PRE-APARTHEID AFRICAN LAND OWNERSHIP AND THE IMPLICATION FOR THE CURRENT RESTITUTION DEBATE IN SOUTH AFRICA[1]

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Swart grondbesit in die voor-apartheidsera en die implikasies daarvan vir die huidige debat rondom die herstel van grondregte

Hierdie artikel neem plase in swart besit in die eertydse Transvaal onder die loep. Die outeur ontleed hoe swart grondbesitters hule belange teen die aanslae van hulle blanke bure en die regering beskerm het. Daarbenewens toon die outeur aan hoe die swartmense na 1913 volgehou het om toestemming te vra om grond aan te koop, en soms onwillige staatsampenare oorgehaal het om aankope goed te keur. Derdens val die klem op die kwessie van skuld en hoe amptenare van die Department van Naturellesake gepoog het om swartmense teen die oproeping van hulle verbande by te staan. Die hoofdoel van die artikel is om die ingewikkelde verhoudinge tussen die staatsamptenare en die swart grondbesitters toe te lig in 'n poging om aan te toon dat die Mandela-regering omsigtig te werk sal moet gaan wanneer die eise van swart grondbesitters, wat moontlik voor die aanvang van die apartheidsera hulle grond verloor het, evalueer word.

This article focuses on African owned farms in the Transvaal. The author examines how African landowners defended their interests against pressures from their white neighbours or the government. In addition, the author demonstrates how Africans showed persistence in seeking permission to buy land after 1913, sometimes maneuvering reluctant government officials into approving a purchase. A third emphasis is on the topic of debt and how officials of the Native Affairs Department tried to help Africans avoid foreclosure. The ultimate aim of the article is to emphasize the complicated relationship between government officials and African landowners in an effort to suggest that the Mandela government must use caution as it evaluates claims from African owners who may have lost their land before the apartheid era.

Introduction

Land ownership is a very sensitive issue for many South Africans in the 1990s. An editorial in *The Star* noted that "for the majority of our population the land question is possibly the most (emotional) issue of all".[2] An academic wrote: "land has a political

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2. *The Star International Weekly*, November 10-16, 1994.

significance that appears out of all proportion to the role of land in the economy".[3] Politicians also discuss the gravity of this issue: one member of the small Democratic Party wrote that the Party "is convinced that the land issue is of the gravest importance to the future of our country and is the key to the procurement of peace and stability".[4] And a page in the *Sunday Times* carried a headline in three centimeter high letters over three stories, which emphasized the theme: "This land is our land". The articles reflected the emotional tie Africans *and* Afrikaners have to the land because of birth, upbringing, history and tradition.[5]

Section 121 of the Interim Constitution is titled "Restitution of Land Rights". Section 121 (2) states:

> A person or a community shall be entitled to claim restitution of a right in land from the state if:
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> a. such person or community was dispossessed of such rights (since June 1913); and
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> b. this dispossession occurred in a discriminatory manner according to what today would be defined as discrimination.[6]

To implement these constitutional provisions, Parliament passed Act Number 22 of 1994, Restitution of Land Rights Act (November 8, 1994). This Act, "to provide for the restitution of rights in land", creates a Commission on the Restitution of Land Rights and a Land Claims Court. Three years will be allowed for the lodging of claims with the Commission for State and private land. The commission is expected to "settle claims by way of mediation and negotiation". If claimants are dissatisfied with the Commission's recommendations, "claims would be referred to the Land Claims Court, which would be able to award compensation for land".[7]

The Act, following the constitutional guideline, only applies to land lost after 1913, but, one assumes that the Commission wil concentrate on land the government confiscated after 1948 as a result of apartheid. The aim of this paper is to explore the evidence to determine if the constitutional provision allowing claims back to 1913 is a wise policy. I believe that the circumstances of "dispossession" varied widely between 1913 and 1948, and the degree of discrimination may be difficult to prove. In addition, while the goal of government policy, segregation, was discriminatory, the actions of Native Affairs Department and Africans may negate claims of overt discrimination in practice. The Mandela government should be very careful to communicate to possible claimants that the 1913-1948 period was a more complicated time, and that officials should be very careful not to raise expectations too high.

I shall examine farms owned by Africans outside the reserves between 1913 and 1948 with a focus on the Transvaal. My evidence is drawn primarily from examples of African-

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Michael de Klerk, "Introduction", in Michael de Klerk (ed.), *A harvest of discontent: the land question in South Africa* (Cape Town, 1991).

4. Unpublished Democratic Party Working Paper, 1992.

5. August 16, 1992, p. 12.

6. Republic of South Africa, *Constitution of the Republic of South Africa Bill*, B212B-93 [GA], Section 121, p. 78. Section 8 is headed "Equality". Sub-section [2] states: "No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language".

7. Act No. 22 of 1994; also *The Star International Weekly*, November 10-16, 1994, p. 6.

owned farms located in the Pretoria District. I have identified over 130 farms or portions of farms which African owned in freehold. These pieces of land were purchased between the 1880s and the early 1940s. The owners included individuals, partnerships (from two men to large numbers of men and women) and tribal groups. The size of the land varied from a few hundred hectares to several thousand hectares. Within my sample, more than 90 percent were retained by the purchasers; three were sold and two were foreclosed before 1948; the other, some specifically identified as "black spots", were expropriated by the government, mainly from the 1950s to the 1970s. Finally, on the basis of the historical evidence, I shall evaluate the possibilities open to the Mandela Government over the next few years.

Background

After the conquest of black South African societies in the 19th century, the right of Africans to own land was circumscribed, and opportunities varied according to the part of South Africa where an African lived. Limited quitrent and freehold land tenure rights existed for Africans in the Cape Colony. In the Orange Free State, however, African were not allowed to own land in freehold, but a small number of exceptions lived in Thaba 'Nchu, mostly because of grants made by the OFS government during the late 19th century. A "Trust" system prevailed in Natal and the Transvaal, whereby white trustees had power over all African land. In the Transvaal, if the unusual happened and Africans purchased a piece of land, they were usually required to do so in the name of the head of the Native Affairs Department (NAD).[8]

This situation changed in 1905, when a court ruled in Tsewu's Case that Africans in the Transvaal could legally buy land. Prior to 1905, Transvaal Africans purchased and registered 61 farms (other purchases in the name of missions, missionaries or whites also took place, but the number may be difficult to determine). Between 1905 and June 1913, individuals, tribal groups and syndicates of Africans purchased and registered 399 farms.[9] Act Number 27 of 1913, the Natives Land Act of 1913, stopped this rapid growth, but did not completely prevent further purchases.

