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13 May 2013

COMMENTS

to the

CHIEF DIRECTOR: PUBLIC POLICY DEVELOPMENT
DEPARTMENT OF PUBLIC WORKS
(Mr Manyane Chidi)

about the draft

EXPROPRIATION BILL, 2013
[made known under Notice 234 of 2013]

Introduction
The Free Market Foundation of Southern Africa (also referred to here as 'the Foundation' or 'the FMF') submits written comments as follows on the draft Expropriation Bill, 2013 (hereinafter also referred to as 'the draft Bill', 'the proposed Bill' and 'the Bill').

The proposed Bill with accompanying explanatory memorandum was published by General Notice in the *Government Gazette* in March 2013 for public written comment.[1]

Extended deadline for comment
A further General Notice[2] has extended the closing date for comments to Monday, 13 May 2013.

Executive summary
The current expropriation statute authorises expropriation of property for public purposes. The Constitution would also permit expropriation in the public interest. The Bill seeks to exploit this, in authorising expropriation of property for a public purpose or 'in the public interest'.

The 'public interest' is a wide, uncertain and elusive general concept. The Bill does not define the 'public interest' in the context of expropriations. This undefined notion of the 'public interest' will confer power to expropriate private property untrammelled by any guiding principle. It will become an exercise of discretion and subjective value judgment.

The 'public interest' will be used to benefit private individuals, even more than at present in expropriations for 'public purposes'. The 'public interest' would be at risk of being used to expropriate property for the benefit of individuals who are not in financial need but are politically well-connected.

The Bill repeats the wording from the property clause in the Constitution, that the amount of compensation must have regard to relevant circumstances of which the market value of the property is but one. We point out that the courts still say that the word 'compensation' would be a mockery if what was paid did not compensate. There is no logical reason why a landowner whose property is expropriated for a worthy constitutional purpose such as land reform should receive less compensation than one whose property is expropriated for a more-mundane purpose such as a storage dam, school or hospital.

We submit that the government, instead of seeking further powers to take over still more private property, should immediately redistribute its own land. The government owns some five to fifteen million parcels of land in historically-black rural and urban areas. The government could immediately redistribute them to existing occupiers at little cost. This would result in millions of new landowners.

Improvement over 2008 Bill
This draft Bill of 2013 is a partial improvement over the 2008 Bill.[3]

This 2013 Bill appears to be largely in line with the provisions in the property clause in the Bill of Rights dealing with expropriation of property and compensation.[4] These are often emotive and vexed questions.[5]

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1 Notice 234 of 2013 in *Government Gazette* 36269 of 20 March 2013.
2 Notice 449 of 2013 in *Government Gazette* 36437 of 6 May 2013.
3 Expropriation Bill 16 of 2008. In terms of that Bill, for example, the determination by an expropriating authority of an amount of compensation for expropriation of property would not have been subject to appeal to court, but would instead have been treated as final administrative action subject only to an ambiguous and seemingly restricted power of judicial review (clause 24 read with clause 18(4) of that Bill). The 2008 Bill was withdrawn before enactment.
4 Constitution, 1996, s 25(2) and (3).
5 Nevertheless, the Constitutional Court has stated that these provisions in the property clause in the Bill of Rights appear to be widely accepted as an appropriate formulation of the right to property, and cannot be said to flout any universally

(The property clause in the Bill of Rights also deals with land restitution.[6] We touch on this again below.)

Bill does not define 'public interest'

The 2013 draft Bill states that the Minister may (subject to compensation) expropriate property for a public purpose or in the 'public interest'.[7]

The Bill's definition of 'public interest'[8] fails to clarify what is meant by the expression 'public interest'. All that the definition does, unhelpfully, is repeat the Constitution's open-ended wording that the public interest 'includes' the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.[9]

This undefined notion of the 'public interest' will confer the power to expropriate private property untrammelled by any guiding principle of what constitutes the 'public interest'.

The 'public interest' is a wide and uncertain term,[10] an elusive[11] general commendatory concept used in selecting and justifying public policy, with no general or descriptive meaning applicable to all policy decisions.[12]

In disputes involving land-restitution claims[13] it involves a weighing or balancing of private interests on the one hand and public interests on the other.[14] This is essentially a discretion requiring the exercise of a value judgment.[15]

'Public interest' expropriations will benefit private individuals

The 'public interest' will be used to benefit private individuals, even more than at present[16] in expropriations for 'public purposes'.[17]

'Public interest' expropriations will benefit the undeserving

The 'public interest' will be used to expropriate property for the benefit of individuals who might not be financially needy or deprived in any way.

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accepted approach to the questions of expropriation and compensation: *Ex parte Chairperson of the Constitutional Assembly, In re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 CC paras 71–73.

6 Section 25(8), stating that no provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination.

7 Bill cl 3.

8 Bill cl 1(1) definition 'public interest'.

9 Constitution s 25(4)(a).

10 *Asko Beleggings v Voorsitter van die Drankraad NO* 1997 2 SA 57 NC, in the context of the Liquor Act 27 of 1989.

11 *Ex parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan area & Another* 1998 1 SA 78 LCC para 11.

12 Although it can be determined for particular cases: Flathman *The Public Interest* 1966 p 82 at 293.

13 Under the Restitution of Land Rights Act 22 of 1994.

14 *Nkomazi Municipality v Ngomane of Lugedlane Community and Others* 2010 3 All SA 563 LCC para 9.

15 *Khosis Community at Lohatla and Others v Minister of Defence and Others* 2004 5 SA 494 SCA para 8.

16 Under the current Expropriation Act 63 of 1975 s 2(1).

17 The notion of a 'public purpose' already allows expropriation of property to be developed by non-profit companies or government entities: *Offit Farming Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2010 2 All SA 545 SCA para 16. The 'public purpose' notion also allows expropriation of one private person's property for the benefit of another, provided the expropriation is connected to some official public purpose. Thus a power to expropriate land for roads purposes and for purposes 'in connection with' roads authorises an expropriation of one private business's property for a public roadway and, connected with this, for a private railway line benefitting another private business: *Administrator, Transvaal and Ano v J Van Streepen (Kempton Park) (Pty) Ltd* 1990 4 SA 644 A 661.

The risk exists that individuals will benefit from the privilege only because they are politically well-connected. It will also become increasingly difficult to stop irregular expropriations. Property will be expropriated, ostensibly to achieve an objective in the 'public interest', but actually with the motive of benefitting private individuals.[18]

Compensation under current statute is market value

Under the current expropriation statute,[19] the measure of compensation to the expropriated person is the market value of the expropriated property.[20]

The purpose of compensation under common law, and as recognised internationally, is to place in the hands of the expropriated owner the full money equivalent of the thing of which he or she has been deprived.[21] The word 'compensation' would be a mockery if what was paid was something that did not compensate.[22] The purpose of compensation is to place in the hands of the expropriated owner the full money equivalent of the expropriated property.[23]

Compensation will be principally based on market value

Under the property clause in the Constitution, the amount of compensation must be 'just and equitable', reflecting an 'equitable balance' between the public interest and the interests of those affected, having regard to all 'relevant circumstances', including the market value of the property, 'the history of the acquisition and use of the property', and 'the purpose of the expropriation'. [24]

The Bill repeats this wording from the property clause in the Constitution.[25]

The courts still take the view that the market value of the property is an important circumstance to take into account when deciding just and equitable compensation.[26]

It is true that the Constitution does not give market value a central role. The Constitutional Court has observed that, viewed in the context of our social and political history, questions of expropriation and

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18 The motive or aim for doing something is not the same as the objective in doing it. (But an improper motive may show that the objective of an expropriation is to further another objective which is plainly beyond the powers of the expropriating authority and which is so inextricably linked to the objective of the expropriation that it infects the expropriation itself with illegality: *AECI Ltd and Another v Strand Municipality and Others* 1991 4 All SA 889 C 891(8).)

