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THE MECHANICS OF INTERVENTION AND THE GREEN PAPER ON LAND REFORM

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1 Introduction

One of the outstanding characteristics of South African land control is that there has always been some kind of official state interference.¹ Over time, interference has taken the form of policies, legislative measures (both primary and subordinate), programmes, plans and papers. Concomitant to the measures issued was an overarching administrative structure rooted in different levels of government and encompassing various departments and agencies. Underlying the above was an ideology of separation on the basis of race with particular class, gender and racial implications.²

In the process of state interference, the law has been integral. Measures promulgated and policies published have resulted from formal, official processes embodying formal, official provisions. Regulation of access to and control of land occurred within an ambience of legality, despite essentially being unjust and inequitable. Regulation and interference occurred on an ongoing basis: one adjustment here would impact on another aspect, resulting in continuous action and reaction, conduct and response. Overall, a fragmented, diverse, inequitable and complex land control system resulted from the mechanics of intervention, especially those of the previous century.³

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¹ See in general Sparks *Mind of South Africa* 301-332; Van der Merwe 1989 *TSAR* 663-692; Feinstein *Economic History* 13; Giliomee *Afrikaners* 8; Changuion and Steenkamp *Omstrede Land* 17-18; Carey-Miller and Pope *Land Title* 3-4; Bennett "African Land" 66.

² Girvin "Race and Race Classification" 1-11; Beinart *Twentieth Century South Africa* 143; Govender "Race and Social Rights" 229-242; Feinstein *Economic History* 13; Van der Merwe and Pienaar "Land Reform in South Africa" 334-380. See generally Lever *South African Society, Du Pre Separate but Unequal*.

³ Pienaar 2011 *Speculum Iuris* 108-133; Van der Merwe and Pienaar "Land Reform in South Africa" 334-380; Carey-Miller and Pope *Land Title* 40-44.

A new dispensation commenced in April 1994. Since then South Africa has been in the process of untangling, re-organising and deconstructing the existent web of measures. Law is again integral. Formal, official processes have resulted in policies, programmes, measures and plans. Official state interference continues unabated: one adjustment here impacts on another connected and inter-linked issue. The difference is that the present process of state interference is guided by and informed by the *Constitution of the Republic of South Africa* of 1996 - in general - but in particular by section 25 (the property clause) that protects existing rights on the one hand and embodies law reform, especially land reform, on the other.⁴ After eighteen years of adjusting and reorganising, the process is still ongoing.⁵ In fact, more recently, even more programmes, policies and legislative measures have been added to the existing framework.

The aim of this contribution is to place the *Green Paper on Land Reform* 2011, one embodiment of the latest overall mechanics of intervention, into perspective. This will be done with reference to the other interventions announced and implemented by the present government under President Jacob Zuma. Accordingly, only developments that occurred after 2009 will be set out and analysed here. Inevitably, the brief is twofold: firstly, to establish whether, overall, a sensible, effective framework resulted within which challenges and weaknesses linked to land reform can be addressed; and secondly, to establish who is most likely to be affected by the recent mechanics of intervention, as well as the possible extent of this.

The contribution is structured as follows: first, an overview of the kinds of interventions employed will be provided, after which structural (or institutional) interventions will be set out, followed by material (or substantial) interventions. An evaluation will follow in which the *Green Paper on Land Reform* is central in light of the other recent developments, including the recent publication of the National

⁴ See in general Van der Walt *Constitutional Property Law* 12-21; Badenhorst, Pienaar and Mostert *Law of Property* ch 22; Pienaar and Brickhill "Land" ch 48; Mostert, Pienaar and Van Wyk "Land" paras 108-175; Carey-Miller and Pope *Land Title* 282-312.

⁵ Pienaar and Kamkuemah 2011 *Stell LR* 724-741.

Development Plan 2030. In this regard important themes relating to land reform will be identified, after which categories of persons most likely to be affected by the recent mechanics of intervention are set out. If possible, the extent of the impact will be ascertained. In conclusion, particular shortcomings in the overall mechanics of intervention are set out, highlighting that, despite continuous interventions, further engineering is still required.

2 Overview of interventions

Various elements are involved in legal aspects linked to land reform in general and the sub-programmes in particular.⁶ Firstly, underlying the final measures and implementation thereof is the relevant policy or policies formulated by government. These policies generally provide the broad goals that government intends to achieve. Overarching, broad policies are embodied in Green and thereafter White Papers. Essentially, the content of final White Papers would have resulted from debate and discussion and would have undergone various processes to that end. Underlying these broad policies are governmental and departmental plans and programmes. These usually provide time lines and other necessary frameworks within which various activities are to take place. Administrative and structural dimensions are further relevant as the plans and programmes have to be administered and implemented. Therefore, particular structures and departments, on various levels, are fundamental to success. Finally, ideas and aims have to be reduced to specific legislative measures and provisions that have to be interpreted and applied in order for interests and rights to become a reality. Overall, various dimensions exist and different role players are involved in the eventual mechanics of intervention linked to land reform.

⁶ In this contribution emphasis is placed on legal elements linked to land reform. Though other elements, including social, economical, agricultural, anthropological and sociological issues are also crucial to the overall success of land reform, these elements are excluded at present. The analysis of institutional and substantive dimensions of intervention is thus for purposes of this discussion aimed at legal issues alone.

This section will deal, firstly, with the institutional or structural dimension, followed by the material (or substantive) dimension. The institutional dimension includes the restructuring of the Department of Rural Development and Land Reform and the underlying relevant plans and programmes formulated recently. The material dimension relates to the policy documents and legislative measures that have been published after 2009. The latter will include the *Green Paper on Land Reform*. As the National Development Plan was published a year after the *Green Paper on Land Reform*, it has to be considered in this context as well. The analysis of the various dimensions is aimed at placing the *Green Paper* into perspective in order to establish whether a complete, sensible and workable network has resulted from the recent mechanics of intervention overall.