The main aim of the proponents of the Natives Land Act was to achieve territorial segregation in the new Union of South Africa.[10] Periodically in the next decade or two after 1913, government memoranda and official correspondence confirm that segregation was the goal of the Act. The method to achieve that aim was to prohibit land sales to Africans in areas outside designated Reserves, allowing Africans only about nine million hectares (about 7% of South Africa). The Natives Land Act, however, was not retroactive: African landowners were not required to give up land which they owned. The 1913 limits on land for Africans were supposed to be temporary, waiting for recommendations from the Natives Land Commission (also referred to as the Beaumont Commission), which the Act established. The government, however, was unable to enact into law, the Native Affairs Administration Bill of 1917, following those recommendations; thus, what was viewed as "temporary", became permanent until 1936.

T.R.H. Davenport and K.S. Hunt (eds.), *The Right to Land* (Cape Town, 1974), elaborate on this discussion, pp. 31-34.

These data are based on Lands Department records compiled during 1912 and 1913. LDE 728, 12473/3 1905-1909, 107 farms; 1910-1912, 179 farms; January 1 to June 19, 1913, 113 farms.

10. I have discussed the reasons why the Natives Land Act was passed in 1913 in my article: The 1913 Natives Land Act in South Africa: Politics, race and segregation in the early 20th century, *The International Journal of African Historical Studies* 26/1 (1993), pp. 65-109.

A clause in the Natives Land Act allowed the Governor General to grant approval for Africans to purchase land under special circumstances. The responsibility for evaluating such requests rested with the Native Affairs Department (hereafter NAD), which was established as a central government department at the time of Union. Native Affairs officials believed themselves to be the main voice for Africans in the government. During the next two to three decades, Department officials sought to bring all matters having to do with Africans under their purview. For example, in 1929, in response to an increasingly important problem, the Department created a Directorate of Native Agriculture, with a director and a staff which included trained African agricultural demonstrators who served as extension agents to African farmers. Certain loan programmes were administered only by the Department. Many officials, such as the native commissioners and sub-native commissioners, spoke and wrote an African language. The tone of many letters and reports by NAD officials is sympathetic and paternalistic, in keeping with their belief that the Department should be the protector of Africans. As the 20th century progressed, the Department attempted to moderate the government's segregation policy, especially in dealing with the implementation of the Natives Land Act.[11]

Government officials became more sympathetic to African land needs after 1918 because Parliament did to expand the available land for African residence and use. NAD officials evaluated requests for permissions to buy land outside the Reserves according to several criteria. The Native Commissioner in the area had to approve and recommend the transaction; he was also expected to comment on the fairness of the price and the ability of the Africans to meet their financial obligations, especially if a mortgage was to be taken. A very important criterion was the location of the land: was it in an area recommended for African residence by the Natives Land Commission and/or the regional commissions set up by Parliament to evaluate the Commission's report? The recommendations of the regional commissions varied from the Land Commissions in terms of the total amount of land recommended and, in some instances, where it was located. Thus, a request relating to land approved by both the Land and the regional commissions, was more favourably evaluated. For most transactions after 1921, the purchasers had to be willing to accept the Minister of Native Affairs holding the land "in Trust" for the group.[12] As a general policy, Native Affairs Department officials opposed the sale of land to Africans in undivided shares on farms where whites also owned shares, preferring that the Africans purchase a surveyed portion, so that they owned only that portion and had no rights to use other areas of a

11. For a broader discussion of NAD policies and its role in the government, see Saul Dubow, *Racial segregation and the origins of apartheid in South Africa, 1919-36* (London 1989), Chapter 3. Department land policies slowly shifted after 1918. However, a full discussion of these changes requires a separate article.

12. NTS 3426, 26/908, Under Secretary for Native Affairs to Marais, Clark & Price (lawyers), May 4, 1921. The Trust system gave "legal ownership" to the Minister of Native Affairs, "though strictly his is merely a formal ownership". KPA (Magistrates Records), Pretoria Native Commissioner, 77/49, Secretary of Native Affairs (hereafter SNA) to Sub-Native Commissioner, November 14, 1924; "Registration of Native-owned land in the name of the Minister of Native Affairs in trust for the Natives concerned is a formality which imposes no liability upon the Minister in respect of any debt attaching to such land". NTS 3426, 26/308, SNA to Secretary of Justice, August 5, 1927, "a formality which is insisted upon so as to ensure that any dealings with the property are brought under the supervision of the Department". NTS 3543, 495/308, file 1, SNA to Additional Native Commissioner, July 30, 1930.

other areas of a farm.[13] In the 1920s, the Department sometimes asked for the approval of the neighbouring whites before proceeding. Over time, more criteria were added. Eventually, the Department expected buyers to be able to pay at least 50% of the cost at the time of the sale. By 1934, a syndicate of more than six Africans had to purchase the land on "a tribal basis, that is to say, the purchase must be negotiated in the name of the tribe to which the co-purchasers belong subject to the incorporation of a clause in the Deed of Transfer reserving rights of use and occupation of the land in favour of the actual co-purchasers and their descendants".[14] But, NAD policies made it possible to create a tribe if none existed.

Officials in the Department might be persuaded to modify a negative decision in extenuating circumstances or because African buyers (and white sellers?) may have maneuvered them into acting because the officials feared that the prospective buyers might suffer substantial loss if the Department rejected their application. Once the Native Affairs Department approved a request, the application went to the Executive Council, which then recommended action to the Governor General. The process could be achieved in a matter of months or it could drag on for several years if the prospective buyers (and the sellers?) appealed an unfavourable decision.