19 Expropriation Act 63 of 1975.

20 The amount of compensation to be paid in terms of the statute to an owner in respect of property expropriated in terms of the statute must not exceed the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer: Expropriation Act s 12(1)(a)(i), and an amount to make good any actual financial loss caused by the expropriation: s 12(1)(a)(ii).

21 Erasmus et al *The Law of South Africa* vol 10(3) 'Expropriation' (A Gildenhuys & G L Grobler) para 51.

22 *Birmingham City Corporation v West Midland Baptist (Trust) Association (Incorporated)* 1970 AC 874 HL 904.

23 *Nelungaioo Pty Ltd v Commonwealth of Australia* 1948 75 CLR 495 HCA 571.

24 Constitution s 25(3). The full text of s 25(3) reads:
(3) 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 interests of those affected, having regard to all relevant circumstances, including—
(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.

25 Bill cl 13(1).

26 *Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others* 2012 ZALCC 7 LCC para 52.

compensation are matters of acute socio-economic concern and 'could not' have been left to be determined solely by market forces.[27]

However, the approach of beginning with the consideration of market value and thereafter deciding whether the amounts are just and equitable is often the most practical method, since it is one of the few factors which is readily quantifiable. Thereafter, an amount may be added or subtracted as the 'relevant circumstances' may require. Actual financial loss can play a similar role.[28]

Relevant circumstance: the history of the acquisition and use of the land

The courts recognise that awarding the rich lower compensation violates the principle of equality (rich people should not be considered second-rank citizens in expropriation matters). One should not distinguish between 'rich' landowners and others in the determination of compensation.[29] If public policy favours taxing wealth, this should be accomplished directly under the taxation power, and not through the backdoor disguised under the cloak of expropriation power.[30]

Relevant circumstance: the purpose of the expropriation

It has been argued by some that the intention of making the purpose of an expropriation a factor to be considered in the determination of just and equitable compensation is to reduce the compensation payable. It is suggested that, if the purpose of the expropriation is (for example) to achieve land reform to redress the results of past racial discrimination[31], it is possible that the compensation for expropriation could be reduced if beyond the state's resources.[32]

Other commentators disagree, saying that, since the purpose of the expropriation (eg land reform) is already taken into account in justifying the expropriation, it should not be enough to override other factors in determining the amount of compensation.[33]

The courts have sided with the latter argument. They have seen no logical reason why a landowner whose property is expropriated for purposes of land reform should receive less compensation than a landowner whose property is expropriated for a more mundane purpose such as a storage dam, school or hospital. Land reform in the public interest does not rank superior to any other legitimate purpose for which property may be expropriated, and the determination of compensation in cases of land reform must not be different. The fact that land may be expropriated for restoration purposes cannot by itself warrant a smaller amount of compensation than would have been payable to the landowners if the land had been expropriated for any other purpose.[34]

Authoritarian powers of entry and interrogation

The proposed Bill would give an expropriating authority's investigating officer powers of entry onto private property to gather information for purposes of expropriation, with powers to enter the property

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27 *Du Toit v Minister of Transport* 2006 1 SA 297 CC par 37.

28 *Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs* 2000 2 All SA 26 LCC par 35.

29 *Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others* 2012 ZALCC 7 LCC para 61.

30 Per Mexican jurist Guillermo F Margadant at conference of United Kingdom National Committee of Comparative Law, Oxford, 2–4 August 1990: *Compensation for Expropriation: a Comparative Study* vol 1'Expropriation in Mexico' 263 277 (Oxford, 1990).

31 See Constitution s 25(8).

32 Davis et al (eds) *Fundamental Rights in the Constitution* 'Property' T Roux 255.

33 A J van der Walt *Constitutional Property Law* 3 ed 507.

34 *Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others* 2012 ZALCC 7 LCC para 73.

without the consent of the owner or person apparently in charge of the land,[35] and to interrogate the owner or person apparently in charge of the land for purposes of valuing the property.[36]

These clauses of the draft Bill should be reconsidered for their likely violations of constitutional rights to dignity[37] and privacy.[38]

Improvements to preserve property after notice of expropriation should be taken into account in determining amount of compensation

The Bill says that, in determining the amount of compensation to be paid, the expropriating authority must not take account of improvements made on the property in question after the date on which notice of expropriation was served upon the claimant, except where they were agreed to by the expropriating authority or where they were undertaken in pursuance of obligations entered into before that date.[39]

This should be adjusted to take account of improvements made on the property after the date of notice of expropriation, where they were necessary for the proper maintenance of existing improvements. (The current expropriation statute takes these necessary improvements into account.[40]) It is prudent for an owner after receiving notice of expropriation to continue making improvements necessary to maintain his existing improvements: an expropriating authority can withdraw its expropriation.[41]

Clauses forcing expropriated owner to preserve property, and reimbursing only his agreed unusual expenditure, might be unfairly applied

The draft Bill would force an expropriated owner to take care of and maintain the property until the expropriating authority takes possession of the property.[42] (The current Expropriation Act is to similar effect.[43])

If the owner in possession wilfully or negligently fails to take care of and maintain the property and as a result the property 'depreciates in value', the expropriating authority may recover the amount of 'the depreciation' from the expropriated owner.[44] (The Bill thus recognises the importance of the market value of property, if only when it becomes government property.)

The expropriating authority must compensate an owner who thus takes care of and maintains the property until the expropriating authority takes possession, but only for 'unusual' maintenance costs, and only such costs as 'may be agreed' by the expropriating authority with the owner.[45]

We understand that the owner might be receiving full value for the property and so should continue with its reasonable care and maintenance. But this should be made clear to avoid abuse and unfair treatment in individual cases.

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35 Bill cl 6(2)(b)(ii). The current expropriation statute contains a similar provision in connection with entry to buildings and enclosed yards: Expropriation Act 63 of 1975 s 6(1).
36 Bill cl 6(2)(a)(ix).
37 Constitution s 12.
38 Constitution s 14.
39 Bill cl 13(2)(d).
40 Expropriation Act 63 of 1975 s 12(5)(d).
41 Bill cl 24.
42 Bill cl 10(3)(a).
43 Expropriation Act s 8(4).
44 Bill cl 10(3)(b).
45 Bill cl 10(3)(c).

Government should redistribute its own land
We respectfully submit that the government, instead of seeking further powers to take over still more private land, should immediately redistribute its own land.

The government owns some five to fifteen million parcels of land (estimates vary) in historically-black rural and urban areas. The government could immediately redistribute them all to existing occupiers at little cost. This would result in millions of new landowners.

We recommend that all land parcels lawfully or permanently held by black South Africans on government- or municipal-owned land should be summarily converted to full unambiguous freely-tradable ownership at zero cost to beneficiaries. All other government land not needed for public purposes should also be privatised. A small proportion of superfluous government land will suffice to provide, free, to all landless and homeless South Africans the full unambiguous freely-tradable ownership of a plot of urban residential land or viable agricultural land.

And the government should allow private owners with informal settlements on their land to convert that land, through private contracts with occupiers, to full unambiguous freely-tradable ownership, with nominal red tape and cost.

We also recommend that all community, traditional and tribal land should be unambiguously and democratically owned and controlled by the people concerned, who should be allowed to give to all lawful occupants who so wish the plots they hold, in full unambiguous freely-tradable ownership.

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About the Free Market Foundation
The Free Market Foundation (FMF) is an independent non-profit policy organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships. The Foundation is a registered Non Profit Organisation and a Public Benefit Organisation with Section 18A(1)(a) approval.

ADDITIONAL COMMENTS

to the

CHIEF DIRECTOR: PROPERTY POLICY DEVELOPMENT
DEPARTMENT OF PUBLIC WORKS
(for the attention of Mr. Manyane Chidi)

about the draft

EXPROPRIATION BILL, 2013

Introduction

Secure property rights represent one of the most important requirements for the protection of both economic freedom and civil liberties.