3 Institutional dimension

3.1 Departmental restructuring

The former Department of Land Affairs and Agriculture underwent a restructuring process in the course of 2009 which resulted in the establishment of the Department of Rural Development and Land Reform on the one hand, and the Department of Fisheries, Agriculture and Forestry on the other.⁷ Minister Nkwinti heads the Land Reform Ministry and Minister Joemat-Pettersson the Fisheries, Agriculture and Forestry Ministry. Restructuring underlined the nexus between land reform and rural development, a theme that has been pursued intensively in the general approach to and administration of the Department responsible for land matters, as well as in the programmes and plans that were consequently drafted by it.⁸

⁷ See generally Du Plessis, Olivier and Pienaar 2009 *SAPL* 608-610; Hall 2009 *PLAAS Policy Brief* 1-6.

⁸ Future references to the "Department" relates to the Department of Rural Development and Land Reform.

3.2 Concomitant plans and programmes

3.2.1 Rural Development and Land Reform Strategic Plan for period 2010-2013

The Strategic Plan's point of departure is that a "rapid change and reviewed land tenure" was essential.⁹ Right from the outset, it called for a fundamental review of the current land tenure system. "Social cohesion and development" were stated as its aims.¹⁰ The introductory part of the Strategic Plan is identical to that of the *Green Paper on Land Reform*.¹¹

The Strategic Plan is founded on three pillars, namely (a) land reform; (b) agrarian development; and (c) development in rural areas. Concerning land reform, two options were placed on the table: (a) the nationalisation of all land (also referred to as all state land);¹² and (b) generally retaining freehold,¹³ but within a new framework.¹⁴ Concerning option (a), land is proclaimed a national asset, linked to leasehold/quitrent, with perpetual or limited rights. Concerning (b) it is proclaimed that all current policies and legislation be reviewed so that freehold could be retained, but in correlation with land ceilings that would limit the amount of land one person could own and the categorisation of farmers into small- (subsistent), medium- or large-scale farmers. It furthermore emphasised the need to speed up redistribution of land and to implement a programme aimed at revitalising land reform projects that had been implemented since 1994. The establishment of a

⁹ *Strategic Plan for Period 2010-2013* (2009) 2.

¹⁰ *Strategic Plan for Period 2010-2013* (2009) 3.

¹¹ In fact, some parts of the Plan have been copied verbatim into the *Green Paper*. For more information regarding the *Strategic Plan*, see Pienaar 2011 *Speculum Iuris* 130-131.

¹² This reference is inexplicable as state land is already owned by the state and cannot be expropriated.

¹³ Throughout the *Green Paper on Land Reform* and the *Strategic Plan* the term "freehold" is employed. The usual term employed within the SA context is "ownership", by which is meant the full potential of all entitlements, including the right to use, enjoy, alienate, burden etc - see for more information Badenhorst, Pienaar and Mostert *Law of Property* 91-94; Van der Walt and Pienaar *Law of Property* 39-47; Mostert and Pope *Law of Property* 89-92. By using "freehold" a foreign legal term is referred to here, usually employed in common law jurisdictions. In the United Kingdom freeholds indicates full ownership, but in a context of "feudalism". It is possible that the term is specifically employed here so as to mean title in land granted by, but essentially (still) vested in, the state.

¹⁴ *Strategic Plan for Period 2010-2013* (2009) 11.

State Land Management Board was mentioned with a view to facilitate management of state owned agricultural land and leases. The Comprehensive Rural Development Programme was subsequently introduced within the context of the Strategic Plan.

3.2.2 Comprehensive Rural Development Programme

The point of departure in the Programme was that all three of the land reform sub-programmes¹⁵ would in future be linked to rural development, but that particular emphasis would be placed on:

- the review of all current land reform projects;
- review of land acquisition approaches, especially the willing-buyer-willing seller approach;
- the facilitation of secure access to land for persons who live on farms;
- the protection of land rights for farm labourers; and
- expediting the finalisation of the restitution programme.¹⁶

Underlying the Comprehensive Development Plan was agrarian transformation, but within the context of food security.¹⁷

3.2.3 Recapitalisation and Development Programme

In the course of 2010 the Department announced the Recapitalisation and Development Programme in light of the dismal success rate of land reform projects since 1994.¹⁸ This Programme is aimed at the revitalisation and resuscitation of struggling projects, which seemed to include the majority of farming projects.¹⁹

¹⁵ Constituting redistribution, tenure reform and restitution - see for more detail of each Mostert, Pienaar and Van Wyk "Land" paras 108-152'; Pienaar and Brickhill "Land" ch 48 as a whole.

¹⁶ Du Plessis, Olivier and Pienaar 2009 *SAPL* 608-610.

¹⁷ Du Plessis, Olivier and Pienaar 2009 *SAPL* 608-610.

¹⁸ See the Minister's and Department of Rural Development and Land Reform's responses to issues around restitution, land claims, projects and recapitalisation, meeting held on 17 November 2009 (Minister and DRLDR 2009 www.pmg.org.za).

¹⁹ *Baphiring Community v Uys* (Case no LCC 64/1998) 19 January 2010.

Apart from its resuscitation function, the Programme was also aimed at assisting emerging farmers, as well as future land beneficiaries. It placed particular emphasis on the promotion of equity schemes.

3.2.4 2010 National Summit for Vulnerable Workers

In July 2010 a Summit for Vulnerable Workers within Agriculture, Forestry and Fisheries resulted in various resolutions, *inter alia* that the resolutions made during the National Land Summit of 2005 had to be implemented, in particular the scrapping of the willing-buyer-willing-seller approach to land acquisition. It was also stated that the provisions of the *Extension of Security of Tenure Act 62 of 1997* (ESTA) be reviewed and strengthened.²⁰

4 Material dimension: policies and legislative measures

4.1 Introduction

The above section dealt with the overall restructuring of the relevant Ministries and Departments that deal with land reform, as well as their underlying programmes and plans. Linked to these developments were time lines setting out deadlines for particular responsibilities and actions. Therefore, on managerial and operational levels, some groundwork had already been done. However, these developments did not provide for actual legislative amendments or advancement within the context of policy or legislation as such. Accordingly, the material dimension - enabling substantive change - is dealt with in this section. To that end the discussion centres around recent developments linked to policies (in terms of which overall direction and ideas are framed) and legislative measures - in terms of which the ideas have been reduced to legislative provisions. A newly announced overarching measure, the National Development Plan,²¹ is also relevant within this context. However, as the aim of the contribution as a whole is to focus on land reform and the mechanics in

²⁰ See, for more detail, Pienaar 2011 *Speculum Iuris* 131.

