

THE RESTITUTION OF LAND RIGHTS AMENDMENT ACT OF 2014

WHAT ARE THE REAL IMPLICATIONS OF REOPENING LAND CLAIMS?

KEY ISSUES

- Restitution to date has been slow and many rural land claims are not yet finalised
- Ungazetted and yet-to-be-finalised land claims are at risk from new claims
- Many new land claims are likely to be for cash compensation, or tribal claims led by chiefs, and contribute little to rural transformation
- Parliament should enact regulations to ring-fence existing land claims

These are expensive and controversial measures. Some see them as appropriate and necessary for pro-poor land reform while others view them as highly problematic – especially members of rural communities whose claims have not been settled in the sixteen years since 1998, when the deadline for lodging land claims expired. A slow and administratively cumbersome process of land restitution has done little to support the wider objective of transforming racially-skewed patterns of land ownership. Many of the new claims will be settled with cash compensation, and thus be even less likely to achieve these objectives. The Act is likely to pit claimants against one another in overlapping and competing claims, and allow unscrupulous traditional leaders opportunities to manipulate land claims for their own benefit.

This policy brief assesses arguments against the Act and recommends measures to safeguard the land rights of ordinary South Africans, including those who have already been waiting for so long for their claims to be addressed, in a context where new restitution claims open many opportunities for abuse by elites.

BACKGROUND

The Restitution of Land Rights Amendment Act of 2014 has reopened the land claims process for another five years, extending the deadline to 2019. An impact assessment commissioned by the Department of Rural Development and Land Reform (DRDLR) anticipates that an estimated 397 000 new claims will be lodged, at a potential outlay of R130–179 billion (DRDLR, 2013) – possibly three times the cost of the arms deal.

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THE STATE OF RESTITUTION

The land restitution programme was initiated in 1994, and was designed to provide redress for dispossession and contribute to wider rural transformation. By the initial 1998 cut-off date, 63 455 claims were lodged, but this was revised to 79 696 by 2007 (Hall, 2010). Government claims that 97% of these claims have been settled, but this is misleading.

The progress of restitution has been very slow

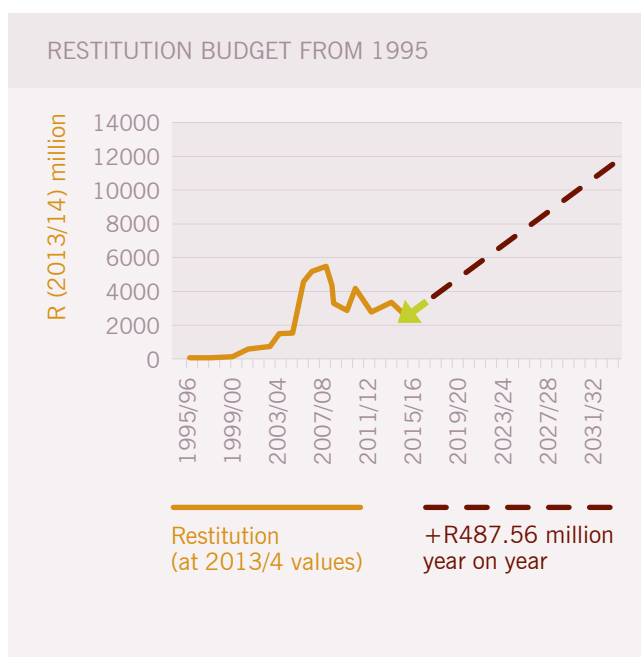
Of the total claims 'settled', 20 592 had yet to be 'finalised' and fully implemented by August 2013. Another 1 507 gazetted claims had not been settled, and a further 7 226 had not yet been gazetted (Gobodo, 2013). If all of the latter are indeed gazetted, this would mean that 37% of claims remain to be fully implemented – 20 years after restitution was begun.

