

Land Circular No. 3

October 2011

GREEN PAPER ON LAND REFORM 2011: CIRCULAR

On 31 August 2011, the Department of Rural Development and Land Reform tabled the Green Paper on Land Reform.

The Green Paper's stated aim is to address the injustice of past discriminatory laws and the inadequacy of existing land reform legislation and policy.

The Department of Rural Development and Land Reform proposes various measures to facilitate these aims. However, the Green Paper raises questions of constitutionality that cannot be overcome by what may seem to be laudable goals. Furthermore, little detail is provided regarding how the various mechanisms proposed in the Green Paper are to be implemented.

BACKGROUND

Since unionisation in 1910 and throughout the 1900s up to the late 1980s, a series of unjust and racially based laws resulted in the dispossession of black people of their land. Significant consequences of the racially discriminatory land laws were that the land tenure of many black people became tenuous and as a result, land development in rural areas was prevented.

Since the early 1990s there has been an effort to address injustices of the past. These efforts included the White Paper on land reform, which recommended the abolishment of all racially based legislation. Shortly thereafter, both the 1936 Land Act and the Group Areas Act were repealed and the Upgrading of Land Tenure Rights Act was passed, with the intention of upgrading black peoples very tenuous rights to land.

In 1996 the Constitution, in section 26 (6), bestowed upon persons whose land tenure was made legally insecure as a result of past racially discriminatory laws and practises, the right to either legally secure tenure or comparable redress.

So as to fulfil the obligation placed on it by the Constitution, the State has, since 1994 embarked on a process of land reform. This process is discussed in more detail in our previous circular (Circular No. 2: New Law Protecting Farm Workers And Farm Occupiers). Suffice it to say at this juncture that the State has passed into law various pieces of legislation which are aimed at fulfilling the promise of secure land tenure as contained in the Constitution. To this end, the Restitution of Land Rights Act, the Land Reform (Labour Tenants Act), the Interim Protection of Informal Land Rights Act, the Extension of Security of Tenure Act, the Prevention of Illegal Eviction and Unlawful Occupation of Land Act have all been brought into law.

Notwithstanding the enactment of this legislation, problems persist with the current land reform policy. The Green Paper speaks to these problems by addressing the three components of land reform, namely, land restitution, land distribution and tenure reform.

CURRENT POSITION AND PROBLEMS WITH THE CURRENT POSITION

Amongst others, the problems alluded to above are the following:

- There exists a lack of cohesion in the nations attitude toward land reform.
- Due to budget constraints and lack of resources, the government has been unable to buy land efficiently, and the process of redistribution has been slow. In order to speed up land redistribution, the Green Paper proposes that an alternative to the “willing seller - willing buyer” model must be established and put into practise.
- The claimants under existing legislation lack the resources to develop the land that is awarded to them. Rural poverty remains rife and rural development continues to be slow and incomplete.
- There is a lack of dissemination of information to those who would benefit under the existing laws.
- Farm workers and dwellers are failed by existing legislation as a result of the inadequate articulation, poor implementation and weak enforcement thereof. The Green Paper attempts to address this failure by providing systems that are (or will be, once implemented,) worker-friendly, co-ordinated and efficient.

PROPOSAL

A set of proposals is advanced by the green paper which attempts to improve on past and current land reform perspectives, without significantly disrupting agricultural production and food securities. The proposals aim to avoid or minimize land distribution and restitution which does not generate sustainable livelihoods, employment and income.

The following programs and institutions are proposed:

- a) A recapitalization and development program;
- b) A single land tenure system with Four Tiers;
- c) A land management commission;
- d) A land valuer - general;
- e) A land rights management board, with local management committee;\Properly aligned common property institution; and
- f) Properly aligned common property institutions
- g) The Land Tenure Security Bill, 2010.

Each of these programs and institutions are discussed briefly below.

Recapitalization and Development Program

The role of this program is to ensure that all land reform farms are 100% productive. The strategy underlying the program is partnership with commercial farmers on a risk sharing basis. Little detail is provided as to how this is to be achieved.

