgisches Deichordnungsgesetz)* 421.

compensation is in finding where the interests of the two sides are equalised, with neither the individual nor the public interest weighing more.[208]

The legislature has a wide discretion to set the standards for compensation, and the Federal Constitutional Court has ruled[209] that a "rigorous market value only oriented"[210] approach is strange under the Constitution. The court ruled in the *Hamburgisches Deichordnungsgesetz* case that compensation does not always mean that the expropriatee should be compensated for the "full equivalent of the value of that which is expropriated".[211] The legislature can enact laws that allow for compensation that is less than market value.[212] The legislature must enact laws that adhere to these principles.[213]

In German law, proportionality is important in the calculation of compensation. According to article 14.3, the amount of compensation payable is an amount to maintain an equitable balance between the public interest and the interests of the affected owners. In the *Deichordnung* case[214] the Federal Constitutional Court ruled that the expropriating legislation must provide a framework for the calculation of compensation on the facts of each case. Market value and financial loss, although relevant, are the only factors and must be weighed against the public interest involved in expropriation. This means that market value is the norm in most cases, but that compensation can be less than market value.[215]

---

[208] *BVerfGE (Hamburgisches Deichordnungsgesetz)* 420 – 421. The interest of the community is important since they ultimately have to pay the compensation (through taxes). See Schmidt-Aßmann "Expropriation in the Federal Republic of Germany" 88.

[209] *BVerfGE (Hamburgisches Deichordnungsgesetz).*

[210] "Eine starre, allein am Marktwert orientierte Entschädigung ist somit dem Grundgesetz fremd" *BVerfGE (Hamburgisches Deichordnungsgesetz)* 421.

[211] "Es trifft auch nicht zu, daß den Enteigneten durch die Entschädigung stets das ‚volle Äquivalent für das Genommene gegeben werden muß'" *BVerfGE (Hamburgisches Deichordnungsgesetz)* 421.

[212] *BVerfGE (Hamburgisches Deichordnungsgesetz)* 421.

[213] Schmidt-Aßmann "Expropriation in the Federal Republic of Germany" 88 – 89.

[214] Schmidt-Aßmann "Expropriation in the Federal Republic of Germany" 419 – 422.

[215] Van der Walt *Constitutional property clauses: a comparative analysis* 142, 151.

3.3.5 Brazil

During Brazil's colonial times, government granted large tracts of frontier land to influential parties, leading to an extreme skewed distribution of land and wealth. This led to large tracks of often idle land alongside a great number of landless peasants, leading to tense relations between large land owners and "squatters".[216] After various attempts at land reform, the National Plan for Land Reform was implemented in 1985 in an attempt to address the high levels of land ownership concentration. This plan focused on the expropriation of private land as the main instrument to obtain land.[217] To understand this in context, the Brazil Constitution and the 1988 amendments should be considered.

The 1988 Constitution of Brazil provides, as fundamental rights and guarantees, the following:

> Art 5 Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms:
>
> […]
>
> XXII. the right of property is guaranteed;
>
> XXIII. property shall comply with its social function;
>
> XXIV. the law shall establish procedures for expropriation for public necessity or use, or for social interest, upon just and prior compensation in cash, with the exception of cases provided for in this Constitution.

Extensive provisions are provided for these exceptions later in the Constitution.[218]

---

[216] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 165.
[217] Alston, Libecap and Mueller 1999 *Environment and Development Economics* 135.
[218] See the following articles in this regard. Art 184 §4°: County Governments may, by means of a specific law for areas included in the master plan, require that the owner of non-built, under-used or unused urban land provide for adequate use of such land, under penalty, successively, of: […] III. expropriation with payment in public bonds, from an issue previously approved by the Federal Senate, redeemable in up to ten years, in equal and successive annual instalments, ensuring the real value of the compensation and legal interest.
Art 184: The Union has the power to expropriate for social interest, for purposes of agrarian reform, rural property that is not fulfilling its social function, upon prior and just compensation in agrarian debt bonds, with a clause for preservation of real value, redeemable in up to twenty years, starting from the second year after issue, and whose utilization shall be defined in law.

It enables small farmers to obtain government land through formal colonization projects that are administered by the National Institute for Colonization and Agrarian Reform (hereafter referred to as INCRA). The idea is that INCRA must expropriate the land that was not being put to beneficial use, create a settlement project and enroll families of landless peasants who were previously registered in a registry. In practice, the extreme slow pace of land reform led to people occupying land that, in terms of the criteria, is expropriable. This often sparked violence or conflict, where INCRA often expropriate the farm as a means to solve the conflict.[219]

This means that, effectively, land can be secured through squatting on either government or "unused" private land. This is possible under Brazilian law that gives "squatters" (*posseiros*) the right to live on unclaimed government land and to put it to private use. If these *posseiros* develop the land effectively for at least a year and one day, then the *posseiros* can obtain a usufruct right to 100 hectares, and after 5 years full title provided that they continue their occupancy and beneficial use. INCRA

---

§1°. Useful and necessary improvements shall be compensated in cash.
§2°. The decree declaring property as being of social interest for agrarian reform purposes authorizes the Union to file the expropriation action.
§3°. Complementary law shall establish a special summary adversary procedure for expropriation actions.
§4°. The budget shall determine each year the total volume of agrarian debt bonds, as well as the amount of funds allocated to the agrarian reform program in the fiscal year.
§5°. Transfers of property expropriated for agrarian reform purposes are exempt from federal, state and municipal taxes.
Art 185 The following shall not be subject to expropriation for agrarian reform purposes: **I.** small and medium-sized rural property, as defined by law, so long as its owner does not own other property; **II.** productive property.
Article 189: It is up to the Union to expropriate for social interest, for the purpose of agrarian reform, the rural establishment which is not fulfilling its social function…
Article 191 The social function is fulfilled … the following requirements
a) adequate and rational use;
b) adequate use of the natural resources available and preservation of the environment;
c) observance of the disposition which regulate labor relations;
d) exploration which favors the well-being of the proprietors and workers.
Art 196 One, who, not being the proprietor of a rural or urban establishment, possesses as his/her own for five uninterrupted years, without opposition, an area not greater than fifty hectares, making the land productive through his/her labor, or that of his/her family, having in the land their habitation, will acquire the property.
[219] Alston, Libecap and Mueller 1999 *Environment and Development Economics* 136.

must survey, document and title these claims on government land. The title comes from statutory law.[220]

The Brazilian Constitution have often abrogated the rights of title holders, giving preferential privileges to *posseiros* as part of land reform, in that they can occupy up to 50 hectares of private land. Should they occupy and develop the land for 5 consecutive years without the opposition of the owner, they obtain title through adverse possession. In the cases where the owner protests the occupation and the *posseiros* are evicted, they are entitled to compensation from the owner for any improvements made.[221]

When land is invaded, an owner can apply for a "reintegration of possession" which means that the property is returned immediately (an eviction order).[222] This is a process in terms of civil law, and does not fall under the land reform mandate that falls under INCRA. Nevertheless, the courts have been found to be notoriously pro-landowner, usually ordering eviction.[223]

INCRA can expropriate farms even if the courts have ordered eviction. At the same time, *posseiros* will not occupy land if they knew they will be evicted, and that the INCRA will not expropriate the land.[224] The INCRA assists in the process expropriating the farm for the squatters including the payment of compensation to the landowner.[225] It can expropriate the property for not fulfilling its social function and use the property then for land reform.[226]

In this context expropriation involves the following steps: first there is a selection of the are to be expropriated, then there is field inspection, survey and valuation of

---

[220] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 164.
[221] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 165.
[222] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 167, Hammond 2009 *Latin American Perspectives* 161.
[223] Hammond 2009 *Latin American Perspectives* 161.
[224] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 168.
[225] Hammond 2009 *Latin American Perspectives* 161.
[226] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 167, Hammond 2009 *Latin American Perspectives* 161.

improvements. The INCRA makes the official evaluation that then gets submitted to the court that must authorize the title transfer to INCRA to distribute to the squatters.

The bank has price data on land and improvements, and the officers and real estate brokers have access to this information. The final determination of compensation (which must be "just") is decided by the judge that handles the case. In this context owners historically received less than market value compensation. The INCRA often pays for the land with Agrarian Debt Bonds, with the improvements on the land paid in cash.[227]

Due to various factors, landholdings have become less attractive, with the price of land falling. This means that an owner wishing to sell his property might be better off allowing occupation and being expropriated by the INCRA. To urge this on, owners often encourage the invasion of a group of squatters on land. Owners, although not widely reported, can also collude with local INCRA officers, or use the courts, to get above market value compensation. This practice was limited when, through Presidential Decree, a precise methodology for price determination was established along with a penalty for technical staff inflating land values.[228] A limited budget to achieve its land reform goals means that officials must account for its valuation, limiting overcompensation in land purchases.[229]

The Brazil example shows that the expropriation process is complex, that it is subject to dispute, and takes long. Expropriation can be challenged based on compensation and based on the underlying validity of the claim.[230]

As a result of slow reform, Brazil saw the surge of organized efforts of squatters, such as the Landless Peasants Movement (hereafter referred to as the MST), that understand the formal and the implicit rules of the game all round. It has devised a strategy involving the government, the land owners, INCRA and the courts. They identify a farm, invade it, and manage to turn such an invasion into an effective

[227] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 167.
[228] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 167.
[229] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 168.
[230] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 168.

expropriation.[231] It is argued that to get the attention of INCRA, this often means that they have to spark conflicts in order to embarrass the President (who is in charge of land reform), that will in turn put pressure on the INCRA to resolve the disputes.[232]

3.3.6 Ethiopia

Section 40 of the Constitution of the Federal Democratic Republic of Ethiopia[233] provides that

> The Right to Property
>
> 1. Every Ethiopian citizen has the right to the ownership of private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.
>
> 2. "Private property", for the purpose of this Article, shall mean any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.
>
> 3. The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.
>
> 4. Ethiopian peasants have right to obtain land without payment and the protection against eviction from their possession. The implementation of this provision shall be specified by law.
>
> 5. Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by law.
>
> 6. Without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land, government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law. Particulars shall be determined by law.

---

[231] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 168.
[232] Alston, Libecap and Mueller 2000 *Journal of environmental economics and management* 169.
[233] The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), the supreme law of the country, was adopted in Addis Ababa by the Constitutional Assembly on December 8, 1994, and came into force on August 21, 1995. English text (original in amharabic) available https://www.wipo.int/wipolex/en/text.jsp?file_id=193667

7. Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it. Particulars shall be determined by law.

8. Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property.