Most rural claims have not yet been resolved

The great majority (87%) of settled claims have been urban, with between R17 500 and R50 000 paid out as compensation in most cases. Single rural claims often involve large groups of people, and are often much more complex and expensive than urban claims.

The budget for restitution is in decline

The limited budget for restitution granted to the DRDLR by Treasury has constrained implementation, and has decreased by more than half since 2008. There is now a large backlog of payments due, and Treasury projects no increase in the coming years. This means that new claims will compete both with the settled claims that are still to be implemented, and also with the old claims that are not yet settled.



Restitution has not contributed to any significant degree to transforming rural South Africa

Largely because of poor implementation, many restitution projects have been beset with problems, and their impacts on improving livelihoods have been weak. Little support has been provided for land-owning Communal Property Associations (CPAs) or Trusts, and these have often foundered. Support for smallholder farming as an option has not been provided, and subdivision of large properties has not been allowed. Where transfers of large areas of highly productive land have occurred, government has favoured business models such as joint ventures between claimants and a private sector 'strategic partner'. These do not allow claimants to live on or use their land themselves. Some of these cases have resulted in endemic conflict between the partners, while 'successful' cases have seen a few actual benefits to claimants (such as preferential selection for limited employment opportunities, sometimes at the cost of existing farm workers), but very few instances of dividends being paid (Lahiff et al, 2012).

POTENTIAL IMPACTS OF THE AMENDMENT ACT

Government claims that reopening restitution will help to reverse 'the legacy of poverty, unemployment and inequality' (Nkwinti, 2013). But it is unlikely to do so, for the following reasons:

1. Most of the land claims lodged since the passing of the Amendment Act in 2014 have requested cash compensation rather than restoration of land ownership (SAPA, 2014).

While cash payments can be a meaningful form of redress for individuals, they do not contribute meaningfully to rural or urban transformation. Are many people seeing land claims against government as a cash cow? Will there also be a large number of new urban land claims asking for cash and making demands on limited government funds? Both these scenarios are likely to be true.

2. At current rates it could take over 100 years to finalise the new claims.

The Amendment Act threatens to replicate, on a vastly larger scale, the experience of claimants in the 37% of land claims, who have waited since 1998 for their claims to be finalised. At the Commission for the Restitution of Land Rights's average rate of resolving 2 949 claims a year, it will take government 144 years to complete restitution. Yet it is by no means clear that Treasury will in fact allocate funds of the order of magnitude required for this.

CATA BETTERMENT CLAIM

The Cata claim in the Eastern Cape is a rare case where restitution was awarded to communal area residents for loss of land under 'betterment' (land use) planning under apartheid. Claimants accepted cash compensation, half of which is reserved for 'development' projects, with substantial implementation support from NGOs.

After more than a decade, implementation has stalled. The operation of irrigation and public works projects has been intermittent, with community factions and traditional leaders challenging both the authority of the elected CPA and the original '50/50' grant allocation. Government has not defended the CPA, and has failed to transfer title to land to the CPA despite a court order to do so by 13 May 2013.

3. Current policies constrain land restoration. A court ruling in *Baphiring Community v Tshwaranani Projects CC* (2013) indicates that government will determine the 'feasibility' of land restoration as dependent on its cost. Considerations of whether or not current agricultural activities will be disrupted, and whether or not the state can provide sufficient support for resettlement and/or production, will also affect decisions on 'feasibility' (Centre for Law & Society, 2013). With financial support now tied to the Recapitalisation and Development Fund, claimants will need to show evidence that they will be 'productive', must develop costly 'business plans', and find mentors or 'strategic partners' (DRDLR, 2013). In the absence of these, they are unlikely to be granted restoration of their land.

4. Restitution can now include claims against 'betterment' (i.e. land use) planning in the former Bantustans, which resulted in widespread loss of land from the 1950s to the 1980s. **Settling betterment claims through cash payments makes no impact on the racially skewed and highly concentrated distribution of land ownership in South Africa.** Well illustrated by the Cata claim (see box), the restitution programme is an administratively cumbersome and time-consuming vehicle for local economic development in communal areas (De Wet and Mgujulwa, 2010). Betterment claims are anticipated to comprise a third of all new claims.

