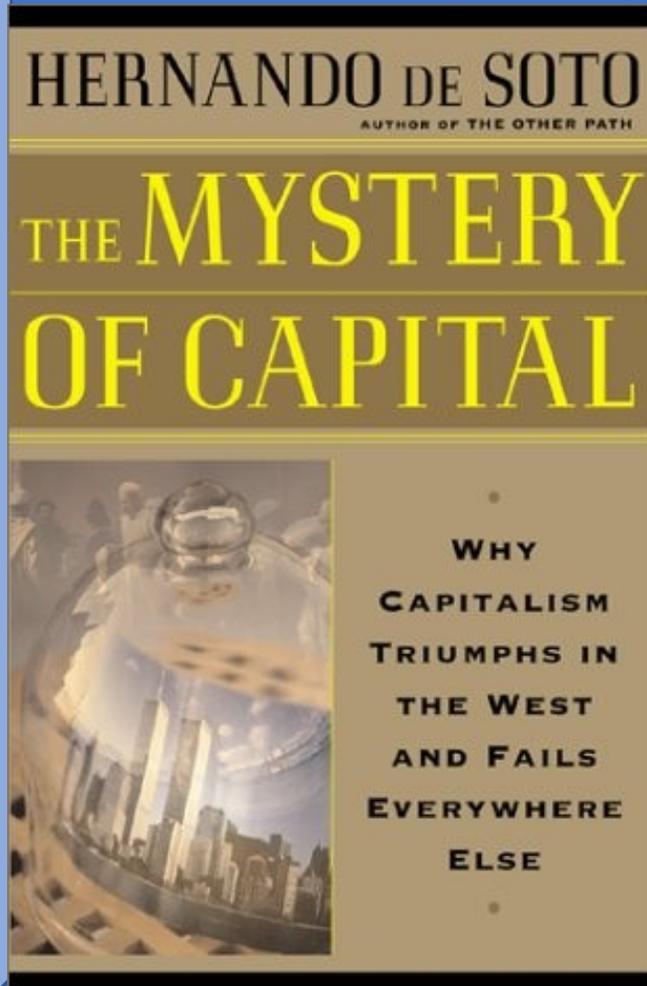


LAND REGISTRATION AND LAND REFORM

GUSTAV RADLOFF

Security of Title



- ❑ Sound land registration is one of the key building blocks of any successful economy.
- ❑ Hernando de Soto argues that the establishment of a middle class without proper land registration is virtually impossible.
- ❑ Even China has made property ownership part of its remarkable economic transformation.

Security of Title

- ❑ South Africa has had an excellent land registration system for property owners for years and can be attributed to excellent legislation:
 - Land Survey Act
 - Deeds Registration Act of 1937
- ❑ Even China has made property ownership part of its remarkable economic transformation.
- ❑ Secure title was not available to black people in this country – more about this later.

Security of Title

- The State does not guarantee security of title.
- Neither is title insurance required in South Africa.
- The integrity and professionalism of the role players ensure a reliable land registration system.
- It makes the need for Government to guarantee security of title, as well as the need for citizens to take out title insurance, unnecessary.

Components of Land Registration

For the identification of land:

The preparation of diagrams (farmland) and general plans (urban land) – Qualified professional land surveyors.

The approval and registration of diagrams and general plans – Qualified examiners in the offices of the Surveyors-General.

For the registration of land:

The preparation of deeds and documents intended for registration – Qualified conveyancers and notaries.

The examination and registration of deeds and documents – Qualified examiners in the various Deeds Registries.

Deeds Registry

- ❑ The work performed by these two groups of specialist attorneys, is examined and registered in the offices of the various Registrars of Deeds.
- ❑ With the registration process, as with the surveying component, the work of the private sector is monitored and preserved by the public sector.
- ❑ These four key role players have functioned efficiently for many decades and South Africans have very little cause to worry about the legal validity of our title deeds.

Deeds Registry

- The warning lights are beginning to flash. The Deeds Registries appear to be in a steady decline.
- The quality of the work done by the deeds examiners is deteriorating as there have been too many hasty and even unwarranted promotions.
- The legal profession anticipated this development and initiated legislation in terms of which the bulk of the responsibility for the correctness of deeds was shifted to conveyancers.

Deeds Registry

- Due to the decay of the Deeds Offices, the legal profession had to assume more responsibilities to assist in the preservation of the integrity of our land registration system.
- The Black Lawyers Association is exerting ever more pressure for the abolition of the conveyancing examinations.
- If incompetent practitioners are allowed to perform this work, we will then have to acquire expensive title insurance, failing which, we may not be able to engage in property transactions or to raise capital against the security of our title deeds.