South Africa's "land acts" are often regarded as the cornerstone of apartheid, the aspect of South Africa's "crime against humanity" that made the biggest single contribution to psychological, political and material dispossession of black South Africans. The "land question" remains one of the most problematic and conflict-provoking aspects of post-apartheid South Africa. The "land debate" consists primarily of an acrimonious discourse about land redistribution from whites to blacks, which is so overpowering that scant attention is paid to other aspects that have greater potential for black economic empowerment.

Black South Africans constitute 80% of the population and live primarily on urban "plots" which they hold under a range of limited forms of tenure. The balance live on plots or farms in rural "tribal" areas (formerly "homelands"), also under a range of forms of tribal tenure. Around 3.4 million black families have been housed in RDP houses where pre-emptive clauses distinguish their ownership from that of whites. A small but growing number of blacks live in historically "white" areas.

Nineteen years after transition to predominantly black rule, most black South Africans still live under the legislative progeny of the Land Acts.

Additionally, the present regime inherited the massive loot of the apartheid government in the form of extensive government-owned land. This land is unutilised or underutilised, and, therefore, is readily available for redistribution to landless blacks.

The FMF proposes that:

1. All black occupied council-owned urban plots be converted to full ownership ("freehold").

2. Superfluous government land be redistributed to the victims of apartheid as a substantial once-off compensation for the crime of apartheid.

3. Pre-emptive clauses be removed from existing and future RDP titles.

4. In tribal areas, communities be allowed to grant private title over homesteads while maintaining communal rights over arable land.

5. The Subdivision of Agricultural Land Act, 70 of 1970 be repealed because it would make it easier for poor individuals to finance smaller, more affordable plots of land. Furthermore, lowering the statutory costs of subdividing and transacting farmland would allow commercial banks to finance lower income individuals' applications.

<u>Note</u>: The Constitution and legislative provisions relating to the expropriation of land adequately deal with this issue and should not be changed. The purpose of the proposed change is obviously intended to reduce the cost of expropriations and impose the difference between the real value of the land and the amount to be paid in terms of the proposed legislation as an ad hoc tax on the land owner. There is no economic or legal justification for taking such an action.

There are better alternatives for dealing with the deprivation of land and the question of poverty than taking land from productive farmers in the manner envisaged. The proposals incorporated in this document describe some of those alternatives.

Converting black occupied council-owned urban plots to full ownership: The "Perryville" example

"Perryville" is a municipal area covering various towns. It prides itself on the extent to which it has implemented land "transformation" for black South Africans. Virtually all black-occupied land has been properly surveyed, included in town planning schemes, proclaimed and registered in the deeds registry. "Perryville" municipality has resolved to become the first urban area in South Africa where all land is held under full freehold on the basis of complete equality between whites and blacks.

Because most formalities have already been complied with, conversion to ownership is relatively easy, at least conceptually. Even so, there are substantial obstacles of the kind that bedevil land ownership in the third world. Firstly, substantial sums in arrear rents, rates and taxes are owed to the municipality, sometimes far in excess of the value of the land. Although these sums are unlikely ever to be paid, they are reflected in the municipal accounts as assets. If they are written off to allow for tenure upgrade, the municipality will be technically insolvent and in breach of local government management legislation. Secondly, there are a host of professions wanting their slice of the cake: town planners, property lawyers, land surveyors, development consultants.

"Normalisation" in "Perryville" can be achieved only if the council breaks with convention in fundamental ways. To solve its accounting problem it was suggested that land-related debts be severed from the land and converted in the council's accounts to civil debts so that "clearance certificates" could be issued on all land regardless of debt to the council. It was also suggested that the council would have to be willing to grant full title without the prohibitively costly intervention of the professions.

FMF is working with "Perryville" to convert 33,000 council-owned urban plots to full freehold title thus granting black South Africans the same land rights as whites and releasing around R3bn into the local economy. We believe this project can be replicated countrywide, converting "dead capital" into "dynamic capital" and altering forever South Africa's landscape.

See Addendum 1: ***Frequently asked questions***.

Redistributing superfluous government land

Government should transfer superfluous state land to the homeless free of charge. An allocation of five hectares per landless rural family and 200 square metres per unhoused urban family would absorb only a small part of government's land holdings.

This land should be defined and allocated under a simple, low-cost form of registration, defining the boundaries by description and sketch plans, and making existing land survey and deeds registration formalities inapplicable.

Titling should be accompanied by a removal of the red tape that prevents people from building their own homes.

There are virtually no budgetary implications to this land reform option.

Thereafter draw a line in the sand regarding government responsibility re providing free housing into perpetuity i.e. thereafter, newly formed households (children getting married and setting up their own homes) and foreigners needing homes will have to buy, build or rent in a normalised market.

Removing pre-emptive clauses from RDP titles

The allocation of RDP houses remains a source of frustration. Each house is handed over to a recipient with a pre-emptive clause that prohibits the sale of the house for 8 years. Studies indicate that it is largely unenforceable and has lead to an 80% 'illegal' occupancy of RDP houses as a result of a 'grey' market in these properties.

The government's "use it or lose it" policy means that many RDP home "owners" are under a kind of house arrest. If they are unemployed, they often face a stark choice between losing their most valuable asset, their home, and getting a job elsewhere, or remaining unemployed where they are.

Note: There should be open, transparent, published waiting lists.

See Addendum 2: ***Convert all RDP housing to full and unrestricted freehold title***.

Solutions for tribal areas

Traditional leaders have indicated that they would be very keen to explore with the FMF the issue of granting secure title to the members of their communities, especially if ways can be found of bringing this about with consensus agreement on the part of community members and in a manner that will not disturb the social cohesion of the communities.

Communities generally emphasise communal rights and family rights. Titled private ownership of property must take cognisance of the cultural sensitivities and other concerns prevailing in rural communities which differ from community to community.

Raising these concerns does not mean traditional leaders in these communities are averse to legal titling and therefore "against" the interests and overall socioeconomic progress of the people and development in these communities.

The FMF is exploring innovative property titling options that take into account the sentiments of the communities while at the same time ensuring the security of tenure that comes with conventional legal titling. The FMF emphasises to all parties that there does not have to be a uniform approach to the issue in every community; that every community should have the right to decide for itself what arrangements it wishes to make in respect of property titling. One option is to grant secure title over each homestead while maintaining communal land rights over arable land.

See also…

Addendum 3: LRP (jurisprudential) and FMF (economic) ***submissions*** on Green Paper on land reform.
Addendum 4: ***Current and apartheid land-tenure restrictions compared***.
Addendum 5: ***Myths about land reform***.

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Addendum 1: Frequently asked questions

Before interrogating individual questions, the general point should be made that most concerns about and objections to blacks having indistinguishable property rights from whites, amounts to a perpetuation of the apartheid notion that blacks should be treated differently, specifically patronisingly and as if they are innately inferior. The assumption underlying most objections to conversion to full freehold is that black South Africans cannot be trusted with rights and powers taken for granted by white South Africans.

Is it right to give people free land? If they have to buy it, even at a nominal price, will they not value it more and be more likely to retain and improve it? Will free land on a vast scale not aggravate the "culture of entitlement", and encourage black South Africans to expect the government to "deliver" all their needs?

These are good questions to which there is no simple answer. The case for conversion to full freehold at no cost to beneficiaries is that black South Africans were denied land rights under apartheid and that *one-household-one-plot* can be regarded as a form of compensation for the crime of apartheid utilising black-occupied land nationalised by the apartheid regime. In other words, it should not be seen as a matter of welfare or charity, but as just compensation for harm inflicted.

Secondly, most black households have paid "rent" and "rates" which can be regarded as instalments for the purchase of their land.

It is true that many have refrained from paying since the rent boycotts as part of the anti-apartheid struggle and that massive amounts of notional debt have accumulated in government books. The fact is that it is practically impossible to unravel the mess. There seems to be no practical solution to the problem, which is compounded by massive administrative problems in the books of government departments at all three levels. The extent to which such notional debts have in any event prescribed is unclear. In most cases the land concerned has acquired its present value by virtue of investment in improvements.