²¹ NPC 2011 www.npconline.co.za.

that regard, the whole of the National Development Plan is not discussed here in detail. Instead, only its relevance in light of the *Green Paper* is attended to.

4.2 Land Tenure Security Policy 2010

On 24 December 2010 a new *Draft Tenure Security Policy* and concomitant *Draft Tenure Security Bill* were published for comment.²² The Policy's point of departure is that the skewed patterns of landholding and untenable power relations have not yet been dealt with effectively.²³ Apart from the fact that particular problems were experienced within ESTA,²⁴ other political, socio-economic and legal considerations have also contributed to the drafting of the Policy. Underlying the Policy was again the aim of rural development, thereby constituting the relevant link to the Comprehensive Rural Development Programme.²⁵

The Policy objectives are fourfold, namely to²⁶

- protect relative rights of farm workers, farm dwellers and owners;
- enhance security;
- create conditions for conducive peaceful and harmonious relationships; and to
- sustain food production.

Apart from these objectives, the Policy specifically underlined the need to provide effective and efficient systems to record and register relevant rights.²⁷ Concerning long-term settlement the Policy mentioned a permit system and that the relevant periods, as well as the conditions and provisions thereof, would be set out.²⁸ Permits could be transformed into freehold and land could be taken away from non-

²² *Draft Tenure Security Policy* (2010) (GN 1118 in GG 33894 of 24 December 2010).

²³ See generally Pienaar and Kamkuemah 2011 *Stell LR* 724-741; Cousins and Hall 2011 www.plaas.org.za.

²⁴ See in particular the issues identified in Pienaar 2011 *Speculum Iuris* 124-126.

²⁵ See 3.2.2 above.

²⁶ *Draft Tenure Security Policy* (2010) 4.

²⁷ *Draft Tenure Security Policy* (2010) 7.

²⁸ *Draft Tenure Security Policy* (2010) 8.

performers. A Land Rights Management Board²⁹ is pronounced to act pro-actively in relation to evictions.³⁰ Provision is furthermore made for alternative dispute resolution mechanisms and a Register of Interests on farms.³¹

4.3 Land Tenure Security Bill

The Bill was drafted in light of the above Policy. Essentially the Bill repeals ESTA and the *Land Reform (Labour Tenant) Act* 3 of 1996³² and provides a single set of provisions to be applicable to certain categories of persons set out in the Bill.³³ Right from the outset the focus on farms is clear. In this regard the Bill is to apply to all agricultural land, namely all land used for agricultural purposes, excluding land occupied by traditional communities.³⁴ Persons and land falling within the ambit of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (PIE) and the *Interim Protection of Informal Land Rights Act* 31 of 1996 are likewise excluded.³⁵ The focus on farms and farm land is further extended by way of the sections setting out the categories of persons falling under the Bill in that all the categories are linked to persons working or residing on *farms*, including persons associated with these categories and persons who have consent from farm owners.

²⁹ *Draft Tenure Security Policy* (2010) 10.

³⁰ *Draft Tenure Security Policy* (2010) 10.

³¹ See for a critical analysis of the *Draft Policy* Pienaar and Kamkuemah 2011 *Stell LR* 728-731.

³² Labour tenants have recognised use and occupational rights as set out in the *Land Reform (Labour Tenant) Act* 3 of 1996. In order to be deemed a labour tenant for purposes of the Act, strict requirements have to be complied with, set out in s 1 of the Act. This kind of occupation is always multi-generational - see for more detail Badenhorst, Pienaar and Mostert *Law of Property* 594-595; Carey-Miller and Pope *Land Title* 525-526.

³³ Clauses 7-11 of the *Land Tenure Security Bill* 2010 provide for five categories to which the Bill would apply. See for more detail Pienaar and Kamkuemah 2011 *Stell LR* 731-732.

³⁴ Clause 1 of the *Land Tenure Security Bill* 2010.

³⁵ PIE provides substantial and procedural protections linked to the eviction of unlawful occupiers - see for more detail Badenhorst, Pienaar and Mostert *Law of Property* 247-253. Protected under the *Interim Protection of Informal Land Rights Act* 31 of 1996 is a list of particular informal rights in land - see s 1. They may be informal because they have not been formalised or registered, irrespective of the particular reason - see for more detail Badenhorst, Pienaar and Mostert *Law of Property* 619-620. If such a right is protected under the *Interim Protection of Informal Land Rights Act*, then it cannot also constitute an occupier's right for purposes of the new *Tenure Security Bill*. Though the overall legislative framework may be made more streamlined by combining the former provisions of ESTA and the *Labour Tenant Act* into one legal measure, different sets of legislative measures will continue to exist, for example PIE and the *Interim Protection of Informal Land Rights Act* - depending on the particular circumstances of each case.

Agri-villages, land development measures and resettlement are also dealt with in various chapters in the Bill.³⁶ In this regard the role and functions of the Land Rights Management Board are specifically provided for.³⁷

Accordingly, prior to the publication of the *Green Paper on Land Reform* at the end of August 2011, land reform in general - but in particular in relation to rural areas - was dealt with as follows:

- Spearheading the process was a recently restructured Ministry with a clear focus on rural development, resulting in a definite link between land reform and rural development. In this regard a Strategic Plan setting out ideas, goals and timelines, as well as a Comprehensive Rural Development Plan were adopted.
- Actually regulating land reform were various legislative measures promulgated to deal with sub-programmes comprising redistribution, tenure reform and restitution.
- Applicable in rural areas, separate legislative measures dealt with occupiers (especially farm workers and rural dwellers) on the one hand and labour tenants on the other.
- Regarding eviction from rural or farm land: ESTA, labour tenancy or PIE applied, depending on the relevant circumstances of each case.
- Regarding communal land or state land occupied by traditional communities, the *Communal Land Rights Act* 11 of 2004 had been declared unconstitutional by the Constitutional Court in May 2010.³⁸ In this regard the *Interim Protection of Informal Land Rights Act* 31 of 1996, co-existing with Customary Law rights, regulated land rights.
- Apart from the existing framework as described above, new suggestions embodied in the Land Tenure Security Policy and corresponding Bill were

³⁶ See cha 5, 6 and 7 of the *Land Tenure Security Bill* 2010 - see, for more detail, Pienaar and Kamkuemah 2011 *Stell LR* 734.