Compensation for the holder of the right is recognised in Ethiopia, although land is held in custodianship by the state. The Civil Code[234] states "that the amount of compensation or the value of the land that may be given to replace the expropriated land shall be equal to the amount of the actual damage caused by the expropriation".[235]

In the context of expropriation, what is expropriated is not an ownership right, but rather a right to use and exploit, to transfer it by inheritance (if rural), to rent for lease, to improve it to sell the produce and compensation for expropriation. Despite the fact that the land belongs to the state, the loss is still compensable.[236]

In terms of the Constitution, compensation is allowed for the loss of labour and capital.[237] Without labour or capital improvements on land, there can be no compensation.[238] In terms of the Expropriation Law,[239] compensable interests are utility lines, permanent improvements to land, movable property that remains, property that can be removed for consumption (such as crops), and immovable property on the land. The land itself is not compensated, because the state is just retaking land, and not private property.

With regard to property situated on the land, such as a building, it is the replacement cost that is compensated.[240] In the rural areas, there is a full monetary compensation for rural farmers who are displaced by the expropriation. Displacement compensation

---

[234] Art 1474(1).
[235] Ambaye 2009 39.
[236] Ambaye 2009 38.
[237] See also art 2(7) of Proclamation 455/2005.
[238] Abdo 2013 *Mizan Law Review* 188.
[239] Art 7(1) of Proclamation 455/2005.
[240] Art 7(2) of Proclamation 455/2005 and art 3 of Regulation 135/2007.

is ten times the average income of the proceeding five years,[241] plus the replacement cost of the buildings on the property.[242]

Urban property holders are provided with another plot of urban land to construct a house and is also entitled to displacement costs.[243]

3.3.7 European Court of Human Rights (ECHR)

Article 1[244] requires a fair balance between public and private interests, with compensation being an important element to determine fair balance.[245] Compensation should not be seen in isolation, as there are other elements that can be important.

For instance, the nature of public interest may justify that compensation is paid below market value, and sometimes the presence or absence of procedural rights might influence the balance. The Convention's fair balance requirement sheds interesting light on the role of compensation, especially in the South African context, where compensation must reflect "an equitable balance between the public interest and the interests of those affected".[246]

This article is generally accepted on placing a duty on a state to compensate if the deprivation of property is very severe. The courts have interpreted this to mean that "an interference with the right to peaceful enjoyment of possessions must strike a 'fair

---

[241] Art 8(1) of Proclamation 455/2005; art 16(3) of Regulation 137/2007.
[242] Ambaye 2009 39.
[243] Proclamation 455/2005 of the Federal Expropriation Legislation.
[244] (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
[245] An interesting case to illustrate the influence of proportionality on the calculation of compensation is *Lithgow v United Kingdom* 8 EHRR 329 par 121. The European Court of Human Rights ruled that market value is not the decisive factor in calculating compensation, but rather that the amount should be "reasonably related to its value".
[246] S 25(3) of the Constitution.

balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[247]

The taking of property without compensation would be a disproportionate interference with property rights that cannot be justified, but the provision does not guarantee a right to full compensation in every instance, as the "public interest" requirement my warrant compensation less than market value.[248]

In the *Jahn*-case[249] the court emphasised the role of compensation in ensuring that there is a fair balance, or whether an applicant must bear a disproportionate burden. In this case, the Property Rights Amendment Act[250] did not provide for any compensation. While the lack of compensation in itself does not make the expropriation unlawful, the question will remain whether the applicants bear a disproportionate and excessive burden. In other words, even in the absence of compensation, an expropriation can be unlawful if it places an unfair burden on an applicant.

The court acknowledges that in the case of taking land for constructing a road or something similar, full compensation might be the only reasonable value to give for the property,[251] but contrasts this with cases where property is taken "pursued in measures of economic reform or measures designed to achieve greater social justice".[252] In such a case, compensation less than market value should be possible.[253] The court notes that "in such cases, the compensation does not necessarily have to reflect the full value of the property in question".[254] The court makes specific reference to the impact the change of political and economic regimes might have. During such

---

[247] *Beyeler v. Italy* EHRR §107; *Holy Monasteries v Greece* 301 Eur Ct HR (ser A) 71 - 1994 pp. 34-35, §§ 70-71; *Sporrong and Lönnroth v Sweden* 5 EHRR 35 - 1982 p. 26, § 69;
[248] *Theodossiou Ltd v Cyprus* [2015] ECHR 376§ 77; *Papachelas v Greece* [1999] ECHR 18 §48.
[249] *Jahn v Germany* (2006) 42 EHRR 49.
[250] *Property Rights Amendment Act*
[251] *Former King of Greece v Greece* 33 EHRR 21 (2001) § 78; *Vistiņš and Perepjolkins v Latvia* IHRL 2046 (ECHR 2012) § 110.
[252] *Vistiņš and Perepjolkins v Latvia* § 111.
[253] *James v United Kingdom* [1986] 8 EHRR 123.
[254] *Vistiņš and Perepjolkins v Latvia* § 111.

a period, marked upheavals and uncertainties gives the state a wide margin of appreciation.[255]

In *Broniowski* the court specifically mentioned the context of property restitution, where a controversial scheme with significant impact for the country as a whole could restrict compensation for the restitution of property that is below market value.[256] In general, the ECHR defers a lot of power to the State to determine the amount of compensation (and allowing for below market value compensation). In *Almeide Garrett v Portuga*l the court said that

> [t]he Court observes that the interference in issue manifestly pursued a legitimate aim, as it cannot be unreasonable for a State to have regard to its financial and budgetary resources when implementing a major land reform with economic and social objectives that cannot be said to be unreasonable.[257]

From aforementioned cases it seems clear that the ECHR makes a clear distinction between expropriation for non-political purposes, and expropriation done under political and economic reform. In the first instance, the court would generally accept that full market value would strike a fair balance,[258] but in the case of reforms, the court accepts that compensation less than market value is possible.

The court also warned that the length of expropriation proceedings needs to be considered when determining compensation,[259] and that unreasonable delays will influence the adequacy of the compensation.[260]

When the expropriation takes place in terms of nationalisation, less compensation is required than when a single item of property is expropriated.[261]

---

[255] *Vistiņš and Perepjolkins v Latvia* § 113; *Kopecký v Slovakia* [2004] ECHR 446 § 35; *Jahn v Germany* § 116 (a); *Suljagić v Bosnia and Herzegovina* IHRL 3687 (ECHR 2009) § 42.
[256] *Vistiņš and Perepjolkins v Latvia* § 113; *de Almeida Garrett and ors v Portugal* [2000] ECHR 2 § 51.
[257] § 53.
[258] *Jokela v Finland* [2000] ECHR 704.
[259] *Malama v. Greece (Article 41)* par 51.
[260] Par 29.
[261] Kriebaum and Reinisch 2012 *The Max Planck Encyclopedia of Public International Law*. Kriebaum and Reinisch 2012 *The Max Planck Encyclopedia of Public International Law*.

The *James*-case is also authority for the view that non-nationals may receive greater protection than nationals in the case of expropriation, because non-nationals cannot participate in electing law-makers. The nationals will therefore have to bear a greater burden in the public interest, that non-nationals.[262]

3.3.8 India

The Indian constitution has certain social reform objectives,[263] and certain expropriations were done to adhere to these reform objectives. In some instances, the compensation that the State offered and what the owners expected did not correlate. Indian statutory compensation provides typically for market value plus 30% *solatium*, interest, moving expenses and other direct damages.[264]

Courts assumed that the general principles of compensation law (as contained in the statute) were entrenched in the constitution.[265] India's statutory compensation practices only focuses on "market value" to determine compensation, rather than other credible valuation techniques that might result in something less than market value.[266]

---

[262] *James v United Kingdom* par 63.

[263] In *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225 1863 states that "[a]rticle 38 shows that the first of the specific mandates to State organs says:

> 38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.' In other words, promotion of a social order in which "justice, social, economic, and political" was the first duty of all the organs of the State. The second specific mandate to State, organs, found in Article 39, contains the principles of what is known as the socialistic "welfare State". It attempts to promote social justice by means of nationalisation and State action for a better distribution of material resources of the country among its citizens and to prevent the exploitation of the weak and the helpless. It runs as follows:
>
> 39. The State shall, in particular, direct its policy towards securing:
>
> (a) that the citizens, men and women equally, have the light to an adequate means of livelihood.
>
> (b) that the ownership and control of the material resources or the community are so distributed as best to subserve the common good;
>
> (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common deteriment;

[264] Bank *Compensation and Valuation in Resettlement: Cambodia, People's Republic of China, and India* 32.

[265] Allen *The right to property in Commonwealth constitutions*224 -229.

[266] Bank *Compensation and Valuation in Resettlement: Cambodia, People's Republic of China, and India* 32.

In the 1970s there was a lock down between the judiciary and the legislature on how to calculate compensation, and what the content of market value is. The repealed article 31(2) of the Indian Constitution provided that no law can authorise an expropriation "unless the law provides for the compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which the compensation is to be determined and given". The Constituent Assembly hoped that this would prevent the courts from inquiring into the adequacy of compensation, therefore enabling the legislature to acquire property below market value. The court in *State of West Bengal v Bela Banerjee,*[267] however, interpreted the article to give a narrow discretion to the legislature to determine compensation, requiring full indemnification of the expropriated owner. The courts believed that property owners have an ethical claim to full compensation.[268]

An amendment to the Constitution followed to respond to *Banerjee* adding to article 31(2) that "no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate". The court reacted with *Vajravelu v Special Deputy Collector West Madras*,[269] by saying that the legislature has no power to acquire property unless it provided for a just equivalent or a way to ascertain the just equivalent of that which the owner had been deprived of.[270] The court ruled that legislation could not be challenged for not providing just compensation, but that such a challenge was possible if compensation was not adequate and if the legislation did not lay down the principles to determine compensation.[271] The courts would only intervene if compensation was illusionary, allowing the legislature to depart from full compensation.[272] Adequacy of compensation was the issue, not full market value. A statute that allow for adequate compensation even if it is not full market value does

---

[267] *State of West Bengal v Bela Banerjee* 1954 AIR 170 172
[268] Allen *The right to property in Commonwealth constitutions*225.
[269] *Vajravelu Mudaliar v Special Deputy Collector, Madras* 1965 AIR 1017.
[270] *Vajravelu Mudaliar v Special Deputy Collector, Madras* 1024.
[271] *State of Gujarat v Shantilal Mangaldas* 1969 AIR 634 650; Allen *The right to property in Commonwealth constitutions* 227.
[272] Allen *The right to property in Commonwealth constitutions* 27 – 228.

not offend the Constitution. In *Rustom Cavasjee Cooper v Union of India*[273] the court stated that:

> [c]ompensation provided by the Madras Act, according to the principles specified, was not the full market value at the date of acquisition. It did not amount to "full indemnification" of the owner […] The law did not offend the guarantee under Art. 31(2) as amended, because the objection was only as to the adequacy of compensation […] but *compensation does not mean a just equivalent of the property*. If compensation is provided by law to be paid and the compensation is not illusory or is not determinable by the application of irrelevant principles, the law is not open to challenge on the ground that compensation fixed or determined to be paid is inadequate. […] Therefore, just equivalent cannot be the criterion in finding out whether the principles are relevant to compensation or whether compensation is illusory. (Own emphasis. References omitted.)