Africans wanted land to meet their need for more agricultural and grazing land. A consistent theme of official documents, as well as the observations of Africans and sympathetic whites, between 1910 and the 1940s is that the reserves were overcrowded. Government officials knew this when the Natives Land Bill was debated in 1913, and the comments and data presented in the next decades do not change.[15] At a meeting with Prime Minister Smuts, Rev. J.S. Mazwi emphasized to the Prime Minster that the "Native areas were overcrowded".[16] And a 1931 petition from Chiefs and Headmen to the Governor General, reiterated the point, referring to "congestion" in African areas and noting that the land set aside for Africans to buy was "wholly inadequate".[17] It also appears that some farms owned by Africans were equally overcrowded. The situation of one Bakgatla-ba-Makau group illustrates this point. An Additional Native Commissioner described the "need of the tribe for more and yet more arable land as each succeeding year comes around". He noted the "urgency which exists for the production of greater quantities of food", and noted that eight Africans petitioned to buy a portion of Elandsfontein 374

13. Section 22 of the Native Affairs Administration Bill (1917) included language "which will have the effect of prohibiting the purchase of land in undivided shares in approved Native Areas by any number of Natives exceeding five ..." The bill was never passed. The idea became policy nevertheless: "The Department is, as a matter of policy, opposed to natives holding a farm in undivided shares with Europeans", NTS 3431, 36/308, SNA to Director of Irrigation, May 23, 1917; NTS 3614, 1027/308, E. Barrett to H. Rose-Innes, Native Commissioner, October 11, 1917; NTS 3426, 26/308, Under Secretary for Native Affairs to Marais, Clark & Price (lawyers), May 4, 1921. 'Undivided shares' meant that the property was not divided into specific surveyed (and fenced?) portions representing the owner's share. Undivided shares meant that the owners could potentially use common areas.

14. NTS 3619, 1073/308, Native Commissioner to Receiver of Revenue, December 21, 1934.

15. For example, NTS 10161, 42/419, Report on the Transvaal by the Director of Native Agriculture, November 1930.

16. NTS 1694, 32/276, "Notes of a meeting of the Prime Minister and selected Africans", August 20, 1920. A comprehensive study of the poor conditions in the Reserves is the *Report of the Native Economic Commission, 1930-32*, UG 22/32.

17. GG 1568, 50/1414, Petition to the Governor General from Chiefs and Headmen in the Marico District, August 21, 1931.

because "they have not sufficient lands in their own area".[18] There were also unique reasons for wanting to buy land after 1913. One African applied for permission to buy an additional portion of land, in part because of the available water and the arable quality of the land, but the main reason was to get "rid of a troublesome white neighbour with whom he is continually at loggerheads".[19] A group of Africans opposed being forced to work on labour contracts in order to continue to live on a white owned far. Therefore, they were looking for land "to live on where they (could) work out their own destiny".[20]

Two phenomena are relevant to the current debate. First, before 1948, Africans vigorously, and with some measure of success, defended their interests against pressures from white neighbours and the government. Second, African showed persistence in seeking permission to buy land, and sometimes maneuvered government officials into approving a purchase. In addition, during the period before apartheid, I found a degree of sympathy among certain government officials for Africans, especially a strong concern over the inadequate amount of land set aside for Africans in the Reserves. Nevertheless, however paternalistic and sympathetic government officials might have been, they still believed in segregation and saw segregation as the ultimate goal of the government's land policies. But, does the historical record justify including the period 1913 to 1948 under the Restitution of Land Rights Act? The following descriptions will illustrate these phenomena.

Defense of Interests: the limits of Government power

The battle over Tweefontein 529 provides an excellent example of Africans standing on their rights, refusing to be forced off their legally owned property and refusing to move onto inferior land in exchange for their property. Native Affairs Department officials participated in a long negotiating process, recognising that they were bound by the law and usually demonstrating a strong concern for African interests. The government did not have the authority to expropriate legally owned African land until 1939,[21] but even then officials were reluctant to use that authority, and threats did not work or seem to make a difference to the African owners, even after 1939, when the government had greater power.

Six Africans purchased undivided shares of Portion C of the farm Tweefontein 529, located in the Elandsriver Ward of the Pretoria District. Portion C measured 2173 hectares, 336 square roods. Four received their deeds in 1911: Garass Nicholas Mgoni, 1/60 share (36 hectares) for £40; James Mboro, 1/40 share (54 hectares) for £60; Matheus Tema Masango 1/24 share (90½ hectares) for £100 and Petrus Masango, 1/24 share for £100. In 1912, Filemon Masako registered a deed for 1/168 share (£20) and three years later the sixth person, Samuel T. Morutse acquired his deed for 1/24 share (£100).[22] Thus their undivided share of Portion C equalled approximately 374½ hectares. The rest of Portion C was occupied by whites. Ownership was, indeed, racially mixed.

In 1923, the African families lived on the southern side of this portion of the farm. They

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18. NTS 3619, 1073/308, file 1, Additional Native Commissioner to SNA, October 2, 1928. See also NTS 3426, 26/308, Sub-Native Commissioner, Hammanskraal to SNA, May 9, 1922, where he states that there is no doubt that "for the purpose of expansion, the tribe require the land", and NTS 3515, 331/308, Lawyers to SNA, March 21, 1947, who refer to a farm which is "too small for the requirements of the Bantoane tribe under Chief David Mathebe".
19. NTS 3587, 839/308, Acting Sub-Native Commissioner to Native Commissioner, August 10, 1914.
20. LDE 988, 18909, SNA to Secretary for Lands, July 31, 1920.
21. Act Number 17 of 1939, Native Trust and Land Amendment Act, 1939, amending the 1936 Act.
22. Pretoria Deeds Office, 3548/1911, 3550/1911, 7129/1911, 9153/1912, 1844/1915.

planted maize (reaped 13 sacks in 1922 and anticipated a harvest of 40 sacks in 1923), and owned 100 cattle and 170 additional small stock. The African owners had a small dam and had started to enlarge it.[23]

That year, 13 white owners complained about the African presence and began a campaign to get them off the farm. They stated that an "unbearable" situation existed, and complained about the destruction of fruit trees, improper cutting of fire wood, ploughing in the wrong places and unauthorised use of a salt pan.[24] The African owners denied their accusations, in fact blaming the whites for tree losses or saying they (the Africans) were simply following the example of the white owners.[25] The Secretary for Native Affairs, J.F. Herbst, believed that "the writer of the letter (W.Botha) seems somewhat illiterate and it is difficult accurately to follow the representations though the general drift is intelligible".[26] Nevertheless, the Secretary's immediate reaction, after deploring the "evil" of Europeans and Africans owning land in undivided shares, was to recommend partition (i.e. division of the land into legally defined, surveyed portions).[27] The Africans accepted the need for a survey, but only by a Government surveyor, because they feared that others might draw boundaries whereby they "will be cut off from the water".[28] Partition never occurred, apparently because the owners, whites and Africans, could not afford the surveying costs.