A Single Land Tenure Framework with Four Tiers

A single land tenure framework is proposed, integrating the current multiple forms of land ownership (communal, state, public and private) into a single four tier tenure system consisting of:

- Tier 1 – State and public land: leasehold
The need for consultation between different spheres of government in instances of disposal of State land has a paralyzing effect on service delivery. By keeping State land in the hands of the State, leasehold will (in theory) enable the State to utilize land more effectively to achieve service delivery objectives.
- Tier 2 – Privately owned land: freehold, with limited extent
The Green Paper entrenches the right of a citizen to outright ownership of property. However, it is anticipated that there will be regulatory limitation relating to prime unique agricultural land. Details of the limitations are not set out in the Green Paper, but it is implied that there will be a cap on the amount and type of land that any single person may own.
- Tier 3 – Land owned by foreigners: freehold, but precarious tenure, subject to obligations and conditions
It is envisaged that foreigners will no longer hold freehold title but be entitled to leasehold, the titles subject to limitations imposed by the Government.

- Tier 4 – Communally owned land: communal tenure with institutionalized use rights
This fourth tier of tenure, communal land tenure, will form the subject of a separate policy document, to be prepared by the Department of Rural Development and Land Reform after extensive consultation. Further details about this tier are not available at present.

In support of these proposals, the Green Paper looks at the land tenure models applicable in China, India, Brazil, Mexico, Chile and, in relation to Africa, Egypt.

Land Management Commission (LMC)

The functions of this autonomous, although not independent, commission will include, advising, co-ordinating, regulating and auditing. The LMC will have the power to subpoena any person to answer questions relating to his land holding or land interest, to enquire about any land question, to verify or invalidate title deeds, and to seize or confiscate land obtained through fraudulent or corrupt means.

The Land Valuer General

The office of the Land Valuer General will be a statutory office responsible for the provision of fair and consistent land values for rating and taxing purposes, as well as for determining financial compensation in cases of expropriation.

Land Rights Management Board (LRMB) and Land Rights Management Committees (LRMCs)

The Green Paper proposes the establishment of the LRMB. Functions of the LRMB will include communicating legal reforms to farm owners, farm dwellers and potential land beneficiaries, providing legal representation, where necessary, and establishing a co-ordinated and integrated support system for development measures in rural areas. The LRMB will have the power to establish LRMCs. LRMCs will be composed of representatives in a specific rural environment. The LRMB, together with LRMCs will be responsible for enforcing respect for, and observance of, rights of fellow dwellers.

The Land Tenure Security Bill 2010

This Bill aims to regulate the rights farm owners and of persons who reside or work on farms, and those associated with them. For more information about the land tenure security bill, please see Circular No. 2: New Law Protecting Farm Workers and Farm Occupiers.

CONCERNS RAISED BY THE GREEN PAPER

We raise the following concerns in relation to the Green Paper :

- The retention of ownership of land in the hands of the State follows models which have been adopted in socialist (and historically, Marxist) countries. It is unlikely to foster investment in land and infrastructure.
- The imposition of limitations on the rights of private landowner will similarly restrict investment in land. It is a continuation of the trend to restrict private property rights without compensation. Since 1994, we have seen this in relation to water rights and mineral rights.
- Imposing a restriction on land owned by foreigners is likely to restrict foreign investment.
- The treatment of communally owned land has been not properly dealt with since 1994. It has resulted in a continued impoverishment of those who live on communal land and has hampered development of these areas.
- Conferring powers to the Land Valuer General to determine compensation in the case of expropriation will result in the courts powers being ousted and we believe would be unconstitutional.
- Imposing a ceiling on land ownership is dangerous and will result in the State being able to expropriate land through the back door.
- The comparison of land reform experience elsewhere is superficial and in many cases, inappropriate.
- There is a complete lack of clarification on the implication of the proposals which the Green Paper has made.

CONCLUSION

The Green Paper raises serious concerns regarding the treatment of land and land rights in South Africa. We will continue to monitor this very important area.

As and when further details become available, we will communicate these developments.

FURTHER ADVICE

Should you require advice or assistance on the above topic, please contact Michael Jackson (031 – 536 8512 mjackson@coxyeats.co.za); Carol McDonald (031 – 536 8529 cmcdonald@coxyeats.co.za); Themba Zikhali (031 – 536 8529 tzikhali@coxyeats.co.za) or Jason Goodison (031 536 8533 jgoodison@coxyeats.co.za).