In *Kesavananda Bharati Sripadalvaru v State of Kerala*[274] the court stated that the compensation amount must have a reasonable relationship with the value of the property taken. This means that in some instances it may not be the market value of the property taken. Market value is the result of "an interaction between various forces".[275] As such it may not have any reasonable relationship with the investments made by successive owners. In this case the court acknowledges that the price of property my rise exponentially due to various contributions made by society and the conversion of the land to different uses. In such a case the court did not find it problematic for the State to "appropriate to itself that part of the market value of a property which is not the result of any contribution made by its owners".[276] *In casu* the court also found that there rests no obligation on a state to pay full market value merely because it acquires the title of the land. The business of the State depends on the power of the state to expropriate property. The court used the analogy of the abolishment of slavery in America. Sometimes the social and moral fabric of society changes to such an extent, that the State feels compelled to deprive (confiscate or expropriate) owners of property even without the payment of compensation. The

---

[273] *Rustom Cavasjee Cooper v Union of India* 1970 AIR 564649.
[274] *Kesavananda Bharati Sripadalvaru v State of Kerala* (1973) 4 SCC 225 258.
[275] Par 723.
[276] Par 723.

example of slavery shows that sometimes a justifiable confiscation of property might be inconsistent with the absolute theory of property, and yet it is tolerated.[277]

3.3.9 Japan

Japan requires "just compensation". In *Grand Bench 23 December 1953*[278] the court ruled that just compensation need not be market value, but can be less. Like property, it is accepted that compensation can be limited for the public welfare. The calculation of it, however, needs to reflect objective and average standards. In Japan, the *Irrigation Reservoir Case*[279] allowed for no compensation when the use of property is restricted because of socially justified circumstances.

3.3.10 Mexico

Expropriation (and confiscation) of property is fairly common in the history of Mexico, going back as far as the 1700s with the Spanish Crown expelling Jesuits from Spain and Mexico.[280] The 1917 Constitution added provisions for Mexico's social agenda, including land redistribution and national appropriation or certain natural resources.[281] The 1917 Constitution places an emphasis on the social value of property rights, reserving certain property rights to the State, and provide for concession to private activity, as well as for expropriation. A 1936 Law of Expropriation, provided details.[282]

The 1917 Act provided for State ownership and control of certain resources. Article 14 permitted expropriation of property through the courts, subject to formalities and procedure.[283] In terms of section 27, this had to be for a public utility, and against the payment of compensation.[284] It also allowed for the right to limit private property for

---

[277] Par 675.
[278] *Supreme Court of Japan, Grand Bench, Decision of 23 December 1953* ; Maki *et al Maki, John M., Ikeda Masaaki, David CS Sissons, and Kurt Steiner. "Court and Constitution in Japan; Selected Supreme Court Decisions, 1948-60."*228 – 252 for translation of the case.
[279] *Supreme Court of Japan, Grand bench, Decision of 26 June 1963.* Grand bench 26 June 1963.
[280] Del Duca 2003 *UCLA L Rev* 41.
[281] Del Duca 2003 *UCLA L Rev* 50. This Constitution confirmed the ecclesiastical expropriation, a program of land redistribution and a declaration of the state as the owner of subsoil resources.
[282] Del Duca 2003 *UCLA L Rev* 50.
[283] Del Duca 2003 *UCLA L Rev* 51.
[284] Galindo "Some Aspects on the Failure of Agrarian Reforms in Mexico and other Latin American Countries" 133.

state utility without compensation, provided that it does not amount to the an expropriation.[285]

Post-revolution land redistribution focussed on the establishment of collectives (*ejidos*) to own and administer the land to be worked on by resident members who hold individual parcels (usufruct rights) temporarily assigned, with access to common-use land.[286] This was done administratively without judicial recourse.[287] Parcels exceeding a certain size acceptable for individual ownership was expropriated,[288] compensation was paid at expropriation after which the land was then assigned to collective who then distributed it to the individuals.[289] Land had to be used productively, and the Constitution provided that if the land was not cultivated for two consecutive years, it was to be taken away ("use-it-or-lose-it" restriction).[290]

The expropriation activity intensified in the 1930s (under Cárdenas), and again in the 1960s (under Díaz) to implement a revolutionary agenda of agricultural land redistribution. The underlying theory was one of restitution of land to its rightful occupants. Compensation was paid on a deferred basis (annual instalments or bonds), and land was assessed at a lower value, and according to Del Duca "agricultural land redistribution had a substantial confiscatory aspect".[291]

There are strong arguments that the period from 1917 marked an increased sense of dignity in subsistence farming communities.[292] According to Del Duca, however, progress on the land was slow due to various problems with the collectives and the inability to get access to credit to spur investment.[293]

---

[285] Del Duca 2003 *UCLA L Rev* 50.
[286] De Janvry *et al* 2015 *American Economic Review* 3130.
[287] Del Duca 2003 *UCLA L Rev* 63, De Janvry *et al* 2015 *American Economic Review* 3130.
[288] Murphy and Rossi 2016 *Journal of Economic Behavior & Organization* 107, in terms of the 1934 Agrarian Code this was accelerated.
[289] Del Duca 2003 *UCLA L Rev* 64.
[290] De Janvry *et al* 2015 *American Economic Review* 3130, Murphy and Rossi 2016 *Journal of Economic Behavior & Organization* 107.
[291] Del Duca 2003 *UCLA L Rev* 64.
[292] Del Duca 2003 *UCLA L Rev* 64 quoting various studies in footnote 138.
[293] Del Duca 2003 *UCLA L Rev* 64.

Another legal hurdle was the expropriation of US investor-owned land. Through various diplomatic channels and in 1941 there was an agreement that the disputes will be resolved on a government-to-government basis. This implied that foreign-owned land had to pursue claims of compensation through the US government, and the Mexican government would then settle with the US government and not with individual land owners, with no recourse to the Mexican courts.[294]

In 1993 there was a Constitutional amendment,[295] marking the end of the distribution of land from large to small holders.[296] The *Programa de Certificación de Tierras Ejidales y de Titulación de Parcelas Urbanas* (hereafter referred to as PROCEDE), was implemented as a certification program of social land.[297] These reforms allowed for the resolve of the collectives and distribution of land to members, or the transfer of land to corporations where the collectives are the owners.[298] There is a mixed reports on whether this improved agricultural production, with Galindo arguing that the annual agricultural GDP growth remains below the regional average, and that it only led to the growth in specific industries.[299] It has, however, benefited the "better off farmers, already involved in more dynamic crops or already established in the more dynamic regions, thereby exacerbating the already strong existing inequalities".[300] He calls for policies to focus on productive aspects rather than on policies to combat poverty.

---

[294] Del Duca 2003 *UCLA L Rev* 64.

[295] The current amendment can be accessed here: https://www.constituteproject.org/constitution/Mexico_2015#s540

[296] De Janvry *et al* 2015 *American Economic Review* 3131. While the reform achieved the objective of distributing small plots of land to a large number of rural inhabitants, it reportedly led to low agricultural productivity and high levels of poverty amongst the beneficiaries.

[297] Murphy and Rossi 2016 *Journal of Economic Behavior & Organization* 108.

[298] Del Duca 2003 *UCLA L Rev* 65. Murphy and Rossi 2016 *Journal of Economic Behavior & Organization* at 108 elaborate on the three possibilities of *ejido* arrangements: *parcelada, común* (communal) and *para asentemientos humanos* (for human settlement). This meant that the political control was dismantled, and that the productive potential of the *ejido* could be unleashed by creating a land market, based on three pillars, namely 1) by allowing the people of the *ejido* choosing a regime most suitable to their needs; 2) eliminating rental restrictions bring more certainty over the land and 3) reducing the discretionary influence of the executive arm of government over the *ejido*. This lead to greater self-governance of these structures.

[299] Galindo "Some Aspects on the Failure of Agrarian Reforms in Mexico and other Latin American Countries".

[300] Galindo "Some Aspects on the Failure of Agrarian Reforms in Mexico and other Latin American Countries" 137.

3.3.11 Namibia

In terms of article 16(2) of the Namibian Constitution, expropriation in the public interest is subject to "just compensation". While the Agricultural (Commercial) Land Reform Act 6 of 1995 does not say what the amount is that needs to be paid, it lays down criteria for the assessment of the amount of compensation.

In terms of article 25(1)(a)(i) and (ii) agricultural land's compensation is not more than the aggregate of the amount that the property would fetch in the open market (willing-buyer-willing-seller), and the amount that would fully compensate for the actual financial loss caused by the expropriation. It seems that in most instances compensation is regarded as market value.[301]

3.3.12 The Netherlands

The Dutch "Onteigeningswet"[302] determines that compensation be full compensation for all the damages that the person expropriated suffers that is a direct result of the compulsory buy. The "real value" is compensated, where "real value" is presumed to mean "market value". In case of partial expropriation, compensation is paid for the reduction in value. A person can lastly also claim compensation for the personal damages that is suffered because of breaking the connection with the property.[303]

3.3.13 United States of America

The United States of America property guarantee is found in the Fifth and the Fourteenth Amendments for the United States of America Constitution. The Fifth Amendment, also known as the "takings clause" was incorporated in the United States of America Constitution in 1791, with the Fourteenth Amendment, the "due process clause", being added in 1868.[304]

---

[301] Treeger 2004 *Constitution* 9.
[302] Of 28 August 1851 as amended
[303] Gildenhuys *Onteieningsreg 2nd ed* 161
[304] Monk 2003 *Social Education* 170.

The Fifth and Fourteenth Amendments state:

> (V) No person shall be […] deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> (XIV) […] No state shall […] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The guarantee is negatively framed, since it protects the individual from state interference by making sure that any interference is in accordance with due process, and that expropriations (or takings) are compensated. Both the exercise of eminent domain power (expropriation for a public purpose) and police power (the infringement of property in the public interest) require due process.[305]

Where compensation is seen as the full and complete equivalent value for complete loss suffered due to expropriation, just compensation is merely the value of land taken or the damage caused to the land not taken.[306] The requirement of just compensation is mostly regarded as based on the principles of fairness and equity. The court stated in *United States v Fuller*[307] that the requirement of just compensation not only derives its contents from the principles of fairness, but also from the technical concepts of property law.[308] The concept of just compensation, as required by the Fifth Amendment, cannot be reduced to a formula or be confined to rules, but must be considered in every case.[309]

The National Commission on Uniform State Law adopted the Uniform Eminent Domain Code in 1974 in Article X of the code formulates principles that govern the main elements of just compensation. §1001 confirms that an owner is entitled to compensation upon expropriation. §1002(a) states the basic rule that the measurement of compensation is the market value of the property expropriated. The courts stated that there are no rigid rules to determine compensation or the payment

---

[305] Van der Walt *Constitutional property clauses: a comparative analysis* 402.
[306] Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings"166.
[307] 93 S Ct 801 (1973).
[308] *Almota Farmers Elevator & Warehouse Co v United States* 93 S Ct 791 (1973).
[309] *Georgia-Pacific Corp. v United States* 640 F 2d 328 (2000).

thereof, but that fair market value is a just standard. The determination of whether the payment of compensation is just is a judicial function.[310]

4 Expropriation Bill 2019, the Property Valuation Act and Departmental guidelines for calculating compensation

4.1 Expropriation Bill

The Expropriation Bill is much needed legislation in order to bring the expropriation practices in line with the Constitution. It sets out the procedures for expropriation as well as laying down guidelines on how compensation must be calculated. The focus will be on the latter.