Finally, by virtue of the "land ethic" amongst most South African blacks, there is a singular relationship with and attachment to the land, which includes the belief that land permanently occupied rightfully belongs to the occupant. What full freehold will do is to modernise this relationship as beneficiaries become accustomed to the idea that land is tradable and residence does not have to be perpetually fixed regardless of economic realities such as whether people want to be peasant farmers or relocate to places with superior opportunities.

If blacks are free to sell, mortgage or let their land, will they not simply dispose of it – "cash in their chips" – and become landless, indigent dependents of the state?

The fact is that a vast proportion of South Africans are presently landless in that they live on land "informally" (i.e. unlawfully). They live in informal, semi-formal, and "squatter" settlements, and in shacks in the yards of people occupying land lawfully. They live in informal and unproclaimed settlements on farms and on allotments often made without regard to legal requirements in urban, rural and traditional areas.

If someone who is a newly empowered land owner, sells or lets their land, there is presently concern about whether they should be allowed to do so given that land was allocated to them by the state. There are an increasing number of instances of land being repossessed because it is not being used to the satisfaction of the state, being let to tenants or sold informally (i.e. unlawfully).

In the discourse on the matter, there is seldom if any mention of the person who has acquired the land. There are two parties to such transactions, those who attach higher value to the land and can make better use of it and are therefore willing and able to pay more than the value the land has for the preceding occupier. That means not only that the land has been transferred to someone who attaches more value to

it, but that the land value has been enhanced not only for the land concerned but of all land in the community, the majority of which has not been alienated. In other words, such transactions benefit the vast majority of land holders.

Furthermore, those who alienate land benefit in many ways. They now have resources with which to pursue objectives that are for them of higher value, such as relocating to another town where they might get a job or start a small business. They may need the money for health or educational purposes. It makes no sense to force people to stay on land which is not of adequate value to them and which is in a place where it is inappropriate for them to reside.

There is a related concern that people who alienate land would not do so to use the proceeds sensibly. Instead of using it to relocate to somewhere where they can get a job or start a business, or to educate their children, or acquire essential health care, or whatever, they may waste the money on reckless living.

This is an obviously patronising, insulting and demeaning conception of South African citizens. It is also manifestly in conflict with reality. There will always be a few people who do not conduct their lives responsibly and forcing them to remain on an unsatisfactory plot is no solution. Fortunately the reality is very different from the fear that vast numbers of beneficiaries will sell or let their properties recklessly and destructively. On the contrary, the black land ethic is such that black South Africans are extremely, perhaps excessively, reluctant to alienate land even when it is manifestly in their interests to do so. The experience in the few places where blacks hold land under freely tradable title is that there is a minimal land market. There are virtually no "for sale" or "to let" signs and very few if any estate agents.

Instead of discouraging blacks from alienating land, what is needed is a public education campaign accompanying conversion to full freehold to encourage blacks to regard land as tradable, letable and mortgageable.

Regarding mortgages, the fear is that people will recklessly mortgage their lands to banks and others and then default on their payments and lose their land and the instalments they have paid. There are two reasons why this fear is unjustified. Firstly, mortgage grantors are reluctant to grant mortgages in low-income communities. The risks and administrative costs are far too high. This is why the government has gone to great lengths to encourage financial institutions through the financial sector charter and other means to grant mortgages in predominantly black areas. The greater interest of banks when low income communities have full freehold is that they are "bankable". The mere fact that people have a substantial tradable asset means that, without a mortgage, they qualify for a rich range of financial products and services. Secondly, there is not much demand for mortgages, which is why banks promote and encourage awareness of the mortgage option.

If it is so simple, why has it not been done?

This is perhaps the best question of all. The answer seems to be a combination of attitudes mentioned in the introduction above to the effect that blacks cannot be trusted with as much freedom and emancipation as whites, on one hand, and complex technical challenges, and perverse vested interests on the other.

The technical challenges vary depending on the nature of existing land occupation. The proposal for conversion to full freehold is that all land permanently occupied by black households should be regarded, as it technically is, as land belonging to government in one of its forms. The underlying commonality between all contexts is disposal of state land. Increasingly "title deeds" have been given or sold to blacks in urban "townships". The problem here is that in many or most there are restrictive conditions according to which land may not be freely sold, let, developed or mortgaged.

Another substantial technical problem is that for land to be owned, present law requires complex and costly preconditions and formalities including cadastral land survey, township proclamation, town planning schemes, deeds registration and conveyancing. There is no experience in South Africa of processing such substantial quantities of land. Serious consideration should be given to reforming the relevant laws so as to enable fast-tracking of at least initial titling.

Another significant technical challenge is that most local governments have as one of the biggest assets on their books outstanding rates and rents from the "townships". This can be dealt with by a combination of writing off debt from indigent households (for the simple reason that, as everyone knows, it will never be paid), writing off debt that has prescribed by effluxion of time, and converting remaining debt to civil debt so that it is delinked from the land and local governments can issue rates clearance certificates.

The principle vested interest is that of low-level officials who administer land in predominantly black areas. These officials are one of the many problematic legacies of apartheid. They can be expected to resist or sabotage land reform for the very simple reason that if blacks own their land unambiguously there will be no need for such officials in black areas for the same reason that there are none in white areas. Needless to say, land management, control and allocation in predominantly black areas is accompanied by a significant degree of real or suspected abuse and corruption. This is of great value to the officials concerned and government will have to decide what to do with them: severance packages, redeployment, etc.

Won't blacks have to start paying rates, property taxes and municipal service charges?

Conversion to full freehold does not change the law in this regard at all. Residents in predominantly black areas are presently required by law to pay whatever charges are levied on such properties. The reality is that there is a random mixture of individuals and communities that do or do not pay according to law. Many do not start paying simply because arrears (rates plus compound interest) that have accumulated since the rent boycotts amount in some cases to over R100,000. They see no point in starting to pay now because it will make very little difference to the total debt they owe and therefore the risk of foreclosure. In particular, there is no point in them paying arrears which frequently amount to more than the value of the land, so even where they are entitled to take transfer into freehold title, they do not do so.

More fundamentally, what rates and charges government decides to impose are a matter of policy regardless of the nature of occupancy or title. The most obvious policy for government is to delink the two completely, that is to determine its rates and services policies independently of occupancy and title.

The point should be made, however, that if people have full freehold title, they will be more inclined to pay rates, etc for the simple reason that they will be wealthier. If they want to sell their land, they will then have to pay whatever is due in order to get a clearance certificate. When people have freehold title they have a valuable asset, which local governments can attach, although this is not recommended.

What this all amounts to is that freehold title does not in and of itself entail any negative implication for beneficiaries as far as government charges are concerned, on one hand, but does substantially enhance the likelihood of increased government revenue, settlement of outstanding debts, and people being inclined to make payments according to law in future.

Doesn't conversion to freehold discriminate unfairly against many people?

There are many senses in which conversion to freehold could be regarded as unfair discrimination.

Firstly, and most obviously, it is a discrimination in favour of people living in predominantly black areas who will be given a substantial asset by the state, in most cases the most valuable asset they will ever own. People of all races outside these areas will not get a comparable "donation". In a perfect world with limitless resources it would be possible to investigate the circumstances of every individual and household with a view to making appropriate and just decisions. The best that can be achieved in the real world is to deal with 50 million South Africans in accordance with general rules that will have overwhelmingly appropriate consequences notwithstanding individual distortions. The legacy of apartheid is that people living in predominantly black areas are generally poorer and to a greater or lesser extent victims of apartheid, specifically land deprivation. They are therefore overwhelmingly the

appropriate beneficiaries of conversion to freehold. At a practical level, people in these areas do not have title like their counterparts in predominantly white areas, yet have invested in improving the land and thus its value although they cannot freely trade it.