The white owners pursued new efforts in 1927, this time involving inquiries by a member of Parliament, Harm Oost.[29] Oost wanted to determine if the Africans could be removed so that a "small irrigation scheme" might be pursued "for the benefit of (the) European co-owners". But, officials reminded Oost, the government lacked the power to expropriate bona-fide freehold owners under these circumstances. Anything that might happen had to be voluntary, and the Africans were adamantly opposed to selling their land.[30]

Oost persisted: the white owners wished "to have the natives transferred to a bushveld farm. Could your department assist us in that direction?"[31] In reply, E.R. Garthorne, Under Secretary for Native Affairs, reemphasised that the Africans could not be forced "to part with their holding and accept land in the bush-veld in lieu thereof". Perhaps an attractive offer to induce the African owners "to agree to an exchange" might achieve the

23. NTS 3488, 220/308, South African Police to Sub-Native Commissioner, May 19, 1923.
24. NTS 3488, 220/308, W. Botha and 12 others to Minister of Agriculture, April 25, 1923; NTS 3488, 220/308, South African Police to Sub-Native Commissioner, May 19, 1923.
25. NTS 3488, 220/308, South African Police to Sub-Native Commissioner, May 19, 1923.
26. NTS 3488, 220/308, SNA to Sub-Native Commissioner, Pretoria, May 8, 1923.
27. NTS 3488, 220/308, SNA to Sub-Native Commissioner, Pretoria, May 8, 1923; NTS 3488, 220/308, SNA to W. Botha, May 30, 1923.
28. NTS 3488, 220/308, South African Police to Sub-Native Commissioner, May 19, 1923. In 1927, the African owners again discussed the issue of partition; they asked that their share include land "contiguous to each other surrounding one of the eight dams on the farm". NTS 3488, 220/308, SNA to Harm Oost, November 1, 1927, reporting on a meeting between the African owners and a government official.
29. Harm Oost (1877-1964), a newspaper editor, businessman and politician. He represented the Pretoria District in the House of Assembly, 1924-1943, 1948-1953. *Dictionary of South African Biography*, vol. 4 (Cape Town, 1981), p. 426. The Oost papers at the State Archives do not include any correspondence between Oost and the white owners of Tweefontein: A69, Box 6, Letters, 1924-1950s.
30. NTS 3488, 220/308, Memorandum: E.R. Garthorne to H. Rogers, September 23, 1927; Detached Clerk, Rayton, to Sub-Native Commissioner, October 17, 1927: the Africans "are unwilling to part with their interest in the farm or exchange for other land".
NTS 3488, 220/308, Oost to Garthorne, November 8, 1927.

desired result, Garthorne suggested.[32] The file is silent about any follow-up on the part of the whites, but the status quo continued.

Early in 1935, the African owners expressed a willingness to consider an exchange, and they identified two Pretoria District farms, Wolvenkraal 560 and Kameelrivier 231, as possibilities. Even though "such an exchange would be in the interests of all concerned and would accord with the Government's segregation policy",[33] nothing came of this initiative. Four years later, the government acquired the power to expropriate African land in 1939 when sub-section (2) of Section 13 of the Native Trust Land Act (Act Number 18 of 1936) was amended by Section 7 of Act Number 17 of 1939. However, it must be emphasized that this section also required that compensating land must be made available if African land were to be expropriated, and the African demanded such compensation.[34] Now the government had the tools to increase the pressure on the Tweefontein Africans.

With the potential threat of expropriation available to the government, the Central Land Board, in 1940, appraised the land and determined what they believed to be appropriate compensation to the African owners if they would sell or if expropriation became necessary. Ownership, however, had become more complicated, owing to deaths of some of the owners, and the surviving owners or the heirs began to take different positions on the issue of sale or exchange. The deaths of three of the owners (and, later, two more) sidetracked the expropriation effort while the estates were being settled, which took years. In addition, a very interesting bureaucratic rift arose, pitting Lands Department surveyors or assessors against Native Affairs Department officials who worked for the Director of Native Agriculture. The two sides disagreed over the method of appraisal and disagreed about irrigation possibilities on part of the farm. Equally important, an official concerned with African agriculture raised the issue of racism when he accused the Lands Department evaluators of appraising African land at lower rates from similar land owned by whites. In addition, debate arose over the difference between what the government offered for Tweefontein and the actual value of land for exchange or purchase by the Africans.

By 1940, three of the original owners were dead: Petrus Masango, Matheus Masango and Samuel Morutse. In each case, some or all of their children lived at Tweefontein, but each heir, Petrus Masango, Alfred Masango and Karel Morutse, worked in Benoni or Pretoria. James Mbara had his home on another farm, Hartebeestspruit, but some members of his family resided on Tweefontein. Filemon Mosako live on the farm and was demanding £5 per hectares for her share, and amount dismissed by the Assistant Native Commissioner as "of course ridiculous". Finally, Gervass Mgoni refused "to negotiate and actually became quite truculent".[35] NAD officials were also having problems actually tracing Mbara, Petrus Masango and Karel Morutse. The Chief Native Commissioner summed up the feelings of the Africans:

> It is likely natives are keeping back information of the whereabouts of these persons. It is evident that they and the owners who have been traced are fearful of committing themselves in any way in regard to the land, and will not appreciate that the land is subject to expropriation, because they are

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32. NTS 3488, 220/308, Garthorne to Oost, November 21, 1927.
33. NTS 3488, 220/308, SNA to Secretary for Lands, January 23, 1935.
34. "If any native whose land has been expropriated ... applies to the Trustee within a period of three months after the date of the expropriation ... the Trustee shall offer for sale to such native ... such land ... as the Trustee may consider to be of the said value, and as the Trustee may determine".
35. NTS 3488, 220/308, Secretary for Lands to SNA, February ? (unclear), 1940, Assistant Native Commissioner to Native Commissioner, March 27, 1940.

altogether opposed to and resent the idea of parting with their land.[36]

The Africans were defending their interests, as they had since 1923, but the government, through the Lands Department and the NAD, was continuing to pursue the matter, but not without a measure of concern for the African owners. NAD officials asked:

> Do you think that any good purpose will be served be referring this matter back to the ANC (Assistant Native Commissioner) for further attention? It seems clear ... that expropriation will have to be resorted to *if pressure is brought to bear upon the Dept* (sic) to have this *black spot* eliminated"[37] (emphasis added).