Clause 12 is an important section in the new Bill because it seeks to align the compensation standard of the legislation with the Constitution. For this reason, clause 12(1) repeats section 25 of the Constitution verbatim. This does not really give calculatable guidelines on how to calculate compensation. To some extent this is done in the Property Valuation Act[311] that will be discussed below.

What it does provide in clause 12(2) is to list the considerations that should be disregarded when determining the amount of compensation (unless there are circumstances which would be just and equitable to do so). This mimics the current Act and is in line with most other jurisdictions. The rationale underlying this section is that "and appreciation or depreciation in the value of the property which…is a by-product or spin-off of the expropriation is to be ignored".[312] This principle is also referred to as the *Pointe Guarde*-principle.[313] It is seen as a principle of equity that it should be ignored.[314]

---

[310] RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 175.
[311] 17 od 2014.
[312] *Port Edward Town Board v Kay* 679.
[313] It was developed in the British case of *Point Guarde Quarrying & Transport Co v Sub-Intendent of Crown Lands* [1947] AC 656 (Tri&To).
[314] A Gildenhuys *Onteieningsreg* (2001) 257. For a thorough discussion of what "scheme" entails and how value must be determined, see A Gildenhuys *Onteieningsreg* (2001) 259 – 267.

A strict application of this provision can frustrate the transformative goals of the Constitution. In the *Khumalo* case,[315] the court preferred to apply the *Pointe Gourde* principle with regard to the underlying purpose of the expropriation, namely land reform. This, despite the fact that the Constitution requires that this factor be considered.

The following guidelines can help to avoid such a situation. The Constitution is there to, *inter alia*, equal out past inequalities. This is re-affirmed in section 25(5), where the state is ordered to take reasonable measures to ensure equitable access to land for its citizens. Application of the Constitution in compensation inquiries should be context sensitive and aim to transform the society to be one that is more equal. Expropriation laws cannot be applied with no reference to the specific historical and social context within which they operate. What is needed is not just a complete overhaul of pre-1994 expropriation practices, as this may leave a void that can lead to uncertainty and instability. What is needed instead is context sensitive development to reach the transformative goals contained in the Constitution. To this end, the purpose of the expropriation as dictated by the Constitution cannot be ignored due to a legislative provision.

Clause 12(3) was inserted, presumably in the climate of the discussion on the possible amendment of the Constitution, to indicate the instances where nil Rand compensation can be envisioned. The provision provides the instances where it may (and not must) be just and equitable for nil compensation to be paid. This is a peremptory provision, which leaves a discretion with the expropriating authority whether the compensation will be nil or more. Since the authority is left with a discretion, it will be helpful to have guidelines on how such a discretion must be exercised.

It is important to note that nil compensation is not without compensation. It indicates that these are the circumstances where the state foresees that "just and equitable" compensation can be nil, but it still leaves room to challenge that. It is also important

---

315 Anderson 1999 *Ethics*.

to note that homes and productive agricultural land is not included in this list. The Bill therefore does not foresee large-scale seizure of land without compensation.

It is also notable that clause 12(3) only refers to "land" and not other kinds of property. In South African Property Law, land or immovable property refers to everything that is also attached to the land. The question then is if this "nil compensation" will also be applicable to permanent fixtures and the other improvements on the land. In Estonian restitution law,[316] a distinction was made between the land and buildings.

Clause 12(3)(a) leaves the possibility for land to be expropriated at nil rand where "land is occupied or used by a labour tenant" in terms of the Land Reform (Labour Tenants) Act 3 of 1996. In the *Khumalo*[317] and the *Msiza*[318] case the court ruled that once an agreement is reached between the labour tenant or the owner, or once the Land Claims Court decided on the validity of the Labour Tenant's Claim, there is an expropriation. In the case of the Land Claims Court making a determination, it will amount to a judicial expropriation. In Msiza the Land Claims Court found that the award made by the court in 2004 amounted to a judicial expropriation. Relying on the judicial definition of "expropriation", as "the compulsory acquisition of rights in property by a public authority" and "the compulsory taking over of property by the State to obtain a public benefit at private expense", the 2004 judgment of the Land Claims Court was therefore regarded as an act of expropriation. The land was thus acquired by the state, since the *effect* of the Court's 2004 order was to force the owners to surrender the land to Mr Msiza subject to "just and equitable" compensation.

---

[316] In general, see Foster 1996 *Colum J Transnat'l L*. Section 2 of the *Republic of Estonia Principles of Ownership Reform Act*, 1991, a claimant can ask for the land to be restored, or for financial compensation. Section 12(3) and (5) exclude land that has been acquired by bona fide purchasers or land in the possession of the state.

[317] *Khumalo and Others v Potgieter and Others* (LCC34/99) [1999] ZALCC 11 at para 21; *Khumalo and Others v Potgieter and Others* (LCC34/99) [1999] ZALCC 68 at para 22; *Msiza v Director-General for the Department of Rural Development and Land Reform and Others* (LCC133/2012) [2016] ZALCC 12 at para 6 – 31.

[318] *Msiza v Director-General for the Department of Rural Development and Land Reform* [2016] ZALCC 12.

One suggestion is that the text should be amended to read:

> "(a) Where the land **[is occupied or used]** has successfully been claimed by a labour tenant, **[as defined]** in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);"

Clause 12(3)(b) speaks to the cases where land is held for purely speculative purposes. What is meant with "speculative purposes" needs to be clarified. Often times land might be not utilised, but there might be steps taken to utilise the land. This therefore need clarity.

Clause 12(3)(c) refers to land owned by state-owned enterprises and state-owned entity. It should be noted that this is not state land, as the state need not expropriate its own land.[319] This should also be read with clause 2(2) that authorise the Minister to only expropriate such property with the consent of the minister responsible for that entity. There might be some problems with this. With housing as a concurrent national and provincial competency, while municipal planning is a municipal competency. Therefore, if a municipality wants to plan low cost housing sections, and want to include the state-owned entities land, the possibility of doing so cost-effectively will hinge on the permission of the minister in charge of the SOE. Often these entities are reluctant to let go of their assets if not at market value, as they need to balance their books. In fact, this land often gets sold to private developers. In light of the fact that there can be different political parties in charge of the local government, provincial government and national government. It should further be noted that the nature of expropriation is such that it happens without consent, so it seems strange that a Minister will have the choice to consent, but ordinary citizens not. Clause 2(2) should therefore be reconsidered.

Clause 12(3)(d) looks at land that is abandoned by the owner. This needs to be clarified. In law property is only considered as abandoned when the owner gives up

[319] Transfer between departments will be done in terms *Government Immovable Asset Management Act* and the *Public Finance Management Act* .

the intention to be an owner,[320] usually with the loss of physical control. But mere loss of physical control would not constitute abandonment.

Clause 12(3)(e) speaks to where the value of the land is equivalent, or less than, the value of direct state investment. This is not clear if it is targeting farmers who historically benefitted from state support, and whether it can also include current beneficiaries of land reform projects.

4.2 The Property Valuation Act

The Property Valuation Act aims at giving effect to the provisions of the Constitution as far as land reform is concerned, specifically to facilitate land reform through the regulation of the valuation of property.[321] It applies to the valuation of property contemplated in section 12,[322] which provides for property identified for purposes of land reform[323] and acquisition and disposal by a department not for land reform purposes if the department so requests.[324] The Act is therefore primarily aimed at land acquired for land reform purposes, but can also be applicable on request by other departments.

The Act establishes the office of the Valuer-General, a juristic person that is accountable to the Minister of Rural Development and Land Reform. The Valuer-General must:

- value any property contemplated in s 12(1)(a);
- make recommendations to the Minister regarding the criteria for the determination of the value of property contemplated in section 12(1)(b); procedures and guidelines for the manner in which a valuation must be

[320] Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 271.
[321] S 2(a).
[322] S 3.
[323] S 12(1)(a).
[324] S 12(1)(b).

performed; and a system to monitor compliance with the criteria and procedures of the two aforementioned;

- determine the matters that must be contained in the valuation report contemplated in section 15.

The Valuer-General may, at the request of another department, value property contemplated in section 12(1)(b). Section 12 provides that if property is identified for land reform purposes, the Office of the Valuer General *must* value the property having regard to the prescribed criteria, procedures and guidelines, and that the Office *may* determine the market value of property for acquisition other than for land reform by another department if the department so requests.[325]

Section 12 implies that property, other than property acquired for land reform purposes, will still be compensated for at market value, while it seems that the value of only the property identified for land reform purposes must be calculated by using the prescribed criteria.[326] "Value" in the act therefore resembles the compensation provision in the Constitution. In the conclusion the problem arising from equating "value" with "compensation".[327]

The staff members that work in the Office of the Valuer-General are registered valuers with extensive experience in the valuation of property,[328] although the Valuer-General may also delegate the valuation to a registered private practitioner. The valuers have the power to make extracts from documents,[329] to question people about documents,[330] to require particulars regarding the property to be evaluated,[331] and other powers that will enable the valuer to make an estimation. The valuation report[332]

---

[325] S 12(1).
[326] Information removed for purposes of peer review.
[327] Van Wyk 2017 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 33 also discusses it and will be dealt with below.
[328] S 11.
[329] S 13(1)(a).
[330] S 13(1)(b).
[331] S 13(1)(c).
[332] Section 15(2).

> must reflect such opinions, statements and information as may be required or prescribed and must reflect an opinion or conclusion on the valuation of the property which is the subject of the valuation and must include all relevant information including, where applicable, the current use of the property, the history of the acquisition and use of the property, the market value of the property, an explanation on how a value was determined and the methodology utilised in determining the value.

A valuer must thus at least show that he considered the factors listed in the Constitution when making a valuation.

In South Africa valuers are regulated by the South African Council for the Property Valuers Profession that regulates the industry in terms of the Property Valuers Professions Act.[333] They are further guided by the International Valuations Standard and local best practice. Valuers are people who are professionally trained to value fixed property and to give expert advice on property-related matters. It is expected that an independent valuer provides impartial and motivated reports with regard to the real or limited right to the land.[334]

When called to testify as an expert, a valuer only provides guidance to a court. It is expected that such an expert would have sufficient knowledge and experience in his special field (i.e. valuation) and would apply the standards and procedures of his profession. Such an expert witness does not appear on behalf of any litigant, but forms his own opinion without regard to the result that the litigant wishes to achieve. In particular, a valuer is required to provide reasons for the conclusion reached, thus explaining it in clear and logical terms. The facts on which the valuer relies must be recorded and the formulas applied must be identified, along with the justification for the choice of formula. It is usually expected that the valuer certifies under oath that he prepared the valuation without knowledge of the facts of the underlying case, and proof of physical inspections and photographs should be provided in order to show that the valuer knows the physical condition of the immovable property.[335]

---

[333] 4 of 2000.
[334] Ellenberger 2007 *The valuers' manual*.
[335] Ellenberger *Valuers' Manual* 1-7.