³⁷ Chapter 8 of the *Land Tenure Security Bill* 2010.

³⁸ See for more detail Du Plessis and Pienaar 2010 *Fundamina* 73-89; Claassens and Cousins *Land, Power and Custom* 1-33.

introduced at the end of 2010. Essentially the existing two separate ESTA and labour tenant legislative measures would be consolidated into a new encompassing legislative measure and new bodies, for example a Land Rights Management Board and a Resettled Community Committee.

It was within this context that the *Green Paper on Land* reform was published in August 2011.

4.4 The Green Paper on Land Reform 2011

4.4.1 Introduction

The introduction to the *Green Paper* underlines that "[n]ational sovereignty is defined in terms of land".³⁹ It emphasises that land is a national asset and that the current land tenure system has to be "fundamentally reviewed". In this regard it also identifies the land question as being fundamental to the resolution of race, gender and class contradictions in South Africa, and⁴⁰

[t]hat the long road necessarily starts with the crafting of a new pragmatic but fundamentally altered land tenure system for the country. Not to do so would perpetuate the current social and economic fragmentation and underdevelopment.

From reading the introduction to the *Green Paper*, the following becomes clear: because land is a national asset, it may be employed as government sees fit, keeping in mind that difficult and hard choices have to be made to "pull the country out of the mess".⁴¹

The vision for land reform is fourfold, namely (a) to re-configure a single, coherent four-tier system of land tenure to ensure that everyone, but especially rural blacks, have reasonable access to land with secure rights; (b) clearly defined property

³⁹ *Green Paper on Land Reform* (2011) 1.

⁴⁰ *Green Paper on Land Reform* (2011) 2.

⁴¹ *Green Paper on Land Reform* (2011) 3.

rights, sustained by a fair and accountable land governance system; (c) secure forms of long-term land tenure for resident "non-citizens" engaged in appropriate investments which enhance food sovereignty and livelihood security; and (d) effective land use planning and regulatory systems.

Underlying land reform are the following principles: (a) de-racialising the rural economy; (b) democratic and equitable land allocation and use across race, gender and class; and (c) a sustained production discipline for food security. In this context it is clear that the emphasis is on rural areas, in particular where agriculture occurs, and that the overall aim is much broader than land reform in general. Instead, it seems as if overhauling the rural economy as a whole may be the final objective. This is also underlined by way of a later section in the *Green Paper*,⁴² section 7, dealing with the "strategic thrust of land reform", which is anchored by the following pillars: (a) a coordinated and integrated broad-based agrarian transformation; (b) an improved land reform programme; and (c) strategic investment in economic, cultural and social infrastructure for the benefit of all rural communities. The Green Paper furthermore provides a cursory overview of comparative law and identifies further challenges and constraints.⁴³

However, the pivotal part of the *Green Paper* is contained in section 5 where the current land challenges and weaknesses are listed, as these provide the rationale for change. All in all, eight challenges are listed. These include:

- (a) the land acquisition strategy;
- (b) a fragmented beneficiary system;
- (c) beneficiary selection for land redistribution;
- (d) land administration and governance, especially in communal areas;
- (e) meeting the 30% redistribution target;
- (f) declining agricultural contribution to GDP;

⁴² *Green Paper on Land Reform* (2011) 8.

⁴³ Generally, the structure of the *Green Paper* is clumsy and repetitive as certain portions overlap and the same rhetoric is used extensively.

- (g) rural unemployment; and
- (h) problematic restitution model and support system.

The real question, however, is whether the challenges listed here will indeed be addressed by the proposals set out in the *Green Paper*. To that end two particular aspects identified in the *Green Paper* need further attention: Firstly, a discussion of the single four-tier tenure announced in the *Green Paper* and secondly an analysis of the various bodies and institutions provided for.

4.4.2 Tenure

The "single four-tier tenure system" refers to:⁴⁴

- state and public land: leasehold;
- privately owned land: freehold, with limited extent;
- land owned by foreigners: freehold, but precarious tenure, with obligations and conditions to comply with; and
- communally owned land: communal tenure, with institutionalised use rights.

Essentially four broad categories of land have been identified and a tenure system was allocated to each category. All of these categories of land already exist. So, no new land categories as such have been identified in the *Green Paper*. With regard to the first tier of tenure, limiting state and public land to leasehold means that the state remains the owner, but that limited real rights are granted to beneficiaries. This would mean that the percentage of state land would remain the same or increase, but would not become less than what it is when the final version of the *Green Paper* (eventually) commences. Approaching land in this manner is reminiscent of the apartheid approach to land where vast tracts of land were held in trust for indigenous communities in exchange for which limited real rights, and

⁴⁴ *Green Paper on Land Reform* (2011) 6.

sometimes even personal rights, were granted on the land.⁴⁵ Concerning the second tier of tenure, it is interesting that the term "freehold" instead of "ownership" is used. "Freehold" is generally reserved for title in common law jurisdictions, of which South Africa is not one. As South African law constitutes a "mixed system", some elements of civil and common law jurisdictions are reflected. However, a strong civil law jurisdiction prevails in South Africa concerning ownership and property in general. Why then use the term "freehold"? Is it merely an incorrect use of a term to indicate ownership as it is known in South Africa, or has it specifically been employed to indicate the "granting" of title that essentially continues to be vested in the state? Is this approach possibly linked to the "Introduction" to the *Green Paper* in terms of which land as national asset was emphasised? Exactly what "freehold, but with precarious tenure" means in relation to the third tier of tenure is equally uncertain. Usually "freehold" would disqualify "precarious tenure". In fact, freehold and precarious tenure would usually anchor different ends of the broad spectrum of land rights.