The Secretary for Lands raised a different concern. The value of each owner's share ranged from £38 to £136. The Secretary noted that the legal costs to the owners would wipe out their profits:

> If we proceed to expropriation and the matter has to go to a Water Court, the unfortunate natives will get practically nothing at all for their land".

He felt compelled to inform the SNA of the financial implication so that "you may give the question of expropriation further consideration".[38]

In 1940, the Central Land Board estimated the value of the land owned by the six Africans at £1 per morgen, or a total of £374.10.0. This valuation was less than the £420 paid by the owners in the 1910s. However, the Lands Department did add money for improvements and a 20% premium for "loss and inconvenience". Thus, the range of the complete offers, depending on the size of the owner's share, ranged from £45.12.0 to £163.16.0 (the figures cited in the previous paragraph did not consider the 20% premium). For the purpose of this discussion, I shall refer only to the land values. The allowances for the improvements did not change in the 1940s, and the 20% premium would relate to the land value. This Central Land Board figure was based on an valuation of the African owned section only.

H.A. Melle, the Assistant Director of Native Agriculture, contended that a distinction should be made between the value of grazing land and the potentially greater value of agriculture land *if* irrigation was available, because he believed that it would be easy to irrigate a portion of the African owned land. Furthermore, he believed that the valuation of even the grazing land was too low.[39] Melle, therefore, recommended the following values: 30 shillings per morgen for grazing land and £10 per morgen for the part of the farm (49½ morgen) which he believed could be irrigated. Consequently, his valuation would have yielded the owners £986.18.11. The Lands Department disagreed with Melle's irrigation assumption and officials at the two Departments agreed to pursue a third evaluation, making use of an irrigation expert to evaluate Melle's belief. The hydrographic surveyor sided with the Lands Department, but the evaluators agreed that the grazing land should be valued at 30 shillings per morgen. It appears that they accepted Melle's argument

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36. NTS 3488, 220/308, Chief Native Commissioner to SNA, June 10, 1940.
37. This note is a handwritten addition to a letter from the Lands Department, GV to CC, October 23; NTS 3488, 220/308, Secretary for Lands to SNA, October 22, 1940.
38. NTS 3488, 220/308, Secretary for Lands to SNA, December 12, 1940. This point was reiterated in a later letter, Secretary for Lands to SNA, March 4, 1942.
39. NTS 3488, 220/308, Melle to Director of Native Agriculture, September 4, 1942.

that they should appraise the value of the entire portion, not just the African section; also, the land had increased in value since 1940, the year of the last appraisal.[40] The land was now valued at £561.15.0.[41] I should note that this last evaluation was completed in 1944. More time had elapsed, without any change in the situation for the owners.

The evaluation process took an interesting turn when Melle accused the Land Board of valuing the land of Africans and whites differently. He noted that at the time the Land Board appraised the African land at £1 per morgen, a white owned piece of land nearby, but of lesser quality, was valued at 30 shillings per morgen. The Secretary for Lands angrily denied this charge of prejudice. He wrote emphatically that the suggestion that the Land Board "differentiates between European and native owners ... is absolutely unwarranted", emphasizing that appraisals were "made purely on merits".[42]

The effort to settle the estates of deceased owners continued into 1947: the Native Commissioner "has been experiencing great difficulty in the administration of the estates concerned", thus preventing other legal action. The record is silent about whether or not this delay was deliberate, and whether the heirs knew about the connection.[43] The Secretary for Lands increased the pressure on the NAD, but then the very important admission: expropriation could not proceed because "the Department is not at present in a position to furnish these natives with land".[44] The South African Native Trust could not offer the Africans land "which is partly irrigable for the same amount offered for their properties, viz. £2 per morgen, as similar land purchased recently by the Trust was valued ... at considerably more than £2 per morgen".[45]

The issue was of major importance because four of the owners had agreed to an exchange if a similar piece of land, with water, was given to them. James Mboro was now willing to accept the improved offer of £2 per morgen plus 20% (£129.10.0), but Petrus Msango remained adamant: "I wish to state that I am not prepared to dispose or sell my inheritance, as this is my property and I wish to retain it", a position his lawyers reiterated in February 1948 when they said that he would legally oppose expropriation.[46]

The African owners, after 1949, agreed that the farm Troye met their needs, in part because of "tribal affinities" with the people either on or near that farm. Yet, even with an agreement about an exchange, and an increase in the amount offered for their land to £3 per morgen, a resolution anticipated that year was not finalised until 1955 for five of the owners and 1958 for the last African owner. Thirty-five years elapsed before the last piece of land was transferred to the Union of South Africa.

His this case study demonstrated "dispossession"? To what degree can discrimination be proved? How would the facts presented here be evaluated in a land court or a court of law?

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40. NTS 3488, 220/308, SNA to Secretary for Lands, February 16, 1944.
41. NTS 3488, 220/308, file 2, chart labelled "Native owned share of farm Tweefontein no. 529".
42. NTS 3488, 220/308, Melle to Director of Native Agriculture, September 4, 1942; NTS 3488, 220/308, Secretary for Lands to SNA, November 3, 1942. An apparently embarrassed SNA quickly apologised and asked for peace.
43. NTS 3488, 220/308, SNA to Chief Native Commissioner, February 8, 1947.
44. NTS 3488, 220/308, SNA to Chief Native Commissioner, February 8, 1947; NTS 3488, 220/308, Secretary for Lands to SNA, June 27, 1947; NTS 3488, 220/308, SNA to Chief Native Commissioner, July 23, 1947.
45. NTS 3488, 220/308, SNA to Secretary for Lands, March 13, 1948. The same point was emphasized in August: SNA to the Native Affairs Commission, August 11, 1948; and SNA to Secretary for Lands, September 24, 1949.
46. NTS 3488, 220/308, Native Commissioner to Chief Native Commissioner, November 17, 1947; Native Commissioner to Chief Native Commissioner, February 2, 1948; SNA to Secretary for Lands, March 13, 1948.

In short, might the descendants have a case under the Restitution of Land Act? Equally important, note that the various parties had to be found, estates had to be settled before action could be taken, and that all the owners had to agree to the government's terms before an agreement could be reached. Will the process be equally as difficult in the 1990s, especially if the actual land is not returned and either alternate land or money compensation is offered and unanimous agreement is required?