The valuer considers the facts relating to the property being valued, together with whatever else influences the determination of the value. A variety of factors can influence market value, and they should be viewed as objectively as possible. This allows the valuer to make certain deductions based on the facts, while leaving the valuer with some discretion. This does not mean that the valuer can act subjectively or be partisan.[336] It is important that the valuer discloses the methods used to draw his conclusions, and the valuation must be a logical deduction from factual data.[337]

It is important to bear in mind that the valuer estimates value, and that the role of the valuer is not to settle disputes. Disputes over value should be settled at a hearing, with valuers giving evidence during the proceedings in order to assist the presiding authority to decide.[338] When the court makes such a decision it is said that the court assumes the role of a valuer, since the court must arrive at a valuation on the evidence placed before it.[339]

4.2.1 How the Property Valuation Act interacts with the Expropriation Bill

It is not clear where in the processes described in the Expropriation Bill the valuation done in terms of the Property Valuation Act fits in. Van Wyk[340] argues (with regard to the 2015 version) that since "value" is defined in language similar to "determination of compensation" in section 25(3) and clause 12(1) of the Expropriation Bill, where the valuation of property is for land reform purposes the Property Valuation Act plays a role parallel to that of the Expropriation Bill. The provisions of the Property Valuation Act then slot into the investigation phase in the Bill, which then follows its normal course. This means that in case of land reform, property will be subjected to the factors twice – first in terms of the Property Valuation Act, and then in terms of the Bill.

---

[336] Ellenberger *Valuers' Manual* 1-8.
[337] Ellenberger *Valuers' Manual* 1-9.
[338] Ellenberger *Valuers' Manual* 1-10.
[339] *Bonnet v Department of Agricultural Credit and Land Tenure* 1974 (3) SA 737 (T) 744C.
[340] Van Wyk 2017 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg*.

I agree that the valuation might play a role in the decision to acquire land for land reform purposes (the investigation phase), and that the valuation process therefore precedes the notice of intention to expropriate or the notice of expropriation. Pragmatically this makes sense, since the amount of compensation can influence the decision whether to expropriate or not. This will require the authority to use its discretionary powers in terms of clause 5. In that sense, the process in the Property Valuation Act can run parallel to the process in the Expropriation Bill.

Since the determination of value is written in directory terms in clause 5 of the Expropriation Bill, the Property Valuation Act may be applicable only once the decision is made to acquire the property for land reform purposes (or on request of a department as per section 12(b) of the Property Valuation Act) and the expropriation process is started with a notice of intention to expropriate. Then the valuation in terms of the Property Valuation Act will be used to determine the compensation offered in the notice of intention to expropriate and later (if needed) in the expropriation notice. Recently the Land Claims Court held that the Minister is not bound to the determination of the Valuer General in the "acquisition" (not an expropriation) of the property.[341]

This can be gleaned from the objects of the Act,[342] most notably the object of the Act to provide for the valuation of property that has been identified for the purposes of land reform. This is further re-enforced by the interpretation *maxim generalia specialibus non derogant*,[343] where it is accepted that legislation that deals with a matter in specific terms (such as the Property Valuation Act and land reform expropriation) will not be repealed by later legislation that deals with matters in general terms (such as the Expropriation Bill). In other words, when we deal with valuation for land reform purposes, then the Property Valuation Act will be preferred to the Expropriation Bill, once it is enacted.

---

[341] *Emakhasaneni community v Minister of Rural Development and Land Reform* LCC03/2009 of 6 March 2019 (LCC)
[342] Section 2(c).
[343] See Du Plessis *Re-interpretation of Statutes* 73.

Other questions that arise is whether the expropriating authority is bound by the valuation of the valuer. The Act seems to lay out the requirements for determining value and the steps that can be taken to question such a valuation. The valuer will then hand over the report with the reasons to the expropriation authority, in order for the authority to exercise their powers (and discretion) to determine the compensation amount. In the conclusion I will return to this: valuers determine value, while the expropriation authority and courts determine compensation. For that reason, the authority will not be bound by the determination of the valuer, but will make its decision based on the report.[344]

The regulations also warrant some attention. While the regulations mainly sought to give the Valuer-General the tools to enable the office to make valuations (in the gathering of data, for instance), there are a few provisions that are relevant for the purposes of this discussion.

It is notable that the term "value" is used throughout the regulations, and that a great deal of reliance is placed on existing valuation practices.[345] When the property is expropriated for land reform purposes, the valuer must apply a range of procedures, mostly mimicking what is required in terms of section 25(3)(a)-(e) of the Constitution.[346] There is considerable emphasis in the regulations on determining market value.[347] Value is determined in terms of regulation 6. This formula requires the current use value to be added to the market value, which is then divided by two. Any unharvested crops or timber not harvested will also be added to the value, and from this figure any acquisition benefits and direct state investments and subsidy will be subtracted.

The regulations thus focus on the determination of "value", with an approach like the two-step approach, where certain amounts are added and subtracted to the aggregate

---

[344] See *Emakhasaneni community v Minister of Rural Development and Land Reform* that seems to confirm this.
[345] Regulation 4(1).
[346] Regulation 5(1).
[347] See regulation 5(1)(d)-(f).

of current use and market value. It seems to be built largely on guidelines that were used by the Department of Land Affairs, as will be discussed below.

4.3 Department of Land Affairs Handbook on Property Valuation

In the land reform context valuers play a significant role, due to the state's "willing-buyer, willing-seller" principle, where the aim is that land reform should happen in accordance with market principles, rather than using the politically less desirable option of expropriation.[348] In this context valuers determine value, and this has been the case since 1996.

For the purposes of land reform valuation, the (then) Department of Land Affairs published a handbook on property valuation in 2000 to aid valuers to incorporate the constitutional principles into valuation.[349] This document also confirms that when using the "willing-buyer, willing-seller" policy, the valuer's role is to assess reasonable market value of land to assist the Department as a private buyer in buying the land.[350] In this sense it is not compensation for expropriation but the value of the land.

When it is not possible to determine market value, the valuer must either estimate the productive value (in a rural area) or the replacement value (in an urban area).[351] The Department has given guidelines as to how to determine compensation for land reform purposes. It regards valuation as a two-step process. The valuer is first required to determine market value in accordance with valuation principles,[a] and is then required to adjust the market value in accordance with the non-market value principles listed in section 25(3) of the Constitution.[352] In law circles this is known as the Gildenhuys two-step approach, while in the world of valuers it is known as the "Putfontein formula", being named after the farm where it was first used.[353] The Department makes it clear that it wants the valuer to present it with "just and equitable"

---

[348] Ghyoot "Land Restitution and Restitution Valuation in South Africa" 185.
[349] Department of Land Affairs *Handbook on property valuation,* 2000.
[350] Department of Land Affairs *Handbook on property valuation,* 2000 10.
[351] Department of Land Affairs *Handbook on property valuation,* 2000 10.
[352] Department of Land Affairs *Handbook on property valuation,* 2000 11.
[353] Ghyoot "Land Restitution and Restitution Valuation in South Africa" 188.

compensation, and not "market value" compensation.[354] The formula as proposed by Gildenhuys was:

Just and equitable compensation = (A/B x C) + D – E

In this formula A is the price the current owner paid originally, B is the actual market value at the time of the original purchase, C is the current market value (without added improvements),[355] D is the value added by the owner to the land and E is the value of any special benefits that the owner received from the state under non-market related payment conditions.[356]

The formula has been criticized as not considering the onerous conditions that were placed on directly or indirectly providing subsidies for the purchase of farms, or the running costs, which distorted the market. These beneficial financial arrangements can often not be quantified because they would be affected by market value. To deduct a proportional discount, the argument goes, would assume that the state is a partner in the farming business and that part of the increase in the value is due to the state. Suspicion is also raised against the idea that value is an additive concept.[357] For this and various other reasons, the use of this formula has been discontinued.

What is insightful about the DLA Handbook is the direction it gives on how non-market value factors will influence "value". This second stage is not aimed at determining "value", but rather at determining "just and equitable" compensation. In terms of these guidelines, the current use that can influence the calculation of compensation is use of the land by land reform beneficiaries connected to the scheme of expropriation; in other words, those rights that are not reflected in the Deeds Registry. In this context, labour tenants like Msiza provide a good example: the fact that a labour tenant occupies and works on a farm and is now being awarded the land in

[354] Department of Land Affairs *Handbook on property valuation,* 2000 11.
[355] Department of Land Affairs *Handbook on property valuation,* 2000 13.
[356] Ghyoot "Land Restitution and Restitution Valuation in South Africa" 188.
[357] Ghyoot "Land Restitution and Restitution Valuation in South Africa" 188.

terms of land reform legislation may have no bearing on the calculation of compensation.

This factor, of course, raises interesting questions about the impact of the *Pointe Gourde* principle. The principle[358] prohibits the inclusion of any enhancement or depreciation in the value of the property arising from its use after expropriation in the calculation of the present value of the land.[359] The rationale underlying this section is that "an appreciation or depreciation in the value of the property which […] is a by-product or spin-off of the expropriation is to be ignored".[360] The DLA circumvents this issue by stating that if this underlying scheme cannot be taken into account when calculating *market value*, then it can be taken into account when determining *compensation*. This has often led to valuers and judges, when calculating compensation, to leave the land reform scheme for which the expropriation is being done out of the equation. In other words, it has led them to determine value instead of compensation. While this principle can play a role in determining value, it plays no role in just and equitable compensation in terms of the Constitution.

With regard to "the history of the acquisition and use of the property", the DLA handbook refers to case law where the question whether the current owner bought the property before or after the statute governing the scheme of the expropriation had been enacted was taken into account. Where the purchase was made after the event, then the Pointe Gourde principle is reversed.[361]

The third non-market value factor is the extent of direct state investment. This includes an acquisition subsidy, reduced-interest loans and infrastructure subsidies.[362] The values of these subsidies should be translated into present-day values by means of adjusting for inflation. This can be done by applying either the consumer price index

---

[358] *Pointe Gourde Quarrying and Transport Co Ltd v. Sub-Intendent of Crown Lands* AC.
[359] *Expropriation Act* s 12(5)(f).
[360] *Port Edward Town Board v Kay* 679.
[361] Department of Land Affairs *Handbook on property valuation,* 2000 13.
[362] Department of Land Affairs *Handbook on property valuation,* 2000 14.