The last category of land, communal land, is especially problematic. Large tracts of land, presently communally occupied, still vest in the state. In accordance with the "four-tier approach" set out here, these portions of land would thus fall under the *first* tier of tenure, namely state land. Communally owned land is, however, specifically excluded from the *Green Paper* and is not addressed further. This is disconcerting as challenge number four identified in the *Green Paper* and referred to above⁴⁶ specifically highlights communal areas as being problematic. Therefore, though this category of land is identified as one of the challenges, it is not addressed further at all.

A "four-tier" approach implies *levels* of some kind. Why specifically refer to it as a "tier" system and not merely as a system with different categories of land and tenure? Is there a specific hierarchy involved here? Is it coincidental that the overarching tier, on the pinnacle, is state land? The four-tier approach furthermore

⁴⁵ See in this regard Van der Merwe and Pienaar "Land Reform in South Africa" 334-348.

⁴⁶ See 4.4.1 above.

operates on the assumption that all land has been surveyed and that a record of some kind exists that indicates the locations and sizes of the various categories of land. Such a land audit has not been completed yet. In fact, it is as yet unclear how much of South Africa's land is state land and how much is privately owned. Large portions of South African land have also not yet been surveyed, especially in areas that previously formed part of the national states and self-governing territories. Constructing a "four-tier tenure system" should at least imply a sound basis.

4.4.3 Bodies and institutions

Overall the *Green Paper on Land Reform* provides for numerous bodies and institutions. Some of these have already been encountered in other departmental documents,⁴⁷ but some have been newly created under or for purposes of the *Green Paper*. This section is aimed at a brief description of the body or institution whereafter two main questions are posed with respect to each: (a) how does this body or institution align with existing and proposed bodies? and (b) how does the body or institution address the list of challenges set out in section 5 of the *Green Paper*? Essentially this section explores whether the body or institution contributes to the challenges land reform faces or not; and if so, how?

4.4.3.1 Land Management Commission

The Land Management Commission is an overarching body that is autonomous, but not independent from the Department. Its functions are mainly fourfold, namely to be advisory, to coordinate, to regulate, to audit and to act as reference point.⁴⁸ All stakeholders will be represented within the Commission. It has wide authority and powers, including powers to verify and/or to validate or invalidate individual or

⁴⁷ See the discussion at 3.1-3.2.4 above relating to the structural or institutional dimension and the relevant documents there.

⁴⁸ *Green Paper on Land Reform* (2011) 6.

corporate title deeds; to grant amnesty or initiate prosecution; and seize or confiscate land acquired through fraudulent or corrupt means.⁴⁹

It is unclear how the Commission would fit into the existing framework that already incorporates courts, the prosecution authority and the Registrar of Deeds. The question whether the Commission is aligned with the existing system and structures therefore cannot be answered. Instead, further questions remain: who, when and how would the guidelines or measures in terms of which the above functions are to be carried out, be formulated? How long will the Commission be active and what about successive planning for its members? What exactly is the relationship and line functioning of the Commission and the Department respectively? On what authority and how would the Commission be able to invalidate title? Most importantly, however, how does this institution assist in addressing the challenges and weaknesses identified in section 5 of the *Green Paper* above? It seems as if it may be of assistance with regard to challenge (d) only, namely administration and governance.

4.4.3.2 Land Valuer-General

The Land Valuer-General has a specific brief and specific role to play, as set out in the Paper.⁵⁰ The absence of a legislative framework to determine when "market value" is one of the variables in determining value as opposed to it being the only criterion, is one of the reasons for the newly proposed institution. It is important to note that the determination of financial compensation in cases of land expropriation is still to take place in compliance with the *Constitution*.⁵¹ Because the exact operation of this institution is not set out in the *Green Paper*, it is unclear how it will function in relation to existing courts and professional boards. However, if it functions in line with the court system and subject to the *Constitution*, it may

⁴⁹ *Green Paper on Land Reform* (2011) 6.

⁵⁰ *Green Paper on Land Reform* (2011) 7.

⁵¹ *Green Paper on Land Reform* (2011) 7.

address at least three of the challenges listed above, albeit partially, namely (a) land acquisition; (d) governance and (e) redistribution.

4.4.3.3 Land Rights Management Board and committees

The Board will consist of (a) sectoral representation from persons or sectors that have rights in land and (b) members appointed by the Minister. The Committees will function in relation to specific rural environments and would include representatives from farm workers and dwellers, commercial farmers, municipal councils and government departments.⁵² The functions and powers of the Board are set out in the Paper.⁵³ These include, *inter alia*, to advise and support and to develop systems of recording and registering rights with the deeds registry. The Board is also empowered to enforce compliance with norms and standards, to hear appeals on matters handled by the Committees and to overturn decisions made by the Committee.

In this regard the following questions remain: what is the relationship between the Board and the already existing Land Rights Management Facility that was established under the former Department of Land Affairs in relation to eviction and legal representation for farm workers and rural dwellers? What is the relationship between the Board and Magistrate's courts and the Land Claims Court concerning reviews and or appeals? What is the relationship concerning the Deeds Registries? Alignment therefore seems to be troubling in light of all of these questions. With regard to the challenges listed in section 5 of the Green Paper it seems as if the Board and the Committees may be of use concerning challenge (c), selection of redistribution beneficiaries and challenge (d) land administration.

⁵² *Green Paper on Land Reform* (2011) 7-8.

⁵³ *Green Paper on Land Reform* (2011) 8.

5 The National Development Plan

5.1 Context

The National Development Plan was published on 15 August 2012 by the Planning Commission located within the President's Office under guidance of Minister Trevor Manuel.⁵⁴ Very similar to the *Green Paper*, the introduction to the National Development Plan is intrinsically linked to land. Part of the introductory sections emphasize that South Africa is our country, our land; that our land is our home⁵⁵ and that South Africa belongs to all of its people.⁵⁶ The aim of the Plan is to eliminate poverty and reduce inequality by 2030⁵⁷ by *inter alia* translating political emancipation into economic and social well-being.⁵⁸ Accordingly, the National Development Plan is not specifically focused on land reform.