Land Reform

- ❑ The Montlanthe Report of 2017 under the auspices of former Pres. Motlanthe encapsulates the essence of Land Reform.
- ❑ The Panel's terms of reference provide for three components of land reform: *Redistribution, Tenure Reform* and *Restitution*.
- ❑ Each of these is governed by a specific subsection of Section 25 of the Constitution.

Components of Land Reform

**Section 25(5):
Provides for
equitable access to
land**

This drives redistribution of both rural and urban land for those whose families were dispossessed prior to 1913.

**Section 25(6):
Provides for tenure
security**

Legal protection for those whose tenure is insecure because of past discrimination.

**Section 25(7):
Provides for
restitution**

For those who can show how they lost land through racially discriminatory laws and practices such as forced removals after 1913.

Consequences of Natives Land Act of 1913

- ❑ **In their influential work, “Why Nations Fail,” Daron Acemoglu & James A Robinson, state the following:**
 - **“Even a modicum of inclusive institutions and the erosion of the power of the chiefs and their restrictions were sufficient to start a vigorous African economic boom.**
 - **Between 1890 and 1913 two forces worked to destroy the rural prosperity and dynamism that the Africans had created in the previous fifty years.**

Consequences of Natives Land Act of 1913

- The first was antagonism by European farmers who were competing with Africans.
- The second factor was that the Europeans wanted a cheap labour force to employ in the burgeoning mining economy, and they could ensure this cheap supply only by impoverishing the Africans.
- Both goals of removing competition with white farmers and developing a large low-wage labour force, were accomplished by the Natives Land Act of 1913.”

Consequences of Natives Land Act of 1913

- 87% of South Africa's total land area was allocated to whites – at the time representing 20% of the total population**
- 13% of South Africa's total land area was allocated to blacks – at the time representing 80% of the total population.**

Consequences of Natives Land Act of 1913

- ❑ As to whether black people should own land, the Privy Council, the High Court of Appeal for the entire British Empire at the time, had the following to say in 1919:
 - “Some tribes are so low in scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.”
- ❑ Attitudes in SA at the time were very similar.

Consequences of Natives Land Act of 1913

- ❑ Some would argue in mitigation – as has been the case in various other countries – that most people would prefer an allocation of the most fertile 10% of the country's total area to the barren deserts, icy wastelands and impregnable mountain massifs comprising the remaining 90%.
- ❑ It would, however, serve no purpose to make any attempt to justify the actions that led to the inequitable distribution of land in our country as that would be an exercise in futility. Fact of the matter is that the 1913 legislation will haunt us for a long time to come.

Leasehold

- The most successful land reform to date occurred during the Apartheid period prior to 1994.
- In late 1970s, 99-year leasehold was introduced in SA's townships.
- I, with two colleagues, formulated the necessary legislation in 1978 which became operational in 1979.
- Based on the principles of the Deeds Registration Act of 1937.
- Thousands of black people in Soweto, Mamelodi, Langa, Kyalitsha, etc. obtained leasehold titles.
- These were converted to freehold in 1991 resulting in major upgrading initiatives due to access to loan finance.

Land Reform Initiatives since 1994

- ❑ The Motlanthe report sets out how the policy relating to land reform has continuously changed since the new South Africa came into being in 1994.
 - “The trajectory of land redistribution over the last 20 years reflects changing policy agendas and ideological positions.
 - Not only has land distribution fallen far short of official Government targets and public expectations, its focus, criteria and modus operandi have also undergone several significant shifts.”

Land Reform Initiatives since 1994

1994: The Reconstruction and Development Program (RDP).

Purpose: Transfer of agricultural land from white farmers to poor black South Africans.

Target: 30% of all commercial agricultural land to blacks within 5 years.

Actually achieved: By 1999 less than 1% of such land.

1995: Modest Settlement/ Land Acquisition Grants (SLAG)

Purpose: Land to black households with a monthly income of less than R1 500,00.

Result: Total failure.

Land Reform Initiatives since 1994

2001: Land Distribution for Agricultural Development (LRAD)

Purpose: Emphasis to assist the poor, shifts to an attempt to establish a class of black commercial farmers.

Result: Desired result not realised as “elites” are benefitted at the expense of more deserving candidates/applicants.

2006: Proactive Land Acquisition Strategy (PLAS):

Purpose: To be applied in conjunction with LRAD.

The State acquires land with the purpose of leasing it to beneficiaries with the aim of eventually transferring it to them in full ownership.

Land Reform Initiatives since 1994

**2011: LRAD
totally
replaced by
PLAS**

Project fails as the State desists from transferring land to beneficiaries.

State elects to rather lease the land.

Minister now talks of 30 year leases.

The problem is exacerbated by the fact that the greater portion of the 8 million hectares transferred to date, vests in Trusts or poorly managed so-called Communal Property Associations.