A more complex ethical challenge is that people who already have permanent occupation of land (whether formal or informal) are privileged compared with people who are landless or live in shacks on other peoples land. Titling for black South Africans could therefore be seen as privileging the privileged. This is a truly serious consideration which has a particular gender dimension. Under the notorious Section 10 of the Group Areas Act, urban land was made available exclusively or predominantly to men. Land in traditional areas was and often still is allocated only to men. This means that most beneficiaries to freehold will be men and that it could be seen as unfair discrimination against women. Women were disproportionately discriminated against under apartheid as far as land is concerned. That this problem exists is no basis for denying the morality, justice, and socio-economic benefits of conversion to freehold. Whilst this is a massive part of the solution to the apartheid land legacy, it does not pretend to be an omnibus solution to all evil.

Mercifully there is a relatively simple and cost free solution to the problem of households that do not receive land on conversion to freehold. Namely to have a *one-household-one-plot* policy whereby superfluous state-owned land in urban areas is utilised for such people. The point is that the state already owns in virtually all urban areas substantial quantities of land, much of which it does not even know it owns. This is not the place to elaborate the point, but a substantial part of such land is called "reserved" land, which is land set aside in all proclaimed predominantly white townships for a full range of government purposes by property developers. Such land remains in perpetuity in the name of the developer in deeds registries and is only identifiable as state land if conditions of title are examined.

Much of this land is suitable for low-income housing. That which is not, can be used for BEE property development purposes or transferred to community owned trusts that will benefit from commercial development thereof.

The next form of apparently unfair discrimination is that all property holders will get full freehold title at no cost regardless of whether they have paid rates, rents, tax and service charges. People who have paid can be regarded as unfairly discriminated against when people who have not paid are treated equally. In a perfect world with limitless resources it would also be possible to address each case on its merits. The reality is that this is simply impossible. Even if it were possible it would delay normalisation of land ownership for decades as technocrats try to unravel the mess.

The time has come for South Africa to put an end to the apartheid land legacy by a practical and symbolic act that will probably be welcomed by all concerned even if they feel somewhat aggrieved that delinquent neighbours are enjoying the same generous treatment.

Addendum 2: Convert all RDP housing to full and unrestricted freehold title

Wouldn't it be wonderful if black South Africans had equal rights, if they enjoyed the same home ownership rights as whites, if they were emancipated, empowered and trusted, if they were presumed to be the equals of whites and no longer patronised? Wouldn't we rejoice if racism were ended, not just racism by whites against blacks, and blacks against whites, but racism by blacks against blacks? Imagine a world in which blacks stop treating blacks as if they are inferior and think they should no longer live under patronising laws which deny them the right to own and deal freely with their land.

Much fuss is made when blacks who get RDP houses that cost R50,000 or more sell them for R10,000. But, no spontaneous outrage erupts when politicians and officials announce with pride and glee the repossession of houses or farms from blacks who were not using them to their satisfaction, or who were not in personal occupation. It would make headline news if whites were treated like this.

This is not recycled news from the 1960's apartheid years; this is now, in the new 2011 aspirantly non-racial, post-apartheid South Africa.

Why is no outrage expressed? Because racism is so ubiquitous that one of its most extreme manifestations is going unobserved and unquestioned. Bureaucratic inertia may explain, but does not excuse why racially inferior land tenure inherited from apartheid is not being converted into full freehold title. Failure to do so is continuing and prolonging the Verwoerdian legacy of giving toxic RDP and redistribution title to blacks in the new South Africa and is perpetuating and exacerbating the problem.

Since 1994 about three million "RDP" houses have been allocated to black South Africans. Most or all are subject to racially discriminatory, restrictive and pre-emptive conditions. The two most common are (a) an eight-year prohibition on selling or letting, and (b) a condition that there may be only one dwelling per property. Both seem reasonable at first, but, as everyone who has anything to do with 'black townships', 'locations' and 'informal settlements' knows, the real world bears virtually no relationship to the fantasy world of planners and legislators. Experts and land audits suggest, but no one actually knows, that one half to three quarters of all RDP and other township houses are not occupied by official beneficiaries; most, in some areas virtually all, have illegal tenant shacks in the yard; and properties have been unlawfully sold, let or developed.

All major political parties have been reported as having taken back such housing. Not one major political party has been reported as calling for blacks in "black" areas to enjoy the same ownership rights as blacks who own property in "white" areas. This is especially curious since presumably no one wants the *status quo* in which most blacks live under virtual house arrest.

Most blacks are faced with the following intolerable choice: if they can get a job somewhere other than where they happen to live, which is the norm, they have to remain unemployed or abandon their most valuable asset, their house. If they choose to abandon an RDP house, it is reallocated to the next person on the waiting list (or, some believe, the next person to pay a suitable bribe), and they never get another, regardless of how compelling their reason might be for leaving. In short, they have to choose between being housed or employed. If they choose to remain unemployed, they will probably lose their house anyway because they won't be able to afford to maintain it or pay property taxes.

Most blacks ignore their lawful options and sell or let their RDP or other township house "informally". Since the law prevents them from having secure or tradable title, they are forced to sell or let at massively discounted "black market" prices. New occupiers live in a state of permanent fear that they might be caught and, with their belongings, summarily evicted onto the sidewalk.

Because of the discretionary and clandestine allocation of RDP houses, there is real or suspected corruption. In some areas people at the bottom of the list believe they will never rise to the top unless they bribe housing officials.

A common objection to black titling is that recipients of RDP housing will dispose of their houses, pocket the cash, and become homeless once more. The most conspicuous thing about this objection is that it is never raised against white rights. Why is it assumed that blacks are incapable of behaving responsibly? Why is it not assumed that people of all races who sell or let their most valuable asset do so after careful consideration? They might need the money more than the house for a host of legitimate reasons: relocating to somewhere with better employment prospects, starting a small business, educating children, or health care.

Perhaps the most bizarre aspect of this objection is the assumption that RDP houses disposed of by initial beneficiaries remain unoccupied. In truth, other blacks move in. For various reasons, the new occupants are likely to be more suitable: they have the resources to maintain or improve the house; they have upgraded from living in a slum; or they have moved to be near their place of employment.

The propensity for freely tradable assets to gravitate rapidly into optimal hands when markets are free is the 'Coase Theorem', according to which there is no need to anguish about the initial holder of assets. Provided there is no restriction on assets being exchanged, they will soon end up in optimal hands.

By far the most important first step that needs to be taken if the problem – or is it a national crisis? – is to be solved, is for the highest levels of government to decide to uproot apartheid tenure once and for all. The decision, fully backed and appreciated by the Cabinet, and purposefully championed by the President should be to immediately discontinue restrictive and pre-emptive RDP housing conditions. The effect would be that all new RDP beneficiaries would get full non-racial (white equivalent) title and property rights would no longer be racially denied.

AUTHOR Leon Louw, the Executive Director of the Free Market Foundation, has campaigned for more than three decades, starting in the depths of the apartheid era, for secure property rights for black South Africans.

Addendum 3: LRP and FMF *submissions* on Green Paper on land reform

29 November 2011

COMMENT
to the
DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM
about the
GREEN PAPER ON LAND REFORM, 2011

1. The Law Review Project

1.1. The Law Review Project (also referred to here as 'the Project' or 'the LRP') is an independent legal research organisation founded to promote the removal of unnecessary, burdensome and unduly-restrictive laws with the aim of promoting economic development.

1.2. The Project makes submissions to government for the review of legislation and proposes and formulates legislative change to achieve this aim. It is a private-sector resource to assist governments.

1.3. The Foundation is a non-profit company. It receives funding from companies, organisations and individuals who support these goals.

2. Executive summary

2.1. The Law Review Project makes the following comments about aspects of the Green Paper with Constitutional or other legal significance. The deadline for lodging comments is 29 November 2011.

2.2. We submit that it is unrealistic and over-ambitious of the Green Paper to propose that the new Land Management Commission could develop the expertise necessary to provide useful land advice and auditing services for all the various government departments, public entities, organs of state, municipalities and agencies at all three levels of government who are responsible for or interested in land. We also submit that it would be unconstitutional for this Commission to be given the power to invalidate title deeds and confiscate land as proposed.