In the broader transformation context nine primary challenges are identified.⁵⁹ In light of the overall focus of the Plan, land reform is not identified as one of the nine primary challenges. However, indirectly, land reform has relevance in relation to at least three of the nine challenges, namely challenge number (4) dealing with spatial division; challenge number (5) linked to a more sustainable economy and challenge number (9) underlining that South Africa is (still) a divided society.⁶⁰ In order to address the nine challenges, 15 chapters are set out, each focusing on overarching or particular issues. Within the land reform context chapter six - inclusive rural economy, chapter seven - South Africa as a region of the world and chapter eight - transforming human settlements, are of particular relevance.

⁵⁴ NPC 2011 www.npconline.co.za.

⁵⁵ NPC 2011 www.npconline.co.za 10.

⁵⁶ NPC 2011 www.npconline.co.za 12.

⁵⁷ NPC 2011 www.npconline.co.za 12.

⁵⁸ NPC 2011 www.npconline.co.za 13.

⁵⁹ These are: unemployment; poor school education (especially for black pupils); poor infrastructure; spatial divides; unsustainable resource economy; poor public health system; poor public service delivery; high corruption levels; and a divided society - NPC 2011 www.npconline.co.za 14.

⁶⁰ NPC 2011 www.npconline.co.za 14.

5.2 Factors that inform the Plan

When considering the proposals set out in the Plan, underlying factors need to be taken into account as well. The Plan has to function and needs to be implemented within an existing framework on the one hand, and has to deal with certain realities on the other. With regard to the latter, the following factors are important:

Since 1994 the proportion of South Africa's population living in rural areas has fallen by about 10%.⁶¹ In 2012 about 60% of the population was urbanized and 40% lived in rural areas. In line with international trends, urbanization should increase further, resulting in about 70% of the country's population living in urban areas in 2013.

However, about 30% of the country's population live in the former homelands or self-governing territories. These areas in particular, and rural areas in general, are under-resourced and generally not economically viable.⁶²

Redress programmes have generally not been effective as their inter-connectedness or links with other factors or considerations have not been appreciated enough. Instead of progress, tension has resulted.⁶³ Land reform is one such a redress programme in terms of which inter-connectedness with other economic, developmental and capacity issues have not been considered sufficiently.

Particularly emphasised in the Plan is the continued aftermath of apartheid planning and spatial racial segregation that still divide South Africa - not only along economic lines, but also physically: apartheid settlement patterns seem to be ingrained and have hardly changed since 1994.⁶⁴ Instead, post-1994 approaches seem to have embedded these patterns even further in that, for example, the construction of low-cost housing occurred along the periphery of towns and cities. In other words: what

⁶¹ NPC 2011 www.npconline.co.za 18.

⁶² NPC 2011 www.npconline.co.za 22.

⁶³ NPC 2011 www.npconline.co.za 25.

⁶⁴ NPC 2011 www.npconline.co.za 24, 34.

South Africa looks like - both in relation to urban and rural areas - have hardly changed. Therefore, continued spatial division and the implications of this would have to inform the Plan in particular. In this context attention would have to be given to both urban and rural settlements.

5.3 Reviving rural settlements and promoting vibrant urban areas

5.3.1 Rural considerations

As explained above, the former homeland areas and self-governing territories house a substantial part of South Africa's population. For many reasons, invariably linked to the grand apartheid design, these areas are in dire need of economic resuscitation. Within the particular areas, further divisions are encountered along gender, generational and cultural lines.

In this regard the National Development Plan focuses on job creation, in particular by way of successful land reform programmes. The Plan propagates secure tenure for all communal farmers, but in particular for rural women. In the broader context, organisational or structural reforms are also mentioned, specifically regarding conflict between traditional bodies and constitutional structures. In other words: communal land in traditional areas where communal tenure is practiced is important and needs attention. The focus is on (a) tenure and mechanisms to increase more secure tenure; and (b) restructuring patriarchal or traditional leadership bodies.

5.3.2 Urban considerations

Urban areas have inherited apartheid divides and post-1994 approaches seemed to entrench existing patterns further. In addition, unlawful occupation of land and informal settlement seemed to have increased after 1994. Concerning the latter, the Plan proposes in particular that informal settlements, where possible, should be upgraded on suitable land.

Overall, however, interesting proposals have been proffered to address the spatial divide in both urban and rural South Africa. These include:

- the introduction of a new Spatial Development Framework and norms;
- the establishment of a National Spatial Development Fund;
- the establishment of a National Observatory for spatial data and analysis;
- the promotion of citizen involvement in planning; and
- the promotion of nature conservation, linked to planning.

Clearly, addressing the continued spatial divide mainly resulting from the former apartheid planning, is a critical issue for government.

5.4 National Development Plan and land reform

Land reform does not feature very prominently in the National Development Plan. This is somewhat understandable, as the thrust of the plan is levelled at the eradication of poverty and the transformation of society. Within this process many rather diverse factors play a role, of which land reform is but one factor. Apart from land reform being mentioned specifically in relation to job creation within the rural sector and its importance in relation to tenure security of rural women in communal areas, other sporadic proposals contained in the Plan can also be linked to land reform:

Land: The Plan proposes that mechanisms have to be introduced that would make land markets work more effectively for the poor and support rural and urban livelihoods.⁶⁵

Housing: The Plan proposes a comprehensive review of housing grants and subsidy schemes with a view to diversify housing products that would allow choice and

⁶⁵ NPC 2011 www.npconline.co.za 58.

greater spatial mix and flexibility.⁶⁶ The focus should also be on the housing gap in the market. The gap relates to persons earning above the level required to receive state subsidy, but below the level required to secure a bond from commercial banks. Innovative partnerships between government, commercial banks and employer housing schemes should also be promoted further.

Property rights: An integral part of the strategy to eliminate poverty is the proposal to broaden ownership of assets to historically disadvantaged groups.⁶⁷ In chapter seven, where the focus is on South Africa as part of the world at large,⁶⁸ the Plan proposes the investigation into different forms of financing and vesting of private property rights to land reform beneficiaries that did not hamper beneficiaries with a heavy debt burden.