(CPI) or the land price index (LPI). The following formula is used to factor in the subsidies:

Sum of subsidies = (B-A) x k_0 + E_1 x k_1 + E_2 x k_2 + E_3 x k_3 + …

Where

B is the true market or productive value of the property at the time of acquisition;

A is the actual price at the time of acquisition;

K_0 is the inflation factor related to land acquisition (using the CPI or the LPI);

E_1, E_2, E_3, etc. are the historical values of the interest rate subsidies and infrastructure subsidies received; and

k_1, k_2, k_3, etc. are the corresponding inflation factors for these subsidies based on the CPI.

As for the purpose of the expropriation, the DLA marks it as uncertain, and no guidelines are offered in the DLA handbook.

The guidance given by this handbook is problematic. Rigorous formulas that determine value cannot be transplanted to life situations to determine just and equitable compensation. Since compensation is context specific, it is not suited to the application of rigid formulas. It might be easier for the courts to develop some rule for context-specific situation through case law. Hopefully the Expropriation Bill[363] and the Property Valuation Act[364] will do this.

[363] B4D-2015.
[364] 17 of 2014.

5 Conclusion and recommendations

5.1 Introduction

In order to address the unworkable order in land reform, in which expropriation must operate, it is important to address and to spell out the normative rules underlying compensation, to ensure that the substantive rules are clear, and to ensure that the procedural rules keep things intact.

The Constitution lays down the normative rules: expropriation must be just and equitable, and the calculation is based on a proportionately analysis. This must all be understood in the context of the Constitution being a document of transformative justice, that seeks to rectify past injustices by looking forward at the same time. This is also possible to do in terms of legislation.[365]

As to the substantive rules, the Expropriation Bill[366] and legislation such as the Property Valuation Act[367] provide these rules. What must be compensated, and when is compensation due.

The procedural rules, as discussed in some of the foreign jurisdictions, that ensures timeframes for decision-making, can also greatly improve the problems with the acquisition of land. It is also possible to ensure that there are procedural values to guide decision-making.[368]

This will be discussed in more detail below, followed with practical steps to be taken as conclusion.

---

[365] See *National Environmental Management Act* and *Spatial Planning and Land Use Management Act* .
[366] 2019.
[367] 17 of 2014.
[368] See *National Environmental Management Act* and *Spatial Planning and Land Use Management Act*.

5.2 The Constitutional framework of compensation and the calculation of compensation

The Constitution lays down the principles for calculating compensation. As a guiding document, it does not provide the detailed mechanism of how such "just and equitable" compensation must be calculated.[369] This can be somewhat problematic if the culture of determining compensation is geared towards equating compensation with market value when compensation can be less than market value or nominal in exceptional circumstances. It is also problematic if the rationale for paying compensation rests on recompensing the individual only.

The idea that property rights are protected insofar as compensation is a requirement at expropriation, and the drive to redistribute land, is part of the same societal goal. Instead of being seen as opposing forces, they must be regarded as mechanisms to reach our Constitutional goals and visions. This is how the conversation should be framed. This will also necessitate that we go back to the beginning: what were the values that the Constitution is built on, and do they still hold.

At the time of transition, there was a need for substantive corrective justice, coupled with the fear from white beneficiaries that transformation would involve material sacrifices. At the centre of this, lies the property question, connected to the economic and social divisions that was created and upheld by the apartheid state.[370] Transformation in the form of restitution and redistribution would inevitably have an impact on wealth and privilege accumulated during apartheid.

Section 25 must be seen as an attempt to mediate between this stability and change, by protecting existing property rights, but also allowing for the infringement of these rights to enable significant reforms.[371] A constitutional amendment that will interfere

---

[369] See Van Wyk 2017 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 31, where she laments that the Expropriation Bill does not really change this.
[370] Van der Walt *Property in the Margins* 3. At the end of apartheid there were 17 000 statutory measures that dealt with land use.
[371] Van der Walt *Property in the Margins* 7.

with this framework (when the amendment is in sections 25(2) or (3)), might be problematic.

If this is no longer applicable, we should first find consensus about the values that we as a society regard as important and binding, before we have the conversation on expropriation without compensation. A conflation of the two conversations will not bring clarity or workable solutions. Likewise, in the absence of clarity on the underlying values that our Constitution instils in the society, the formal rules will not hold up. We need both.

It is also for this reason that I think a cosmetic change to the Constitution for political reasons should be resisted.

In the current framework, the Constitution is there to, *inter alia*, equal out past inequalities. This is re-affirmed in section 25(5), where the state is ordered to take reasonable measures to ensure equitable access to land for its citizens, and section 25(8) specifically states that nothing in the section may impede the state from taking legislative and other measures do land reform. The application of the Constitution in compensation inquiries should be context sensitive and aim to transform the society to be one that is more equal. Expropriation laws cannot be applied with no reference to the specific historical and social context within which they operate. What is needed is not just a complete overhaul of pre-1994 expropriation practices, as this may leave a void that can lead to uncertainty and instability.

What is needed instead is context sensitive development to reach the transformative goals contained in the Constitution. This balancing is flexible, and will at certain times require greater interfernces with property rights than others. In other words, in times of great inequality, and where expropriation happens in projects that address this inequality, the interference with property rights will be greater than at times or instances of less inequality. Such a proportionality principle is therefore flexible and durable enough to adapt with changing circumstances. I rigid method or calculations might, ironically, at times be too restraining. In this respect jurisprudence on especially eviction law has over time evolved, where greater interference with private ownership

is allowed in the context of social responsibility. There, however, always remains a balance.

In the context of compensation for expropriation, it will require a transformative-friendly application of pre-1994 legislation, developing the law to bring it in line with the constitutional aspirations. It means focussing on "just and equitable" compensation, and not market value. It means questioning the way in which the Expropriation Act[372] and other expropriation legislation was applied pre-constitutional, and asking whether such an interpretation is still viable. It means questioning existing laws for constitutional validity and re-interpreting them in a Constitution-friendly way if they are inconsistent. This might create a tension between constitutional protection of property and the integrity of the (apartheid inherited) private property laws.

Where compensation is less than market value for land reform purposes, it might place an unfair burden on the individual for addressing past injustices, that should in fairness be placed on the whole of society. For that reason, it might be useful to return to the TRC recommendations of a wealth tax, in order to top-up the shortfall in compensation.

In terms of the mechanics of section 25, expropriation being a subset of deprivation means that expropriation without compensation may not pass the arbitrariness test of the deprivation, as such a deprivation can be viewed as arbitrary.

5.3 International law and foreign law lessons

It should be noted that International Law does not allow for expropriation without compensation, except in instances that deals with nationalisation. It also prohibits that only a certain group of people is targeted for an expropriation.

International law, however does not require precise methods of calculating compensation, and in general only require general principles to guide the decision-makers' discretion in calculating compensation.

---

[372] 63 of 1975.

As far as the foreign jurisdictions are concerned, Australian legislation clearly distinguished between the calculation of value and compensation. It requires that Parliament only provide the procedures to be followed, and this procedure needs to be fair.

The value / compensation distinction is true in the case of Austria too. Austria has strict guidelines and timeframes for the determination of compensation, and indicates that such a process should not frustrate the expropriation. This resonates with South African case law, and might be something that can be added to the Expropriation Bill.

What is also helpful there is the rule that if the private owner can fulfil the public purpose for which the state wants to expropriate, then the state should not expropriate. While this does perhaps not have a direct bearing on compensation as such, it does have fiscal implications that might be favourable for the state. Likewise, should the state not use the property for the purpose for which it was expropriated within one year, the property can be resituted to the owner. This is a great accountability mechanism.

The German jurisprudence and underlying values guiding compensation is an important guideline for South Africa. In Germany the focus is not on recompensing the individual, but in achieving a balance between protecting property rights and making sure that the exercise happens with regard to the societal interests. The German courts also clearly distinguish between the constitutional principles of compensation on the one hand, and the calculation of compensation on the other. As will be explained below, this is an important framework for South Africa.

Ethiopia offers interesting comparisons for how to calculate compensation for expropriation without regard to the land. It is also interesting that, despite land being under custodianship of the state, the state offers fairly comprehensive compensation for the rights taken, and the improvements made.

Like the German example and jurisprudence, the European Court of Human Rights made it clear that compensation will be a proportionality inquiry. What is helpful in the context of land and other reforms, is the fact that the court could accept that in

cases where property is expropriated to pursue measures of economic reform or to achieve greater social injustice, less than market value compensation is acceptable.

The Indian example has something similar. What is more important from the Indian lesson is the possible lockdown between the legislature and the Constitution, should the legislative instruments not adhere to the Constitutional values. In South Africa such a lock down should be avoided. Courts have an important function in laying down the principles of expropriation. In that regard, the review of the adequacy of compensation and the warning that compensation cannot be merely illusionary, is important. In terms of valuation, the warning that in the case of an exponential rise in land prices, a different index (like, I would imagine, a property price index) can be used to determine compensation.

While in the United States of America compensation is fairly comprehensive, there is the argument that just compensation is based on the principles of fairness and equity rather than market value. The US also allows for a contextual inquiry rather than to lay down hard and fast rules. Questions of fairness and equity is left for the courts.

5.4 Issues on the Expropriation Bill

It is suggested that the department provide clarity on the issues raised above with regards to the compensation requirement. It is also important to get clarity on the interaction between the Bill and the Property Valuation Act. It is urgent that framework legislation for redistribution also be promulgated, to indicate in which circumstances land can be expropriated for redistribution purposes.

5.5 A way forward: compensation, value, principles and calculations

5.5.1 Through the courts

5.5.1.1 Value

"Compensation" and "value" are two different concepts. Value refers mostly to "market value" and not "just and equitable", as this is compensation. The person or institution that determines "value" does not necessarily determine "compensation".

There are different entities that determine value. In terms of the new Property Valuation Act,[373] the valuer-general values property in terms of section 6(a) for land reform purposes, and reports to the relevant expropriating authority (most notably the Minister of Rural Development and Land Reform). Clarity on the role of each of these entities, and the status of the valuation, can prevent possible power struggles between these two entities.

Valuers are trained to determine value, and in the context of expropriation this is normally market value. The normative compensation requirement of "just and equitable" sits uncomfortably, and with no concrete formulas or figures on how to calculate it, seems impossible to achieve. Valuers also do not have the discretion to consider these factors. In the *Msiza*[374] case, the court considered the valuations, and afterwards deducted an amount from the value, without providing clear guidelines on how this discretion was exercised. This is also problematic. On appeal, the Supreme Court of Appeal[375] argued that various factors, including some section 25(3) factors, "have all been taken into account in considering market value."[376] In other words, the factors listed to help determine "just and equitable" compensation are now subsumed into the inquiry into "market value." This is also problematic, as it conflated the concept of "value" with that of "compensation". This problem might be solved if legislation (either the Property Valuation Act or the Expropriation Bill) requires that the valuers must try to come to some sort of agreement on the value, and clearly set out the points of disagreement with reasons. This will facilitate the judicial officer to make a ruling on the compensation amount.