Land Reform Initiatives since 1994

- ❑ Incompetence simply cannot be cured by legislation.
- ❑ As the report states:
 - “If land holding entities are dysfunctional, land cannot be productively used and the constitutional imperatives of ensuring access to land and tenure security are flouted”.
- ❑ The endeavour to create a new form of landholding with this kind of legislation which is neither freehold nor leasehold, is doomed to fail
- ❑ Financial institutions always prefer the most secure forms of landholding because it affords better security.

Land Reform Initiatives since 1994

- When it comes to land restitution, the task of the Land Claims Commission is made even more difficult by the confusion that exists between “the purpose of restitution, which is to provide redress to specific claimants for the loss of specific pieces of land, and the goals of land redistribution, which is to ensure the racially equitable distribution of land in the country”.**

Land Reform Initiatives since 1994

- ❑ The restitution of land rights is heading towards chaos.
- ❑ I quote from the report:
 - “There are more than 7000 unsettled, and more than 19000 unfinalised ‘old order’ claims (claims lodged before the initial cut-off date of 1998).
 - At the present rate of finalising 560 claims a year, it will take at least 35 years to finalise all old order claims.
 - New order claims (lodged in terms of the now repealed Restitution of land Rights Amendment Act of 2014) that have already been lodged, will take 143 years to settle
 - If land claims are reopened and the expected 397 000 claims are lodged, it will take 709 years to complete land restitution”.

Land Reform Initiatives since 1994

- ❑ “The budget for land distribution is contained within the budget vote for Rural Development and Land Reform and appears as a line item entitled ‘Land Reform’ alongside ‘Restitution’ and ‘Rural Development’.
- ❑ Here the focus is on the ‘Land Reform’ budget only. Expressed as a percentage of National Expenditure, the Land Reform budget has generally been between 0.15% and 0.4% reaching a peak of 0.44% of the national expenditure in 2008/9 and then declining to 0.25% in the current financial year”!

Expropriation

- ❑ If Government is not prepared to spend money on the upliftment of the landless and dispossessed victims of our past, ***EXPROPRIATION WITHOUT COMPENSATION*** not only becomes a great temptation but in fact an irresistible option for future action.

Expropriation

- ❑ **When President Cyril Ramaphosa delivered his State of the Nation address in Parliament on the 16th of February 2018, he said the following:**
 - **We are determined that expropriation without compensation should be implemented in a way that increases agricultural production, improves food security and ensure that the land is returned to those from whom it was taken during colonisation and Apartheid.**

Expropriation

- A committee was subsequently established to look into the possibility of amending the Constitution.
- The public was approached for comment and 449552 submissions were received.
- 65% of the respondents opposed the amendment of the Constitution.
- In Parliament, however, 229 members voted for amending the constitution with only 91 votes against such action.

Constitution's Property Clause

**SECTION
25(3):
Not yet
tested in
the Courts**

It is in my view unnecessary to amend the Constitution because the criteria for determining the value of land for expropriation purposes, are clearly set out in Section 25(3) of the Constitution.

Constitution's Property Clause

**SECTION
25(3):
Not yet
tested in
the Courts**

The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all the relevant circumstances, including:

Constitution's Property Clause

**SECTION
25(3):
Not yet
tested in
the Courts**

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

Constitution's Property Clause

- ❑ These criteria have never been tested in our courts simply because the officials who are supposed to take the necessary initiatives to have these criteria properly tested, are either too incompetent to do so, or even worse, simply too lax or unwilling to do so.
- ❑ The consequences of an amendment to Section 25 to make expropriation without compensation for purposes of land reform, even easier, can be mitigated if the amendment makes it clear that such expropriation shall always be subject that it is reasonable and justifiable in an open and democratic society as envisaged in Section 36(1).

Expropriation

- ❑ Section 36(1) of the Constitution read in conjunction with certain provisions of the draft Expropriation Bill, 2020.
- ❑ Section 36(1): The rights in the Bill of Rights may be limited only in terms of a 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

Expropriation

- ❑ **The proposed amendment to the Constitution:**
 - **Section 25(3A): National legislation must...set out specific circumstances where a court may determine that the amount of compensation is nil.**

Expropriation

- ❑ The circumstances that may render expropriation without compensation acceptable, as it would be “reasonable and justifiable in an open and democratic society,” are set out in the draft **Expropriation Bill, 2020**:
 - Where the land is not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from an appreciation of its market value.

Expropriation

- **Where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard.**
- **Where the owner has abandoned the land by failing to exercise control over it.**
- **Where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land.**
- **When the nature or condition of the property poses a health, safety or physical risk to persons or to other property.**

2017 Motlanthe Report

- ❑ The Report under the chairmanship of former Pres. Motlanthe furnished reasons for the dismal failure of the Government's land reform initiatives:
 - "Experts advise that the need to pay compensation has not been the most serious constraint on land reform in South Africa to date – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity have proved more serious stumbling blocks to land reform.