5.5 *Green Paper correlation*

The respective roles of the *Green Paper on Land Reform* and the Development Plan differ. Though both aim at improving society at large, including by way of socio-economic development, the focus areas and corresponding proposals differ. Interestingly, though, both plans rely hugely on social cohesion for its successes. The discussion below addresses in more detail relevant themes that have emerged in the National Development Plan and its correlation to land reform generally.

6 Discussion

6.1 *Themes*

Various themes have resonated in the different policy documents, plans and strategies that have been made public since 2009. The emphasis on rural development and the promotion of social cohesion are highlighted throughout the

⁶⁶ NPC 2011 www.npconline.co.za 34-35.

⁶⁷ NPC 2011 www.npconline.co.za 24.

⁶⁸ NPC 2011 www.npconline.co.za 57.

Strategic Plan, the Tenure Security Policy, the *Green Paper* and more recently also in the National Development Plan. Accordingly, the overall aim of improving rural livelihoods by way of land reform institutions and legislative measures has been made crystal clear. Exactly how that is to be done is, however, far from clear.

Other themes that have come to the fore include the promotion of tenure security, food production and security and different approaches to land acquisition. These themes have been picked up and dealt with sporadically in policy documents and legislative measures and have, to some extent, resurfaced again in the National Development Plan.

Tenure reform was a focus point in the Strategic Plan. Its initial two broad options were refined further in the *Green Paper*, resulting in the four-tier tenure approach. Apart from stating the land categories and its tenure, no further information or details were provided. In particular, the need for improved tenure security has resulted in the proposed Draft Land Tenure Security Policy and concomitant *Draft Land Tenure Security Bill*. Many problems remain regarding (a) the poor drafting of the Bill⁶⁹ and (b) lack of synergy between the Policy and Bill.⁷⁰ Mention is made of permits and upgrading thereof, but no provision is made for them in the Bill. In fact, it is anyone's guess as to what kind of rights persons falling under the new Bill would have, and how these are acquired, recorded and terminated. Tenure security in relation to communal areas was, however, specifically underlined as an important burning matter in both the *Green Paper* and the National Development Plan. In the National Development Plan communal land features in relation to two matters: (a) its tenure issues and (b) the organisations or structures involved in communal areas. In this regard the improvement of tenure security is propagated within the framework of transforming traditional bodies and organisations. Within the land reform paradigm eradicating the remnants of spatial racial planning and addressing insecurity within communal set-ups seem to be an urgent priority.

⁶⁹ Pienaar and Kamkuemah 2011 *Stell LR* 739-740.

⁷⁰ Pienaar and Kamkuemah 2011 *Stell LR* 737-739.

Sustained food production and food security resonated throughout the policies and programmes as well. In the National Development Plan food security is mentioned in connection with the alleviation of household poverty specifically. Yet, there is no indication in any of the land reform materials, including the *Green Paper*, how food security and sustainability is to be approached or achieved.

Different approaches to land acquisition, especially moving away from the willing-buyer-willing-seller principle, have been a priority since the 2005 Land Summit.⁷¹ The establishment of the new Land Valuer-General may assist in this endeavour, though the property clause as it presently stands already provides for the expropriation of property for public purposes and in the public interest, which includes land reform.⁷² Though no particular proposals have been formulated regarding different approaches to acquisition of land in the National Development Plan, a rather general proposal was made concerning mechanisms that would make land markets work more effectively for the poor.

Regarding terminology used, it is noteworthy that the National Development Plan employs the terms "ownership" and "private property rights" compared to "freehold, with limited extent" and "freehold, but precarious tenure" which are encountered in the *Green Paper*. Clearly, the National Development Plan is not intent on formulating property regimes or ownership frameworks. However, the use of terminology of which the content may (or hopefully) be ascertained more readily, is preferable.

6.2 Affected persons

Ideally, when the draft measures have been promulgated and the policy documents have been finalised, all of the measures should form one large framework. This means that the legislative measures and policy provisions should function as a whole. Because the main focus in the *Green Paper* is on rural land in particular, it could prove to be a valuable exercise to determine, firstly, who the parties are who

⁷¹ See in this regard Du Plessis, Olivier and Pienaar 2005 *SAPL* 186-208.

⁷² See, for more detail, Van der Walt *Constitutional Property Law* 18-21.

stand to be affected by these measures and, secondly, the extent of its probable impact. In this regard the following persons would most probably be affected: (a) farm workers, farm dwellers and persons residing on farms, with consent and persons associated with these categories; (b) labour tenants; (c) landowners; (d) traditional communities; and (e) foreign (non-citizen) landowners.

Farm workers and occupiers: all of their rights, duties, responsibilities and protections will be set out in the Tenure Security legislation, once promulgated. Because they also qualify as land beneficiaries under various land reform programmes, the recapitalization programme⁷³ may also have some relevance for them, albeit limited only. The kind of right that can be vested, including rights linked to development, resettlement and agri-villages, is not clear yet. However, whether the land utilized for these purposes is state or privately owned land would be important, as the overarching four-tier tenure system set out in the *Green Paper* comes into play as well. Therefore, state farms or agricultural land vested in the state and employed in the land reform programmes will only be made available by way of leasehold. In these instances, permits that were issued which may be upgradeable to ownership (as provided for in the tenure security measures),⁷⁴ would not be available with regard to this category of land. Privately owned land, on the other hand, employed in land reform programmes may in theory be open to the broad spectrum of rights that may end in "freehold".

Labour tenants: this category of rural dwellers would generally fall within the ambit of the new *Land Tenure Security Act*. However, claims for land rights that have already been submitted under chapter three of the *Land Reform (Labour Tenant Act)* 3 of 1996 would continue under that Act. This means that labour tenants who have not submitted claims or who do not intend to submit claims, will in future form part of the *Land Tenure Security Act*. In this regard provisions of the recapitalization programme may also be relevant to these persons, as they could qualify as beneficiaries under the overall land reform programme as well. Superimposing the

⁷³ See 3.2.3 above.