5.5.1.2 Compensation

Guidelines of how to calculate compensation can only crystalize through jurisprudence, when the courts are confronted with concrete cases. This is because "justice and equity" is context dependent. We have an example in eviction jurisprudence (on PIE)

---

[373] 17 of 2014.
[374] *Msiza v Director-General for the Department of Rural Development and Land Reform*.
[375] *Uys NO v Msiza* [2017] ZASCA 130.
[376] Par 25.

that shows how this will give clarity and meaning to values. For this reason, I would suggest that every expropriation case should, for the first five years, go to the courts for determining compensation. A Land Management Facility that focusses on Restitution, Land Tenure, Communal Property Associations and Judicial Administrator provides for a programme where the state fund certain litigations, and I suggest that something similar should be set up for expropriation. I would further suggest that the Land Claims Court be the court to determine it, by possibly creating a specialized unit for this purpose.

From the wording of section 25(2) and (3) of the Constitution, it is clear that the courts have authority to determine compensation. It can also be deduced from the word 'approved' that there are other authorities that can determine compensation that the court merely approves if needed. The Expropriation Bill[377] allows for mediation, and these mediation tribunals will then also determine compensation. These are the authorities mentioned specifically in legislation, such as the Minister of Public Works in the Expropriation Act,[378] or other ministers to whom he delegates his power.[379]

The two-step approach that was developed in the courts and mimicked in the departmental guidelines is not ideal. A better starting point would be accepting that the goal is not "market value" but "just and equitable" compensation. This would enable a judge at times to consider including evidence on or considerations such as the economic standing of an owner in determining what an equitable amount of compensation would be. It might encourage a judge to consider discounting compensation, if the goal that the expropriating legislation wishes to achieve requires the owner's rights to give way to the bigger public purpose. In short: it requires a contextual determination of compensation that aims at the "just and equitable" rather than at market value compensation. The use of more rigid or precise tools is not feasible and would hamper a contextual determination of just and equitable

[377] 2019.
[378] 63 of 1975.
[379] For example, the *South African National Roads Agency Limited and National Roads Act* 7 of 1998.

compensation. The tool we have is the *Constitution*, which tells us where we ought to go.

The Constitution expects something more. The Constitution states that, at least in some contexts, compensation cannot be value. And this is where the distinction between 'value' and 'compensation' becomes important.

Perhaps this is part of our compensation problem in South Africa, which so clearly crystalized in the Msiza-cases: valuers present the courts with value, and the courts must then determine 'just and equitable' compensation, and these two amounts can differ, depending on the context. It is important to understand that market value as a central factor, especially in land reform, is specifically done away with because no mathematical formula and no market will correct the inequalities that we have to grapple with in expropriation cases. In this respect the courts too have an important role to play in steering the determination of compensation. But in the absence of clear guidelines, it is for the courts to give guidance on how to determine 'compensation' (and not mere value) without stepping on the toes of the legislature's powers. Being confronted with specific factual situations that provide the context, the courts are especially well suited for such an exercise, if they exercise it with judicial restraint. This strengthens the argument that expropriation cases should go to court to determine compensation, until clear guidelines have cristalised.

Determining, or giving directions to determine, just and equitable compensation in a vacuum is simply not possible. That is perhaps also why the guidelines issued by the Department of Land Affairs were no longer used. The Property Valuation Act and regulations are only aimed at calculating "value".

5.5.2 Legislative rules

5.5.2.1 Introduction

Though it is my strong opinion that a contextual approach is the best approach to determine what "just and equitable" is, there are some proposals on how certain legislative rules, guidelines or regulations can help with compensation.

5.5.2.2 Placing percentages on the factors listed in section 25 in legislation

The one suggestion from the Land Access Movement of South Africa (LAMOSA)[380] is subtracting percentages for factors, and that this should be regulated in regulations or guidelines that is flexible and that can easily be changed. This will include a rebuttable presumption that, if market value is relevant to determine just and equitable compensation, the affected person (eg. owner) to show that the subtractions should not apply.

For instance, from the current use of property 50% may be deducted if the land is not beneficially used. This is quantifiable in most instance. In the cases of history of acquisition 20% may be deducted if the land was acquired for free, not beneficially occupied, or where acquisition or mortgages and supported through banks at beneficial rates. A 20% deduction if the purpose is land reform may be applicable. Market value and direct state investments are readily quantifiable.

There was a suggestion to add to the list "the nation's commitment to land reform, and to reforms to urgently bring about equitable access to all South Africa's natural resources", in which case a premium of 10% will be paid to people who offer their land.

While this is a possible step, the burden placed on the owner may be too onerous. Such an approach should therefore be limited to the investigation phase in Expropriation Bill, where the valuers converse about the value. Such a method must also be balanced with the economic implications that it may have.

As to the question of who should be compensated, in section 25(4), the following should be inserted:

(4) For the purposes of this section—

(a)

(b)

---

[380] Submission can be found here: https://pmg.org.za/committee-meeting/27343/ .

(c) those affected [by an expropriation] must include:

(i) an owner of expropriated property;

(ii) a beneficial occupier on expropriated land; and

(iii) a farmworker on expropriated land,

and may include:

(iv) a money lending institution where the expropriated property serves as security for a loan, and

(v) any other person in circumstances similar to an owner, beneficial occupier, farmworker or lender;

(d) the amount of compensation agreed, decided or approved may be ZERO rand;

(e) the amount of compensation and the time and manner of payment shall be agreed, decided or approved separately in respect of an owner, beneficial occupier, farmworker, lender and any other person affected; and

(f) compensation may be in the form of money, compensation in kind, comparable redress, equitable redress or other similar form.

While I agree that the concerns raised here are important to ensure the protection of vulnerable groups, I am of the opinion that this should be dealt with in legislation.

5.5.3 Other possibilities that have been mentioned[381]

- Clear guidelines on how to weigh up the concerns (in line with the above). Appeal mechanisms provided in legislation can help avoid expensive court processes. This can happen in the office of the valuer general, if the problems described are addressed.
- Municipal valuations can be used.
- There can be calculations based on the original purchase price, and then adjusted in terms of inflation or a house price index.
- A combination of the factors – municipal valuation, previous purchase prices, current use.
- A flat rate per hectare, determined on the different areas and types of land.

[381] See draft paper by T Ngcukaitobi and M Bishops delivered at the Constitutional Court Review IX Conference, available at https://www.wits.ac.za/law/constitutional-court-review-conference/ .

If such guidelines are developed, it must still comply with the compensation standard of "just and equity" and the proportionality principle.

5.6 "Without compensation"[382]

5.6.1 Introduction: when it may be possible to acquire property at nil compensation in the current constitutional framework

These are the limited circumstances where "nil compensation" might be possible in the current constitutional framework.

5.6.1.1 Deprivations

In line with the *AgriSA*[383] judgment, if the loss of property amounts to a deprivation only, then compensation need not be paid. This will require a regime change with regard to a resource, for instance, for agricultural land. This will not be an expropriation, but a deprivation that does not need compensation. This, however, need to comply with the constitutional requirements as discussed in 2.2.3.

5.6.1.2 Nil compensation is "just and equitable"

As is done in clause 12(3) of the Expropriation Bill 2019, the state can indicate cases where it can foresee that nil compensation is "just and equitable". There might be instances where the court rules that compensation is minimal or nil, but the Constitutional Court will need to give guidance in this. Parliament can lay down interpretative guidelines in the Expropriation Bill.

5.6.1.3 Section 25(8) limitation

As discussed above at 2.3.2, there are situations where the state can invoke section 25(8) for reform purposes, in order to limit the payment of compensation in section

---

[382] I place "without compensation" in quotation marks, because I do not believe that the Constitution provides for "without compensation". It does, however, provide for situation where nil rand compensation can be paid, but this still leaves the possibility for someone to contest the compensation amount.

[383] *Agri South Africa v Minister for Minerals and Energy.*

25(2). The government will have to show that the payment of compensation will impede land reform. This will, however, be subject to section 36(1) of the Constitution (see 2.3.3), and will be subject to a proportionality analysis.

5.7 Constitutional amendment

It is my strong argument that it is not the Constitution that stands in the way of implementing successful land reform. However, in the current political reality it might be politically important for parliament to "make explicit what is implicit" in the Constitution.

My suggestion would be a change to the wording of section 25(8) to read that

> No provision of this section, nor compensation, may impede the state […]

If an amendment is also possible in section 25(2)(b) to read

> subject to compensation which may be nil 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.

Alternatively, section 25(4), generally regarded as the "interpretation clause" for section 25, can make it clear that "just and equitable" can also be R0 if it is just and equitable.

Any proposed amendment must be careful not to interfere with the proportionality principle. While this principle will be applicable in terms of PAJA and section 36(1) in any case, it can lead to interpretative conundrums. The possible argument that proportionality is integral to the rule of law, and therefore a founding provision of the Constitution that requires a 75% majority to amend, should also be taken into account.

Bibliography

Literature

Abdo M "Legislative protection of property rights in Ethiopia: an overview" 2013 *Mizan Law Review* 165-206

Alexander G "Constitutionalising property: Two experiences, two dilemmas" 1999 *Property and the Constitution* 88-108

Allen T *The right to property in Commonwealth constitutions* (Cambridge University Press Cambridge 2000)

Alston LJ, Libecap GD and Mueller B "A model of rural conflict: violence and land reform policy in Brazil" 1999 *Environment and Development Economics* 135-160

Alston LJ, Libecap GD and Mueller B "Land reform policies, the sources of violent conflict, and implications for deforestation in the Brazilian Amazon" 2000 *Journal of environmental economics and management* 162-188

Ambaye D "Land valuation for expropriation in Ethiopia: Valuation methods and adequacy of compensation" 2009

Analytics G *Implementation evaluation of the Restitution Programme* (2014) available at https://evaluations.dpme.gov.za/evaluations/426 accessed

Anderson ES "What is the Point of Equality?" 1999 *Ethics* 287-337

Anonymous *Special Investigation Unit Report in respect of the National Departmnet of Rural Development and Land Reform.* (2018) available at

Badenhorst P "Compensation for Purposes of the Property Clause in the New South African Constitution" 1998 *De Jure* 251

Badenhorst P and Moster H "Revisiting the transitional arrangements of teh Mineral and Petroleum Resources Development Act 28 of 2002 and the constitutional property clause: An analysis in two parts. Part 1: Nature and content of rights acknowledged by the revised transitional provisions" 2003 *Stell LR* 377 - 400

Badenhorst P, Pienaar J and Mostert H *Silberberg and Schoeman's Law of Property* 5th ed (LexisNexis Butterworths Durban 2006)

Bank AD *Compensation and Valuation in Resettlement: Cambodia, People's Republic of China, and India* (2007) available at http://www2.adb.org/Documents/Reports/Capacity-Building-Compensation-Valuation/ accessed

Brown D *Land Acquisition* 3rd ed 1991)