5. Where land restoration is chosen by claimants, **the Act threatens to initiate a conflictual process of people claiming and counter-claiming the same portions of land.** Submissions to government suggest that some new claimants will contest the rights of existing claimants. Government rejected proposals that, when reopening claims, the older claims should be protected against new counter-claims and should be resolved

first. Instead, the Act includes a vague statement about 'prioritising' these claims.

6. The Act has prompted competing claims to ownership of vast territories of land by traditional leaders and Khoisan groups, based on assertions of nineteenth-century tribal boundaries. These threaten existing property rights holders, including land reform and restitution beneficiaries, with no mechanisms on the table at present for securing their tenure. Statements by President Zuma have encouraged traditional leaders to lodge claims, including pre-1913 claims, despite their current illegality, and the Minister of Rural Development and Land Reform, Gugile Nkwinti, has stated that CPAs will not be allowed within communal areas, since this will create 'communities within communities', which implicitly endorses apartheid definitions of 'tribes' as the only 'traditional communities' that count (Claassens, 2014). There is evidence that the Ingonyama Trust in KwaZulu-Natal and traditional councils in North West Province and elsewhere are being used to support the private accumulation strategies of powerful chiefs and their allies, and land restitution claims could be a means to similar ends (iAfrica.com, 2014; Custom Contested, 2014).

WHAT CAN BE DONE?

Given that the Amendment Act is now law, and that its repeal in the short term is extremely unlikely, it is imperative that its potential for negative impacts be reduced. The Commission for the Restitution of Land Rights should institute safeguards to protect the rights of existing land claimants, as well as new claimants located within the jurisdictions of traditional leaders. **Parliament should enact regulations to effect these safeguards.** We also recommend that an amendment to the Amendment Act be considered, which reduces the time frame for new claims from five years to a shorter period, so that the period of uncertainty for existing claimants is reduced.

The Commission should also consider the following recommendations:

- 1. Ring-fence existing land claims and finalise their implementation** prior to settling new claims.
- 2. Expedite transfers of restored land to successful claimants** within 12 months of settlement.
- 3. Fulfil government's legal obligations to the CPAs and Trusts to which land has been awarded**, providing effective support to and oversight of all existing CPAs and Trusts holding land on behalf of successful claimant groups.

4. **Restitution must be granted to the people who lost land** and not to those who claim jurisdiction over their land, such as chiefs and traditional councils.
5. Where land is restored, successful claimants should have **title awarded to the institution of their choice.**
6. Successful claimants must be provided with **developmental support from diverse funding streams for different land uses**, rather than discretionary ‘recapitalisation’ funds for market-oriented farming alone; this is inappropriate within rights-based claims to restitution.
7. Provide a fully detailed **Strategic and Operational Plan** to improve the Commission’s institutional capacity and secure appropriate budgets for the extended time frame of restitution.

CONCLUSION

The Restitution of Land Rights Amendment Act of 2014 is an ill-conceived and poorly planned intervention that could undermine the rights of existing land claimants. Its main political rationale appears to be vote-catching and political theatre, not meaningful rural change. It is unlikely to contribute positively to post-apartheid rural transformation. If the 12 000 land claims lodged in the first two months of its life are anything to go by, most claims will be for cash payouts, either for land lost under ‘betterment’ planning in communal areas, or in urban areas. The Act will likely open the floodgates to hundreds of thousands of requests for cash compensation, but contribute little to local economic development, infrastructural improvement or investment in new job-creating activities – reconfiguring the economy that government policies should be focused on.

Urgently required now are safeguards for the rights of existing land claimants, and fulfilment of government’s obligations to the land-holding entities established by successful claimants.

Most importantly, government needs to review its ineffective land redistribution programme, and then use it to drive broader transformation in South Africa’s rural areas.

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