Obtaining approval for a purchase: Persistence paid off

Under the Natives Land Act, 1913, Africans could not buy land outside of the reserves. However, as suggested earlier, the Governor General could approve purchases under special circumstances, although the Act was silent on the criteria to be used. The process was not always easy, and, at times, the prospective buyers had to request permission from the NAD numerous times before approval was granted. Such is the case with a small group of Africans who wanted to buy a section of Elandsfontein 374.

In September 1927, the Acting Sub-Native Commissioner reported that eight Africans wanted to buy a portion of Elandsfontein 374 located in the center of the farm, a plot surrounded by land owned by whites. Ninety percent of the land was arable, comprised of "rich" black turf soil, "agriculturally very valuable", although the water supply was insufficient. When the weather was good, the owners could expect "a heavy yield" of maize and kaffir corn.[47] The prospective buyers had lived on portions of the farm for twenty to thirty years, land the Bakgatla-ba-Makau believed to be "old tribal ground".[48] The asking price was very high, £13 per hectares. If the purchase was allowed, these Africans would become the second African owners of portions of this farm.[49] The response was NO. An enclave "surrounded by European proprietors (was) a condition in conflict with accepted policy". Even though the tone of the letters of support from the Additional Native Commissioner was supportive and emphasized the Africans' need for land (the "urgency which exists for the production of greater quantities of food"), top NAD officials were unmoved. New requests were made for permission to sell: the seller is under "financial embarrassment" and "most anxious" to sell. Still the answer remained "not recommended".[50]

A new approach: emphasize the positive qualities of the buyers. Seven of the eight people owned 145 cattle, and three had bank savings accounts (£30, £50, £55); one woman was employed "regularly" in Pretoria. In addition, five other persons, in regular employment, were "stated to be steadily saving against the time when it is hoped by them that they will be allowed to purchase".[51]

In response to still another request in early 1932, the Secretary for Native Affairs defended the Department's position. He noted the policy "to insist upon purchasers being able to pay in cash at least fifty percent (sic) of the purchase price before they seek approval," and that these Africans could do so. Second, he pointed to the conditions of the sale, whereby the Africans promised to repay a mortgage of £1 300 at 7% on the

47. NTS 3619, 1073/308, Additional Native Commissioner to SNA, October 2, 1929; August 21, 1931; May 16, 1932.
48. NTS 3619, 1073/308, Additional Native Commissioner to SNA, October 2, 1929.
49. NTS 3619, 1073/308, Acting Sub-Native Commissioner to SNA, September 21, 1927.
50. NTS 3619, 1073/308, SNA to Additional Native Commissioner, October 14, 1929; Additional Native Commissioner to SNA, October 30, 1930; Native Affairs Department Memorandum, November 1, 1930, and additional note which referred to the purchase being against "present policy".
NTS 3619, 1073/308, Additional Native Commissioner to SNA, August 21, 1931.

outstanding balances within five years, "which would seem to be within the capacity of very few Natives".[52]

The Additional Native Commissioner again wrote to support the application. "I am satisfied that they (the buyers) are genuine in their intentions and should be able to meet their liabilities each year if not totally then at least partially". Then candidly, he added, "much will depend upon what is gained from the land which, as already reported, is rich ... it is largely upon their expectations of good crops that the natives hope to meet their liabilities".[53] Meanwhile, other actions contributed to improving the case and added other elements to this picture. The land was going to be registered in the name of the Minister of Native Affairs in Trust for the Bakgatla-ba-Makau, under their Chief, Alfred Motsepe, and not in the names of the individuals who paid for the property. However, those who paid would have exclusive rights to the use of the land. The Bakgatla, therefore, had to approve of the transaction, and, in theory, the Bakgatla would be responsible for the debt if the fifteen buyers defaulted. The leaders of the Bakgatla-ba-Makau agreed to support the purchase, but not before tensions were resolved. Bakgatla leaders resented the fact that purchasers had not consulted the Chief and Council before they began their negotiations to buy the land, "and angry remarks were made at what was thought to be a deliberate intention on the part of the buyers to disassociate themselves from the Tribe ..." In addition, the leaders "made it clear" that the Bakgatla would not, under any circumstances, be responsible for the debt.[54] This important caveat was written into the Executive Council Minutes approving the purchase, and it was to be inserted in the mortgage agreement.[55] At last: "Under the circumstances the Minister ... is prepared to waive the 50% requirement and approve of the purchase".[56] After almost five years of effort to obtain official government sanction, fifteen Bakgatla purchased a portion of the farm, measuring just over 283 hectares for £2 600 (at a cost of £9.7.8 per hectares).[57]

A second example presents a different picture, one where the Africans involved maneuvered the government into reluctantly approving the purchase. I shall only briefly describe the circumstances to illustrate this point.

In 1919, over one hundred members of the Bakwena-ba-Magopa agreed to buy an undivided 11/60th share of Portion A (1076 hectares, 415 square roods) of Elandsfontein 204. Only after signing a contract and paying a substantial down payment did the prospective buyers seek government approval. The original deed of sale was signed on March 1, 1919, but the request for approval came about one year later.[58] NAD officials deemed the price, £4 per hectares, to be high. During the following years, while the government debated whether or not to approve the purchase, the buyers paid about £1 800 on account and physically took possession of the land. The Pretoria magistrate and Native Commissioner was not particularly favourable to the Bakwena: my experience "is that they

52. NTS 3619, 1073/308, SNA to Additional Native Commissioner, May 12, 1932.
53. NTS 3619, 1073/308, Additional Native Commissioner to SNA, May 16, 1932.
54. NTS 3619, 1073/308, D. Jenner to Roux and Jacobsz, May 14, 1932; NTS 3619, 1073/308, Additional Native Commissioner to SNA, May 16, 1932.
55. NTS 3619, 1073/308, Executive Council Minute, July 11, 1932; Typed addenda, May 27, 1932 to NAD Memorandum dated May 16, 1932.
56. NTS 3619, 1073/308, Executive Council Minute, July 11, 1932; Typed addenda, May 27, 1932 to NAD Memorandum dated May 16, 1932.
57. Deed 5262/1932, August 3, 1932.
58. NTS 3426, 26/308, Sub-Native Commissioner to Native Commissioner, July 30, 1920; Clark & Solomon (lawyers) to SNA, October 20, 1920. In 1922, the SNA complained that "negotiations had been entered into by the Natives without reference to yourself or this office ..."; SNA to Sub-Native Commissioner, April 29, 1922.