Brown D and Fogg A "The law of resumption in Australia" in Erasmus G (ed) *Compensation for Expropriation - a comparative study: conference: preprinted papers* (Jason Reese 1990

Budlender G "The constitutional protection of property rights" 1998 *Budlender G, Latsky J and Roux T Juta's New Land Law (Juta Cape Town 1998) Chapter*

Claassens A "Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation" 1993 *S Afr J on Hum Rts* 422

Currie I and De Waal J *The bill of rights handbook* (Juta and Company Ltd 2013)

De Janvry A *et al* "Delinking land rights from land use: Certification and migration in Mexico" 2015 *American Economic Review* 3125-3149

Del Duca P "The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization" 2003 *UCLA L Rev* 35

Du Plessis E *Compensation for Expropriation under the Constitution* (University of Stellenbosch 2009)

du Plessis E "The public purpose requirement in the calculation of just and equitable compensation" in Hoops B *et al* (eds) *Re-thinking Expropriation Law I: Public interest in Expropriation* (Juta: Eleven International Publishing The Hague 2016) 369 - 386

Du Plessis LM *Re-interpretation of Statutes* (Butterworths 2002)

Du Plessis W "Valuation in the constitutional era" 2015 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1725-1759

Du Plessis W and Olivier N "The Old and the New Property Clause" 1997 *BPLD*

Dugard J *International Law: A South African perspective* 2nd ed (Juta Durban 2001)

Ellenberger E *Valuers' Manual* (Butterworth Durban 1995)

Ellenberger E "The valuer" 2007 *The valuers' manual*

Foster FH "Restitution of Expropriated Property: Post-Soviet Lessons for Cuba" 1996 *Colum J Transnat'l L* 621

Galindo J "Some Aspects on the Failure of Agrarian Reforms in Mexico and other Latin American Countries" unpublished contribution delivered at the *Forum for Development Studies (*2019

Ghyoot V "Land Restitution and Restitution Valuation in South Africa" *Indigenous Peoples and Real Estate Valuation* (Springer 2008) 175-200

Hammond JL "Land occupations, violence, and the politics of agrarian reform in Brazil" 2009 *Latin American Perspectives* 156-177

Hoops B "Expropriation without compensation: a yawning gap in the justification of expropriation?" 2019 *SALJ*

Iyer D "Is the Determination of Compensation a Pre-requisite for the Constitutional Validity of Expropriation? Haffajee NO and Others v Ethekwini Municipality and Others" 2012 *SPECJU*

Kleyn D "The constitutional protection of property: A comparison between the German and the South African approach" 1996 *SA Public Law* 402-445

Kriebaum U and Reinisch A "Property Right to International Protection" 2012 *The Max Planck Encyclopedia of Public International Law*

Maki JM *et al Maki, John M., Ikeda Masaaki, David CS Sissons, and Kurt Steiner. "Court and Constitution in Japan; Selected Supreme Court Decisions, 1948-60."* (University of Washington Press Seatle 1964)

Monk LR "The words we live by: the constitution in context." 2003 *Social Education*

Murphy TE and Rossi MA "Land reform and violence: Evidence from Mexico" 2016 *Journal of Economic Behavior & Organization* 106-113

Nations U *Expropriation* (2012) available at https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf accessed

Schachter O "Compensation for expropriation" 1984 *American Journal of International Law* 121-130

Schmidt-Aßmann E "Expropriation in the Federal Republic of Germany" in Erasmus GM (ed) *Compensation for Expropriation - a comparative study*1990

Sullivan R "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in Erasmus GM (ed) *Compensation for Expropriation - A Comparative Study*1990

Treeger C "Legal analysis of farmland expropriation in Namibia" 2004 *Constitution* 16

van der Sijde E *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (Stellenbosch: Stellenbosch University 2015)

Van der Walt A *Constitutional property clauses: a comparative analysis* (Kluwer Law Intl 1999)

Van der Walt A "The State's Duty to Pay Just and Equitable Compensation for Expropriation: Reflections on the Du Toit Case" 2005 *S African LJ* 765

Van der Walt A *Constitutional property law* (Juta and Company Ltd 2011)

Van der Walt A *Property and Constitution* (Pretoria University Law Press (PULP) 2012)

Van der Walt A "The modest systemic status of property rights" 2014 *JL Prop & Soc'y*

Van der Walt AJ *Property in the Margins* (Bloomsbury Publishing 2009)

Van Wyk J "Compensation for land reform expropriation" 2017 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 21-35

Wälde TW and Sabahi B "Compensation, Damages and Valuation in International Investment Law" 2007 *Transnational Dispute Management (TDM)*

Case law

ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary ICSID Case No ARB/03/16

Agri South Africa v Minister for Minerals and Energy 2013 (4) SA 1 (CC)

Amoco International Finance Corp v Iran 1988 27 ILM 1314

Banco Nacional de Cuba v. Sabbatino 376 US 398 (1964)

Bonnet v Department of Agricultural Credit and Land Tenure 1974 (3) SA 737 (T)

BP Exploration v. Libyan Arab Republic (53 ILR 297) 1973

BVerfGE (Hamburgisches Deichordnungsgesetz) 24, 367 [1968]

City of Cape Town v Helderberg Park Development (Pty) Ltd 2007 (1) SA 1 (SCA)

City of Cape Town v Helderberg Park Development (Pty) Ltd 2007 1 SA 1 (SCA)

CJ Burland Pty Ltd v Metropolitan Meat Industry Board (1968) 120 CLR 400

The Commonwealth of Australia v Tasmania (1983) 158 CLR 1

Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica ICSID Case No ARB/96/1

de Almeida Garrett and ors v Portugal [2000] ECHR 2

De Villiers v Stadsraad van Mamelodi 1995 (4) SA 347 (T)

Du Toit v Minister of Transport 2003 (1) SA 586 (C)

Du Toit v Minister of Transport 2006 1 SA 297 (CC)

Emakhasaneni community v Minister of Rural Development and Land Reform LCC03/2009 of 6 March 2019 (LCC)

Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs 2000 2 All SA 26 (LCC)

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a/ Wesbank v Minister of Finance 2002 4 SA 768 (CC)

Florence v Government of the RSA 2014 6 SA 456 (CC)

Former King of Greece v Greece 33 EHRR 21 (2001)

GAMI Investments, Incorporated v Mexico Final Award, IIC 109 (2004)

Georgiadis v Australian and Overseas Telecommunications Corporations (1994) 179 CLR 297

Grace Bros Pty Ltd v The Commonwealth of Australia (1946) 72 CLR

Haakdoornbult Boerdery CC v Mphela 2007 5 SA 596 (SCA)

Harvey v Umhlatuze Municipality 2011 (1) SA 601 (KZP)

Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood 2001 1 SA 1030 (LCC)

Holy Monasteries v Greece 301 Eur Ct HR (ser A) 71 - 1994

Inglewood Pulp and Paper Co Ltd v New Brunswick Electric Power Commission [1928] AC 492

Jahn v Germany (2006) 42 EHRR 49

James v United Kingdom [1986] 8 EHRR 123

Jokela v Finland [2000] ECHR 704

Kesavananda Bharati Sripadalvaru v State of Kerala (1973) 4 SCC 225

Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225

Khumalo v Potgieter 2002 2 All SA 456 (LCC)

Kopecký v Slovakia [2004] ECHR 446

Lensworth Finance Ltd v Commissioner of Main Roads (1978) 5 QLCR 261

Lithgow v United Kingdom 8 EHRR 329

Mazizini Community v Minister for Rural Development and Land Reform [2018] ZALCC 5

Mhlanganisweni Community v Minister of Rural Development and Land Reform 2012 ZALCC 7

Minister of Transport v Du Toit 2005 (1) SA 16 (SCA)

Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng, (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005(1) SA 530 (CC)

Msiza v Director-General for the Department of Rural Development and Land Reform [2016] ZALCC 12

Nelungaloo Pty Ltd v The Commonwealth of Australia (1948) 75 CLR 495

Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd 2011 (1) SA 293 (CC)

Papachelas v Greece [1999] ECHR 18

Pharmaceutical Manufacturers Association of South Africa and another: In re Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa 2000 2 SA 674 (CC)

Port Edward Town Board v Kay 1996 (3) SA 664 (A)

Reflect-all 1025cc v MEC for Public Transport, Roads and works, Gauteng Provincial Government 2009 (6) SA 391 (CC)

Rosenbaum v Minister for Public Works (1965) 114 CLR 424

Rustom Cavasjee Cooper v Union of India 1970 AIR 564

S v Manamela [2000] ZACC 5

SJR Investments Co Pty Ltd v Housing Commission of Victoria [1971] VR 211

Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt ICSID Case No ARB/84/3

Sporrong and Lönnroth v Sweden 5 EHRR 35 - 1982

State of Gujarat v Shantilal Mangaldas 1969 AIR 634

State of West Bengal v Bela Banerjee 1954 AIR 170

Suljagić v Bosnia and Herzegovina IHRL 3687 (ECHR 2009)

Supreme Court of Japan, Grand Bench, Decision of 23 December 1953

Supreme Court of Japan, Grand bench, Decision of 26 June 1963.

Theodossiou Ltd v Cyprus [2015] ECHR 376

Uys NO v Msiza [2017] ZASCA 130

Vajravelu Mudaliar v Special Deputy Collector, Madras 1965 AIR 1017

Vistiņš and Perepjolkins v Latvia IHRL 2046 (ECHR 2012)

Pointe Gourde Quarrying and Transport Co Ltd v. Sub-Intendent of Crown Lands AC

Beyeler v. Italy EHRR

Malama v. Greece (Article 41)

AT:VFGH:2017:E1006.2017 Abweisung der Beschwerder einer Tiroler Agrargemeinschaft

Legislation

Bodenbeschaffungsgesetz

Constitution of the Republic of South Africa, 1996

Eisenbahn-Enteignungsentschädigungsgesetz

Expropriation Act 63 of 1975

Expropriation Bill 2019

Government Immovable Asset Management Act

Land Acquisition Act

Land Reform (Labour Tenants) Act 3 of 1996.

National Environmental Management Act

Promotion of Administrative Justice Act 3 of 2000

Property Rights Amendment Act

Public Finance Management Act

Restitution of Land Rights Act 22 of 1994

Spatial Planning and Land Use Management Act

Staatsgrundgesetz

International instruments

United Nations General Assembly Resolution: Permanent sovereignty over natural resources 1803 (XVII) (1962)

United Nations General Assembly Resolution on Permanent Sovereignty Over Natural Resources A/RES/3171 (XXVIII) (1973)

Charter of Economic Rights and Duties of States 3281 (XXIX) (1974)

Government publications

Australian-Thailand Free Trade Agreement in of (2004)

Report of the High Level Panel on the assessment of key legislaiotn and the acceleration of fundamental change in of 2017

Uncategorized References

Gildenhuys A *Onteieningsreg 2nd ed* (Butterworths Durban 2001)