⁷⁴ See the discussion at 4.2 above.

Green Paper's four tier tenure system in this regard would mean that private land and state land, where relevant, would again be approached and handled differently.

Farm owners: all of their rights, duties and responsibilities in relation to labourers, occupiers and persons who were granted consent to occupy, would likewise be dealt with in accordance with the *Tenure Security Act* when promulgated. Implications for these owners in light of the *Green Paper* are that though "freehold" would continue, some limitations or restrictions regarding the size of land parcels and how many farms and land parcels an individual could have, would commence. The exact dimensions of the limitations are unclear as yet. To date it is uncertain how much of agricultural land that is exploited successfully is state land and how much of that is privately owned. What is clear, however, is that about 20% of the farmers produce about 80% of the output, thereby underlining the major contribution of large commercial farms in South Africa.⁷⁵

Traditional communities: one needs to draw a distinction between traditional communities *occupying* land and those communities *owning* land. All land occupied by traditional communities has been excluded from the ambit of the *Land Tenure Security Bill*. This land may comprise land outside the traditional communal areas⁷⁶ and may also relate to state land.

Communally owned land forms the fourth tier of the newly proposed tenure system in the *Green Paper* and comprises communal tenure, with institutionalised use rights - whatever that means. This whole category of land is excluded from further discussion in the *Green Paper*. Therefore, land occupied by traditional communities or owned by communities, irrespective of its location, has been excluded from both the new draft tenure security measures and the *Green Paper*. In light of the unconstitutionality finding of the *Communal Land Rights Act* 11 of 2004 in *Tongwane*

⁷⁵ Kane-Berman 2012 www.businessday.co.za.

⁷⁶ These are the areas that used to form the homelands, constituting the four independent national states and the six self-governing territories - see for more detail Badenhorst, Pienaar and Mostert *Law of Property* 586-587.

v The Minister of Agriculture and Land Affairs,⁷⁷ an interim measure, namely the *Interim Protection of Informal Land Rights Act* 31 of 1996, which is extended on an annual basis, now regulates these areas.⁷⁸ It would seem that, as far as section 25(6) and 25(9) of the *Constitution*⁷⁹ is concerned, non-compliance is reigning, 18 years after embarking on the all-encompassing land reform programme.

Foreign (non-citizen) land owners: owners of rural land who are not South African citizens will have "freehold, but with precarious tenure" and could face limitations regarding the size of land parcels and the number of land parcels an individual could hold.

Though all of the above categories of persons, be it owners or occupiers, will certainly be affected by the recent developments, the full extent thereof is a mystery. The *Green Paper* provides no information as to the extent of the limitations or the kind of impact these measures, once promulgated, may have. How can persons who will be affected respond and prepare in circumstances like these?

7 Conclusion

As explained from the outset, ongoing adjustment and re-adjustment by way of legal mechanics relating to land is nothing new. It is necessary and expected. To my mind, however, five issues in particular are problematic in relation to the manner in which the recent mechanics of intervention regarding land, overall, was approached and structured.

⁷⁷ *Tongoane v Minister of Agriculture and Land Affairs* 2010 JDR 0539 (CC).

⁷⁸ Du Plessis and Pienaar 2010 *Fundamina* 73-89.

⁷⁹ "A person or community whose tenure of land is legally insecure as a result of past discriminatory laws or practices is entitled, to the extent provided for by an Act of Parliament, either to tenure which is legally secure or to comparable redress" - s 25(6) of the *Constitution of the Republic of South Africa*, 1996; "Parliament must enact the legislation referred to in subsection (6)" - s 25(9) of the *Constitution*. S 25(6) places a duty on the State to improve insecure tenure or to provide redress, while s 25(9) provides that government has to enact the necessary legislation to effect more secure tenure – see, for more details, Badenhorst, Pienaar and Mostert *Law of Property* 607-630; Carey-Miller and Pope *Land Title* 456-555; Claassens and Cousins *Land Power and Custom* 33.

1. The process continues in the absence of a land register or land audit that would provide the necessary information and statistics. A sound basis for any approach to tenure is required. In this regard the basis for the "four-tier tenure" system is seriously lacking. How much land is there? Where is the land located? Who owns what?

2. Communal land comprises vast areas of rural land. Rural areas have been an important departmental focus for the past four years. Yet, communal rural land has been excluded from the latest, crucial developments. The importance of communal land was again emphasised recently in the National Development Plan. How can all-encompassing land reform occur when a major element, communal land, which affects millions of South Africans, is excluded?

3. Cause and effect, conduct and response, have not been considered carefully. When one provision impacts on another issue, the overall effect has to be re-assessed and re-addressed. For example, when a provision relates to the recording of rights, the corresponding measures linked to systems and agencies have to be adjusted accordingly. The bodies and institutions to be established have to fit into the existing structures or existing structures have to be re-adjusted. Roles and functions have to be aligned accordingly. Unfortunately, ideas and concepts have not been imbedded in a framework that facilitates implementation.

4. At least some kind of certainty or formula of estimation or determination is required for investment purposes and consumer confidence. In this context phrases like "precarious tenure" and "freehold with limitations" are counter-productive. The *Green Paper* is far too vague and generally lacking in detail and depth.

Finally, to my mind, the most disconcerting aspect of the *Green Paper* is that it lost sight of the weaknesses and challenges it aimed to address. Of the eight crucial areas identified in section 5 of the *Green Paper*, only five may be addressed, and then in some instances *only partially*, by the new approaches and institutions. Three of the identified challenges, namely the declining agricultural contribution to GDP,

rural unemployment and the problematic restitution model and support system never even resonated in the *Green Paper*.

It would seem as if the mechanics of intervention, at least in relation to land reform, are still in dire need of further engineering. We need engineers who see the big picture and understand how the different cogs fit together. Only then can all of the challenges listed be attended to effectively. Only then can all the dimensions of redistribution, tenure reform and restitution be addressed. Only then can there really be a "Green Paper on Land Reform".

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List of abbreviations

DRDLR	Department of Rural Development and Land Reform
ESTA	Extension of Security of Tenure Act
NPC	National Planning Commission
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review