2017 Motlanthe Report

- **The panel is of the view that Government has neither used the powers it already has to expropriate land for land reform purposes effectively, nor used the provisions in the Constitution that allow compensation to be below market value in particular circumstances. Rather than recommend that the Constitution be changed, the panel recommends that Government should use its expropriation powers more boldly, in ways that test the meaning of the compensation provisions in Section 25(3) particularly in relation to land that is unutilised or under-utilised.”**

Consequences

- ❑ **Sadly, Government failed to heed the advice of the panel and proceeded with the proposed amendment to the Constitution as well as the proposed new Expropriation Bill.**
- ❑ **It is my view that the recommendations made by the panel to address the problem of land reform, are all doomed to fail.**
 - **Firstly: It is recommended that the host of existing legislation passed to achieve both land restitution and land redistribution, should be appropriately amended. Amending legislation does not stop corruption and it also cannot miraculously transform incompetent officials into competent officials.**

Consequences

- ❑ **Secondly: Further legislation needs to be passed! I quote:**
 - **“A new Land Framework law that would focus on the right to equitable access to land and also articulate the different components of land reform with one another. Yet, to date, there has been no law that defines the meaning of equitable access to land or sets targets and reporting requirements in relation to redistribution.”**
- ❑ **Who is going to administer this legislation or drive the mechanisms to realize these dreams?**

Consequences

❑ **Thirdly: A new Land Records Act**

- **“A new Land Records Act to support an inclusive and robust land administration system that caters for all South Africans across a full spectrum of co-existing land rights. As long as the majority of South Africans have no recorded land rights, they remain vulnerable to eviction and dispossession. They also remain largely invisible to the formal economy. The Land Records Act would be a crucial component of a land administration system that provides robust forms of recourse to ordinary people seeking to assert and protect their land rights.”**

Consequences

- Have they forgotten all about our existing, comprehensive and excellent land registration legislation and more in particular the Deeds Registries Act No. 47 of 1937?
- An enormous amount of expertise and energy over a period of many decades was required to create our accurate land register in the country's Surveyor's General and Registrars of Deeds. All of a sudden talks of another "land records system"!
- Who is going to bring this about and where will the knowledge and expertise to achieve this unnecessary duplication, come from?

Consequences

- ❑ It will simply lead to discrimination based on race being replaced by discrimination based on title.
- ❑ The Government seems to persist in its vain attempt to validate half-baked land rights concocted in legislation such as the Communal Property Associations Act and the proposed Communal Land Tenure Bill.
- ❑ These third world concepts, are in essence simply an extenuation of the tribal land principle where the chieftains rule the roost and will only result in the poorest of the poor remaining trapped in an endless cycle of poverty.

Conclusion

- ❑ I delivered a paper on “Land Registration and Land Reform” in 1996 at the John Marshall Law School in Chicago.
 - “The author (Clem Sunter) in no way implies that we should slow down the process of land restitution. However, it would be prudent to ignore the fact that land itself is not an asset. It is an asset only because of productive and profitable use by the owner.
 - The commercial sector produced about 95% of the total agricultural output compared to approximately 5% by the subsistence sector.

Conclusion

- This is primarily due to the commercial sector's dominant position in terms of land ownership, effective land utilization and a well-developed infrastructure with extensive financing, marketing and support structures.
- Therefore, any restitution has to be accompanied by training where necessary – not only in appropriate farming methods, but also entrepreneurship and business administration. An awareness of exactly how much the local environment can sustain in crop and livestock production, has to be instilled.
- Restitution, therefore, involves the transfer of both knowledge and land.”

Conclusion

- ❑ I am of the view that the time has arrived for Government to realize that demographic realities have irrevocably changed the playing field:
 1. Our country's population, barely 5 million in 1904, is now approaching 60 million. There is simply not enough viable agricultural land in this barren land of ours to resettle the poor on agricultural land.

Conclusion

- 2. Urbanisation on a massive scale occurs all over the planet and certainly also here in South Africa, mainly due to the inability of rural areas to meet with the aspirations of expanding populations. Land in urban areas must be made available to the poor and dispossessed as the real need for land lies in the urban environment. This will have to be accompanied with proper service delivery.**

Conclusion

- 3. Patches of agricultural land are not the key to empowerment. Only proper education and training can achieve this. This is exactly what happened in the recent past in the Far East. The same, alas, cannot be said of South Africa. We are not catching up but in fact slipping further backwards as we seem to emphasise the wrong and irrelevant issues.**

Conclusion

- ❑ **South Africa desperately needs investors and the surest way to drive them away, is to create an environment where the sanctity of land ownership is suspect. Even the perception that such may be the case, may, and probably will, cause irreparable harm to our country.**

THANK YOU

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