2.3. It would also be unconstitutional if the proposed new Office of the Valuer-General purports to make final determinations of the financial compensation payable in cases of land expropriation. We observe too that, if this new Valuer-General's Office will as proposed provide land values for municipal-rating purposes, this would duplicate the valuation functions which existing municipal-rating legislation assigns to metropolitan and local municipalities under oversight of the national local-government minister. That legislation requires property valuations to reflect market values or prices if sold in the open market by a willing seller to a willing buyer. This requirement might conflict with the Department of Rural Development and Land Reform's new preferred approach with expropriations for redistribution.

2.4. We submit that it is unnecessary to establish a Land Rights Management Board to communicate legal reforms, advise rights-holders, develop land-registration systems, provide legal representation, or enforce compliance with laws. Existing government organs could do so. It is unnecessary to create a statutory framework for convening local committees to carry out these tasks; if the government wishes to communicate a legal reform or advise local rights-holders it could convene a meeting for interested parties.

2.5. We point out that it is already state policy to give land-reform beneficiaries merely lessee's rights. The government's leasing policy ties land beneficiaries to onerous lease obligations to farm the land or lose their rights. The government apparently applies similar restrictive conditions when providing urban housing. There is no security of tenure, properties are liable to forfeiture for prescribed reasons, and disposal requires official consent. We submit that the government thus in substance imposes on blacks the same land-tenure restrictions as were imposed under apartheid. Under apartheid there was no security of tenure, rights of occupation were subject to forfeiture for prescribed reasons, and disposals required official consent. The government or statutory bodies owned the land. These racially-based land measures have been formally abolished. Yet the government administratively imposes what are in our respectful view substantially the same restrictions.

3. Deadline to comment on Green Paper

3.1. The Green Paper on Land Reform, 2011 ('the Green Paper') was published in the Government Gazette on 30 September 2011 under General Notice 686 of 2011.

3.2. That General Notice invites any interested person or body to provide comments on the Green Paper as published under the Notice, and that written comments must be submitted to the Director General, Rural Development and Land Reform, at the contact details provided.

3.3. The Notice states that the closing date for comments is 60 calendar days from the date of publication of the Notice in the Gazette, which is to say by Tuesday 29 November 2011.

4. Land Management Commission

4.1. If the Green Paper's suggestions are adopted, there would be a Land Management Commission, subservient to government.

4.2. The Green Paper states that this Commission would be autonomous, but not independent, of the Ministry and Department. It would be accountable to the Ministry through the Department and would submit regular reports to the latter. The Commission would be composed of stakeholders in land and persons appointed by the Minister because of special attributes.

4.3. The proposed Commission's functions would be: Advisory through the issuing of advisory opinions, research reports and guidelines on land management to all land-related departments and state organs; coordination to ensure alignment and inter-linkages of land-management agencies, departments, spheres and organs of state; regulatory to ensure that lands will be managed to protect quality and values; auditing and monitoring of uses to assure integrity of the state and public lands inventory; and acting as reference point.

4.4. We respectfully submit that it is unrealistic and over-ambitious of the Green Paper to propose that the Land Management Commission could render services to all the various government departments, public entities, organs of state, municipalities and agencies at all three levels of government who are responsible for or interested in land. Each of these organisations has its own experience and requirements. In our respectful view it is unlikely that the proposed new entity could develop and maintain the skills and expertise necessary to provide useful research, advice and auditing services for all these different bodies.

4.5. The Green Paper also says that this Commission would have power to invalidate title deeds and confiscate land obtained through fraud or corruption.

4.6. This may be well-meaning. Instances have been reported of fraudulent transfers of land being executed and possible corruption in deeds registries. But stripping registered owners of land titles administratively is drastic and unnecessary. Fraud is not lightly to be inferred. Frauds and land disputes should be left to be decided under common law as at present.

4.7. Disputes should be decided by courts or independent tribunals, not by a Commission answerable to government such as this. The Constitution stipulates that everyone has the right to have any dispute which can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

4.8. The Constitutional Court has observed that impartiality connotes absence of bias actual or perceived, and independence embodies the traditional constitutional value of judicial independence and connotes not merely a state of mind or attitude in the actual exercise of judicial functions but a status or relationship to others particularly the Executive Branch of government that rests on objective conditions or guarantees. A statutory office such as the proposed Land Management Commission, accountable to the Ministry, reporting to the Department and with ministerial appointees, would meet these criteria for impartiality and independence.

5. Land Valuer-General

5.1. The Green Paper also suggests the appointment of a Land Valuer-General and the creation of an Office of the Valuer-General.

5.2. The Green Paper states that the Office of the Valuer-General will be a statutory office responsible for 'determining' financial compensation in cases of land expropriation, under the Expropriation Act or any other policy and legislation, 'in compliance with the constitution'.

5.3. If the aim is that this functionary would make final determinations of compensation payable, this would be unconstitutional. The Constitution lays down that the amount of compensation for expropriated property, and the time and manner of payment thereof, must either been agreed to by those affected or decided or approved by a court.

5.4. But perhaps the benefit of the doubt should be given to the Green Paper. It says that the Office of the Valuer-General would be responsible for the provision of 'specialist valuation and property-related advice to government'. So perhaps the intention is that this official would be a mere resource to government to assist it by determining amounts for the government to offer as compensation for expropriation of property. If an expropriated party does not agree to accept the amount offered, then the amount of compensation would be decided or approved by a court as the Constitution requires.

5.5. The Green Paper proposes that this new Valuer-General's Office would provide 'fair and consistent land values for rating and taxing purposes'.

5.6. This would involve the taking over by this new Valuer-General's Office of the valuation functions assigned by existing municipal rating legislation to the 236 metropolitan or local municipalities. That municipal-rating legislation lays down that metropolitan or local municipalities may levy rates. There are eight metropolitan municipalities and 228 local municipalities.

5.7. The municipal-rating legislation states that a municipality intending to levy a rate on property must cause a general valuation to be made of all rateable properties in the municipality and a valuation roll to be prepared of all those properties. A general valuation must reflect the market value of properties

determined in accordance with market conditions which applied at date of valuation. Market value is the amount the property would have realised if sold on the date of valuation in the open market by a willing seller to a willing buyer. A rate levied by a municipality on property must be an amount in the rand on the market value of the property.

5.8. The municipal-rating legislation says that the national Minister responsible for local government may monitor, and from time to time investigate and issue a public report on, the effectiveness, consistency, uniformity and application of municipal valuations for rates purposes. The investigation may include studies of the ratio of valuations to sale prices and other statistical measures to establish accuracy of valuations.

5.9. We submit that there could be an inconsistency between the Green Paper's attitude to land values for government purchases of land for redistribution (when it appears to favour offering purchase prices lower than market prices) and the government's approach to valuations for the levying of municipal rates and taxes (where doubtless the government would favour market values).

6. Land Rights Management Board

6.1. The Green Paper proposes that there should also be a Land Rights Management Board, with local management committees.

6.2. The Green Paper states that this proposed Board would: Communicate legal reforms to farm- owners and -dwellers and potential land beneficiaries; build institutional capacity inside and outside state institutions to advise rights-holders; develop accessible and efficient systems for recording and registering rights on land in collaboration with the Chief Registrar of Deeds; encourage social solutions to social problems and disputes; provide legal representation where necessary such as for unlawful evictions; establish a co-ordinated and integrated support system for state and public participation in integrated development measures in rural settlements.

6.3. The Board would also enforce compliance with norms, standards and land-rights management policies and laws.

6.4. The Green Paper says that the Board would also have power to establish and dissolve local Land Rights Management Committees, and delegate certain powers to them. A local committee would comprise representatives of residents in a specific rural environment or settlement: farm-workers and -dwellers and commercial farmers, and municipal councils, government departments and police.

6.5. We respectfully submit that it is unnecessary to establish a Land Rights Management Board. If the government wishes to communicate legal reforms, build institutional capacity to advise rights-holders, develop systems for registering land rights, encourage solutions to social problems, provide legal representation, support participation in rural-development measures, or enforce compliance with laws, it could do so though existing government organs. It is not necessary to create a new board.