are the slackest of all Native Tribes in this District and under the weakest domestic control". He furthermore suggested that they might not understand the high debt burden facing them, "the large financial obligation which they appear to so lightly entertain".[59] NAD officials also rejected the application because Africans and whites would own the farm in undivided shares.[60] However, the Secretary for Native Affairs was very worried about the large down payment and the chances for this money being returned if the purchase was not approved; since the entire transaction was illegal, they might not win in court. Therefore, even though the Secretary for Native Affairs still believed the price to be excessive, he relented and offered to approve the sale if the current owner arranged for the partition of the farm.[61] After certain formalities were completed, the sale was completed.[62]

Debt

One historical perception is that, before 1948, many Africans lost their land because of foreclosures, a result of an inability to meet their mortgage payments. Among my sample of farms there is more evidence of the mortgage being paid than not.[63] Nevertheless, mortgage debt was a problem, and farms were foreclosed. The reasons for failing to meet obligations varied according to the group, but the economic impact of drought was often cited as a major cause. In addition, a downturn in the prices for cattle could be a problem, as well as the debtors being overextended or being expected to pay off the mortgage too quickly (in comparison with their normal income expectations). NAD officials carefully watched the progress of mortgage payments for African-owned farms, and the manuscript record in Department files sometimes includes frequent requests (sometimes monthly) for information about progress in paying off a particular loan. The degree of sympathy among NAD officials for the owners varied, but Department policy was to prevent eviction of the Africans.

The same buyers discussed above, on Elandsfontein 374, who spent almost five years gaining approval for their purchase, ran into financial difficulties almost immediately. They were unable to meet their obligation to the seller, and they did not meet their scheduled payments to the mortgage holder on time. In the long run, arrangements were made to help them, so that they did not lose the farm. The following discussion concerns this process, although all the details are not available. What emerges is information about several options which government could have followed to assist the Africans, including the possibility that

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59. NTS 3426, 26/308, Magistrate and Native Commissioner to SNA, August 3, 1920.
60. NTS 3426, 26/308, SNA to Sub-Native Commissioner, April 29, 1922.
61. NTS 3426, 26/308, SNA to Sub-Native Commissioner, April 29, 1922.
62. NTS 3426, 26/308, Sub-Native Commissioner to SNA, November 19, 1924. Deed 1284/1926, February 12, 1928. The farm was purchased by 103 Africans, held in Trust by the Minister for Native Affairs. The purchase price was £4 192 and the mortgage was £2 355.
63. NTS 3498, 273/308, Sub-Native Commissioner to SNA, October 2, 1917, where he notes that the mortgage was paid off ahead of schedule for *Syferpan 612*; NTS 3533, 431/308, Chief Native Commissioner to SNA, November 10, 1936, for *Wildebeeskuil 8*; NTS 3549, 538/308, Chief Native Commissioner to SNA, September 28, 1936, for *Witlaagte 445*, portions A and D; NTS 3609, 981/308, Chief Native Commissioner to SNA, May 4, 1939, June 21, 1939, for one portion of *Buffelsdoorn 185*; NTS 3499, 278/308, Native Commissioner to SNA, January 20, 1942, for *Elandsfontein 374*, paying off the debt incurred in the Water Court case; NTS 3562, 614/308, Additional Native Commissioner to Taylor & Geerling, June 14, 1945; Additional Native Commissioner to SNA, August 13, 1945, for *Kalkbank 112*, portion B; Deed 4002/1913, for Portion B of *Elandsfontein 374* purchased by Moemise Motsepe.

the government take cession of the mortgage, arrange an interest rate reduction or a subsidy under the Farm Mortgage Interest Act, No. 34 of 1933, or, after 1936, give a loan from the South African Native Trust. Once again, officials in the field demonstrated a concern for these Africans and encouraged NAD officials to help, because the African owners were "hardworking, respectable persons, who make good use of their opportunities and have made every endeavour to meet their obligations".[64]

The Secretary for Native Affairs was right when he predicted that paying off a £1 300 mortgage at 7% interest in five years was "within the capacity of very few natives".[65] The original purchase price was £2 600. The buyers paid £680 to the seller as a down payment, and £1 300 from their mortgage, leaving a balance of £620, which they did not pay, as anticipated, on August 30, 1932. By October 1937, even though the Africans had paid £1 220.0.7, their debt was still £1 335.2.11.[66]

Because the owners were attempting to meet their obligations, NAD officials looked for means to help them. One official asked if these Africans were eligible for assistance, through a reduction in the interest rate, under the Farm Mortgage Interest Act, No. 34 of 1933,[67] since the Act had been interpreted to include Africans. There was also a possibility for a subsidy under the same law, and, in fact, they received a subsidy between July 1, 1933 and July 1, 1935.[68] This assistance was granted after it was agreed that the owners were, in fact, farmers under the definition in the Act, even though they also worked in the cities "to supplement" their agricultural earnings: "their principal means of livelihood is what they produce".[69] In 1937, the owners applied to the South African Native Trust for "an advance" of £1 360, to pay off the seller and the mortgagor, a request supported by both the Native Commissioner and the Chief Native Commissioner.[70] The initial reaction of Department officials was favourable: a note on the memo written the same day stated: "This seems a deserving case". But, technicalities stood in the way because the land was not in an area where new land was available for purchase by Africans under the Native Trust and Land Act, 1936, "an advance from Trust funds is precluded - vide section 9(1)(E) of the Act".[71] I have no further details about the means used to solve the owners' dilemma, but they did not lose their land to foreclosure. It was still in their hands in 1948.

The fate of the owners of Elandsfontein 204, also discussed above, was different. Since the people were mired in debt, the NAD let the mortgagor foreclose on the land, which was sold at auction. However, the Africans were not forced to move because the government purchased the farm, to prevent the land from returning to white control.