6.6. Nor it is necessary to create a statutory framework for convening local committees to carry out certain of these tasks. If the government wishes to convene a local committee to communicate a legal reform, advise local rights-holders, provide a solution to a local problem, or participate in rural-development measures, it could convene a meeting and invite interested parties to attend.

7. Leasehold of State and other public land

7.1. The Green Paper proposes that there should be leasehold tenure for State and other public land.

7.2. We point out that it is already state policy to give to land-reform beneficiaries merely lessee's rights. The Department of Rural Development and Land Reform's 2010-11 annual report states that the Department has transferred some 322,845 hectares in 288 land-reform projects and provided access to land to 3,089 beneficiaries through 'leases or caretakership agreements'.

7.3. The Ingonyama Trust's grant policy is to similar effect. The KwaZulu-Natal Ingonyama Trust Board's preference in most cases is to enter into leases of Trust land. Ownership thus remains with the Trust for ultimate transfer 'in due course' to its beneficiaries. The Board does not usually agree to the sale of land. The Board sees real-estate management as its major core function.

7.4. The government's leasing policy ties land beneficiaries to onerous lease obligations to farm the land or lose their rights. A leasing policy keeps the government in control of redistribution land and beneficiaries. Officials repossess properties from land-reform recipients who are not using them to their satisfaction, or who are not in personal occupation.

7.5. The government apparently applies similar restrictive conditions and controls to residential housing allocated under the Reconstruction and Development Programme (RDP). These properties are reportedly subject an eight-year prohibition against selling or letting, and a condition that there be only one dwelling per property.

7.6. It thus appears that Blacks continue to get racially inferior land tenure on farms and houses. There is no security of tenure. Beneficiaries' rights are subject to forfeiture for prescribed reasons. Disposal requires official consent.

7.7. We submit that the government is thus in substance imposing on blacks the same land-tenure restrictions as the apartheid government imposed on blacks under the apartheid land laws.

8. Blacks' land-tenure rights under apartheid

8.1. Apartheid tenure in black areas

8.1.1. Proclamations under the black administration act of 1927 provided for the administrative grant to blacks of permission to occupy residential sites and arable allotments in reserve towns and settlements. There was no security of tenure. Rights of occupation were subject to forfeiture for prescribed reasons. Disposal required official consent.

8.1.2. For example, rural residential or arable allotments could not, without permission in writing of the commissioner, be used for any purpose other than that for which occupation was authorized. The rights of the holder in or to the allotment or any improvements thereon could not be transferred, mortgaged, leased or otherwise disposed of except in accordance with the commissioner's prior written approval. This permission in no case entitled the holder to compensation from the government's land Trust for any improvements on such land; and such improvements would as a rule upon termination of the holder's rights to the allotment, or cancellation of the permission to occupy, become property of the Trust without payment of compensation. A permission to occupy could be cancelled if the holder failed to comply with any of the conditions of such permission or longer used the allotment for the purpose for which it was granted.

8.2. Black land acts

8.2.1. The black land act of 1913 prohibited the sale or lease of demarcated land in scheduled areas reserved for blacks to whites. It prohibited blacks from acquiring land outside these scheduled areas. Scheduled areas comprised only reserves and locations which blacks already inhabited. These scheduled areas were only about half the land that blacks inhabited. Though intended as a preliminary delimitation to be increased, that was not done until 1936. In that year a government land trust was created to purchase additional areas released for black occupation.

8.2.2. Scheduled areas under the 1913 land act included much government land. The government's land Trust created in 1936 purchased and owned additional areas released for black occupation.

8.2.3. In urban areas, a 1937 blacks (urban areas) amendment statute applied similar restrictions in those areas. The amendment prohibited the acquisition of land by blacks from non-blacks in urban areas. Only blacks could acquire premises in black townships (residential areas set apart for black residence near urban areas occupied by whites, coloureds or Indians). These laws were augmented by the group areas statute in 1950, providing for the proclaiming of areas for a particular racial group, and the prohibiting of other groups from living, trading or owning land there. Members of other groups living there were moved out. A 1954 statute for black resettlement provided for elimination of 'black spots' or townships in white areas and the forcible relocation of occupiers.

8.2.4. Black townships near urban areas were largely municipal land, but vested in statutory black-affairs administration boards after 1971 for a period. Blacks had been unable to acquire freely-transferable and mortgageable property in these urban townships, until a 1984 statute enabled blacks to acquire 99-year leasehold rights to urban lots. Similar 99-year leasehold and so-called deed-of-grant rights also became available in the 1980s in towns in the 1913 and 1936 scheduled and released areas.

8.3. Repeal of apartheid land laws

8.3.1. In 1991 all apartheid land laws were repealed by a statute for abolition of racially-based land measures. That statute provided for repeal or substitution of land-tenure proclamations and regulations made under the repealed laws in order to readjust matters in a non-racial manner.

8.3.2. Another 1991 statute provided for the upgrading and conversion into ownership of the various statutory rights to land referred to above (quitrent, 99-year leasehold, deed-of-grant rights, permissions to occupy, etc), in accordance with prescribed procedures.

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29 November 2011

COMMENT
to the
DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM
about the
GREEN PAPER ON LAND REFORM, 2011

1. Executive summary

1.1. The Free Market Foundation of Southern Africa (also referred to here as 'the Foundation' or 'the FMF') comments as follows on the Green Paper on Land Reform, 2011 ('the Green Paper').

1.2. The Foundation gladly takes part in the rigorous engagement promised by the Green Paper for fundamental review of the land-tenure question.

1.3. There is no need for new costly bureaucratic institutions like the proposed Land Management Commission. The poor capacity of government agencies is not cured by creating another government agency.

1.4. The proposed Office of the Valuer-General will likewise be superfluous. Its envisaged functions of analysing markets and maintaining a valuation database could be carried out by existing departments or external consultants. We point out that prices agreed by willing buyers and sellers do not distort markets. The proposed Land Rights Management Board and committees are likewise unnecessary.

1.5. The proposed imposing of limits on the extent or hectarage of private-owned land would prejudice the productive use of land. The proposed imposing on foreigners of precarious tenure and compliance with obligations would prejudice foreign direct investment and impair South Africa's economic-freedom rankings.

1.6. The resale by land-reform beneficiaries of their land is not a sign of failure. Freely-tradable assets gravitate into optimal hands. The policy of granting leases of State and other public land and tying land beneficiaries to onerous lease obligations on pain of losing their farms and houses gives blacks the same racially-inferior tenure that they had under apartheid. This perpetuates poverty. Land-reform beneficiaries should receive full unrestricted ownership title with freedom to dispose of the property as and when they please.

1.7. It is a myth that land reform should focus on redistribution of rural land. Reform should be concerned with access to the more-valuable urban land and housing. The government should cease to pursue the ineffective, slow, costly and insignificant measures that it has attempted to implement to date. There is no time to waste.

1.8. The government should immediately redistribute its own land. A small proportion of superfluous government land will suffice to provide, free, to all landless and homeless South Africans the full unambiguous freely-tradable ownership of a plot of urban residential land or viable agricultural land. All land parcels permanently held by black South Africans on government- or municipal-owned land should be summarily converted to full unambiguous freely-tradable ownership at zero cost to beneficiaries.

2. Fundamental review by rigorous engagement

2.1. The Green Paper states that the Department will fundamentally review the current land tenure system, through rigorous engagement with all South Africans, so that we could emerge with a tenure system which should satisfy the aspirations of most if not all South Africans, irrespective of race and class.

2.2. We trust that the Department in that spirit will engage rigorously with these written comments by the Free Market Foundation, with a view to South Africa's emerging with land reforms that satisfy the aspirations of all.

3. Land Management Commission

3.1. If the Green Paper's suggestions are adopted, there would be a Land Management Commission, subservient to government.