Portion A of Elandsfontein 204 "is tolerably well watered, contains fair arable lands, and

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64. NTS 3619, 1073/308, Additional Native Commissioner to SNA, November 18, 1933; Acting Additional Native Commissioner to SNA, November 2, 1934; Chief Native Commissioner to SNA, October 3, 1937.
65. NTS 3619, 1073/308, SNA to Additional Native Commissioner, May 12, 1932.
66. NTS 3619, 1073/308, Chief Native Commissioner to SNA, October 8, 1937.
67. NTS 3619, 1073/308, Acting Additional Native Commissioner to SNA, November 2, 1934. He also expresses his concern that the mortgagor might call the bond and foreclose if forced to reduce the rate.
68. NTS 3619, 1073/308, NAD Memorandum, October 13, 1937.
69. NTS 3619, 1073/308, Native Commissioner to Receiver of Revenue, December 21, 1934; NAD Memorandum to the SNA, January 3, 1935.
70. NTS 3619, 1073/308, NAD Memorandum, October 13, 1937. The application was under Regulation 59, Government Notice 494, published April 2, 1937.
71. NTS 3619, 1073/308, Handwritten notes to NAD Memorandum, October 13, 1937, dated October 13, 1937 (by E. Garthorne) and October 19, 1937 by the SNA, D.L. Smit.

is fenced".[72] However, drought had been a problem in 1927, and the African owners were having difficulty meeting their financial obligations. The mortgagor, the widow of the seller, threatened to call in the mortgage because she was "entirely dependent on the interest" and none was being paid.[73] In March 1928, the buyers still owed a capital balance of £1 906; unpaid interest for 1927 equalled £116.19.9.[74] One Native Commissioner was quite unsympathetic: "any sympathetic assistance extended to these natives will not be appreciated nor will the prospects be in anyway improved of inducing them to wipe off their liability".[75] However, the Assistant Native Commissioner in Hammanskraal believed the leaders of the African owners when they confessed that they could not raise sufficient money even to meet the interest payments because " many of the buyers have got nothing while others refuse to believe that the ground will be sold". At least 27 (out of 103 owners) of those without funds were widows. Those who could afford to pay had already contributed substantial amounts, "in fact (have) been bearing the burden of the transaction all along". He recognised that a foreclosure "cannot be avoided". Nevertheless, he hoped that the NAD would buy the farm, because "it is obviously undesirable that the portion in question should revert to European ownership".[76] The land was attached on January 5, 1929 and sold by order of the Court on March 9, when the Department of Lands bought it for £1 925.[77] The Africans continued to live on the farm, paying rent to the government. Should these Africans be considered as having been dispossessed in 1929? Would they have a case for restitution?

Conclusion

In the later 1990s, how will the government handle the land question? What are the restitution possibilities? When a claim is determined to be valid, what will the government be able to do? There are three main possibilities (as described under the Restitution of Land Rights section of the Constitution): return the actual land, offer alternate land or offer appropriate compensation. Another section of the Interim Constitution, however, safeguards property already owned by private individuals:

Section 28: (under Fundamental Rights) Property:

2. *No deprivation of any rights in property shall be permitted otherwise than in accordance with a law* (Emphasis added).
3. Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation.

President Mandela has promised that white owned land will not be confiscated. When he signed the Restitution of Land Rights Act, he said: "There is no need for the widespread concern that we have found from the farming community. They have nothing to fear. Restitution can be done without depriving people who already have property". Then Mandela added: "This Act has led to a great deal of concern especially on the part of white

72. NTS 3462, 26/308, Additional Native Commissioner to SNA, November 7, 1928.
73. NTS 3462, 26/308, Lawyers to SNA, February 1, 1928, February 13, 1928.
74. NTS 3462, 26/308, Lawyers to SNA, March 8, 1928.
75. NTS 3462, 26/308, Additional Native Commissioner (Pretoria) to SNA, November 7, 1928.
76. NTS 3462, 26/308, Assistant Native Commissioner (Hammanskraal) to Native Commissioner, November 8, 1928.
77. Deed 3471/1929, March 12, 1929.

farmers, who feel that they are threatened, that they are going to lose their farms. There is nothing of the sort (planned)". And the Minister of Land Affairs, Derek Hanekom referred to expropriation as a possibility only in "rare instances" and promised that if it occurred, "it would be done in consultation with the people involved and with full compensation".[78] How much money can the government afford if these rare instances are considered? Thus, return of the original land to the original owners will probably not be possible in many cases.

Is there alternate land available? The government owns substantial amounts of land (perhaps one million hectares) which could be used as compensation for claims. It is also possible that some white farmers, particularly those who are close to bankruptcy, might be willing to sell their property if the right financial incentives were offered. In 1936, the government authorized an increase in the available land for Africans. During my research I found a number of letters from white farmers, written during the late 1930s, offering their land to the government. Perhaps this pattern might repeat itself in the 1990s.

Will today's claimants be willing to accept alternative land? My evidence from the pre-1948 period found that farmers were willing to accept exchanges. Did this suggest flexibility on their part? Realism? The record is silent. But, I also noted that the Africans considering exchanges were tough bargainers, carefully evaluating the new land and its water resources, cautiously examining the similarities to what they owned. Might this occur against in the 1990s?

How will the intricate details be addressed? How will all the surviving owners or their descendants be located? Will it be difficult to identify heirs in a country where the writing of wills by Africans has not been the usual practice and marriage records may not be available? In addition, if the settlement involves alternate land or monetary compensation, will the large numbers of owners of one piece of land have trouble agreeing on an acceptable form of compensation? The process could go on and on and on.

The implementers of apartheid after 1948 unjustly and heartlessly took land away from Africans. The Mandela government must make amends to these people or their descendants. I hope, however, that the claimants understand the limitations of the current process. Also, because of the evidence I have presented, I believe that great caution is necessary in evaluating claims from the period 1913 -1948. I worry, therefore, that the government may be unwisely raising expectations, with the possible consequence of promoting negative feelings towards government and the courts among those people who lose their claims or receive less than they had anticipated.

Other problems in South Africa will receive greater publicity, such as education, housing, and health care. However, there is no question that the land issue is a very important subject. Because it is highly emotional and very sensitive, Mandela, Hanekom, and especially the members of the Commission on the Restoration of Land Rights and the Land Claims Court must proceed with extreme caution. Everything they do, every decision they make, must be *perceived* as fair. Perception, in fact, may be more important than results, because if what I have just described is accurate, the results may be disappointing for many people.

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78. *The Star International Weekly*, Nov. 17-23, 1994, p. 4.