3.2. The Green Paper states that this Commission would be autonomous, but not independent, of the Ministry and Department. It would be accountable to the Ministry through the Department and would submit regular reports to the latter. The Commission would be composed of stakeholders in land and persons appointed by the Minister because of special attributes.

3.3. The proposed Commission's functions would be: Advisory through the issuing of advisory opinions, research reports and guidelines on land management to all land-related departments and state organs; coordination to ensure alignment and inter-linkages of land-management agencies, departments, spheres and organs of state; regulatory to ensure that lands will be managed to protect quality and values; auditing and monitoring of uses to assure integrity of the state and public lands inventory; and acting as reference point.

3.4. We submit that the creation of a new statutory body such as this Land Management Commission would be financially costly and probably futile, and is administratively unnecessary.

3.5. The Commission's proposed functions could be carried out by liaison between existing state departments and organs. There is no need to create another one.

3.6. The Green Paper states that the main constraint to be overcome to enable the land-reform programme to succeed is the poor capacity of organs of state to implement measures. The document says that there is poor co-ordination and integration of effort and resources among public institutions.

3.7. We submit that the problems of dysfunctional government agencies are not cured by creating another government agency. As the Green Paper says, co-ordination by relevant organs of State is a key to successful execution of a sustainable land-reform programme.

4. Land Valuer-General

4.1. The Green Paper also suggests the appointment of a Land Valuer-General and the creation of an Office of the Valuer-General.

4.2. The Green Paper states that the Valuer-General's Office would among other things undertake market and sales analyses, set guidelines and standards to validate the integrity of valuation data, and maintain a valuation-information database.

4.3. We submit that it is superfluous to create an Office of a Valuer-General to carry out these functions.

4.4. If the government wishes to carry out market analyses or maintain a valuation-information database, it can do so within existing departments or by procuring private consultants. It is unnecessary to establish a new and separate government office for this.

4.5. The Green Paper mentions that a current challenge and weakness, and rationale for change, is the land-acquisition strategy's willing-buyer willing-seller model which it describes as a distorted land market. We submit that prices arrived at between willing buyers and willing sellers do not distort the market. They are market prices. A market consists of willing buyers and willing sellers.

5. Land Rights Management Board

5.1. The Green Paper proposes that there should also be a Land Rights Management Board, with local management committees.

5.2. We submit that the creation of these new bodies would be unnecessary and costly.

6. Privately-owned or freehold land with limited extent

6.1. The Green Paper states that the proposed land-tenure framework would include private ownership or freehold 'with limited extent'. This implies that private landowners would be restricted to a maximum hectarage.

6.2. To impose any such limitation on the maximum area of land which any person (whether an individual or a company) can own would be counterproductive.

6.3. Land is an economic resource. The national interest is served by allowing it to be consolidated or subdivided freely. The absence of restrictions on the size of land portions which may be acquired enables land to be utilised at the optimal size and enhances the productive use of land. This benefits all South Africans.

6.4. Any policy of imposing maximum property extents on the private owners of land would lead to less-productive uses of properties. Applied to agricultural land, it would effectively reduce all such properties to inefficient peasant smallholdings. It would also discourage the economic development of land for large-scale industrial, commercial and other productive uses.

7. Foreign-owned land subject to precarious tenure and compliance with obligations

7.1. The Green Paper proposes that foreigners would own land under 'precarious tenure' and be subject to obligations and conditions. There would be 'secure forms of long-term land tenure' for resident non-citizens engaged in appropriate investments which enhance food sovereignty and livelihood security, and improved agro-industrial development.

7.2. This would seemingly not apply to, for example, a retired couple in Britain who buy a flat in Cape Town's Camps Bay to stay in during the European winter. The document is concerned with rural and in particular agricultural land and ignores residential, commercial and other non-agricultural land.

7.3. We submit that xenophobia in the form of these proposed discriminatory measures against foreigners would be counter-productive. Land is an economic resource like any other. The national interest is served by allowing land to be used and traded freely, so that it gets spontaneously into the hands of optimal users. It would make no difference whether people who own land are local or foreign. The fact that foreigners are willing to invest in our country and land should be welcomed.

7.4. This proposed precarious tenure for foreigners and need to compliance with obligations would undermine secure property rights and introduce regulatory uncertainty in foreign direct investment. This would adversely affect foreign direct investment into South African agriculture. It would also adversely affect South Africa's comparative global rankings for economic freedom.

8. Leasehold of State and other public land

8.1. The Green Paper proposes that there should be leasehold tenure for State and other public land.

8.2. The Minister has reportedly disclosed, as if it were an admission of failure, that some 30 per cent of land bought by government since the end of apartheid for redistribution to black farmers has been resold by the beneficiaries, often back to the original owners. But this is no failure:

8.3. We submit that the resale by land-reform beneficiaries of their land is not a cause for concern or complaint. Freely-tradable assets gravitate into optimal hands. Bargaining will lead to an efficient outcome regardless of the initial allocation of property rights. Ownership and private property exists only where the individual can deal with and dispose of his property in the way he or she considers most advantageous, and society as a whole benefits. The government's leasing policy prevents this, by tying land beneficiaries to onerous lease obligations to farm the land or lose their rights. It makes beneficiaries into serfs beholden to the State.

8.4. The government applies the same restrictive conditions and controls to residential housing allocated under the Reconstruction and Development Programme (RDP). These properties are commonly subject to an eight-year prohibition against selling or letting, and a condition that there be only one dwelling per property. Occupants are in the invidious position of not being able to realise their equity. Many sell or let 'informally' at heavily discounted prices, since they have no freely tradable title. New occupiers live in fear that they might be caught and summarily evicted. Many of these houses have illicit second-dwelling shacks in the yard.

8.5. A leasing policy keeps the government in control of redistributed land and recipients. Officials repossess properties from land-reform recipients who are not using them to their satisfaction, or who are not in personal occupation.

8.6. Blacks continue to get racially-inferior land tenure on farms and houses, not wealth-creating full ownership title. This prolongs the apartheid legacy. It perpetuates and exacerbates the problem of poverty in the new South Africa.

8.7. It is assumed within the government that blacks act irresponsibly if they dispose of their property. But people sell or let their most valuable asset only after careful consideration. They usually need the money more than the property. They usually need the funds for legitimate reasons. Good reasons include moving elsewhere with better job prospects, starting a small business, educating children, or health care.

8.8. The Green Paper proposes the avoiding or minimising of land redistribution and restitution which do not generate 'sustainable' livelihoods, employment and incomes. We submit that the government should

not tie beneficiaries to the land by restricting their free right to dispose of the property. This imposes the government's view and ignores beneficiaries' own views of what will best sustain their livelihoods, employment and incomes.

9. Myths about land reform

9.1. The Green Paper largely reflects the national obsession with land owned by the few white farmers with their handful of black residents. It ignores residential land, which is of far greater importance and value and where almost all South Africans live. (Yet the Green Paper does observe, in our respectful view correctly, that demand for land may be for non-agricultural uses.)

9.2. Land reform has been led astray by myths. One myth is that land reform should involve restitution or redistribution of 'rural' land; however, land reform should be concerned with access to land and housing in urban areas, and the obsession with rural land abandoned.

9.3. Another misapprehension is that access to land is important for black liberation; yet most people in advanced countries, including many of the wealthiest, do not own land, but live as tenants on someone else's apartment blocks or other property.

9.4. People generally believe that under apartheid blacks owned 13 per cent of the land. This is incorrect. But the government's land trust and then homeland governments, and now their successor the South African government owns most of that land.

9.5. It is a myth that land ownership should be measured by how much land blacks own as a proportion of total land area. What matters is what land blacks own as a proportion of total land value. Urban land is more valuable than rural land.

9.6. Most people believe that the government delivers when it gives benefits to blacks at the expense of whites. But the government genuinely delivers when it creates an environment in which black South Africans become land- and home-owners and enjoy other benefits by their own efforts through an unrestricted market.

9.7. Restitution is not always clearly understood, especially by whites, who assume that it amounts to a Zimbabwe-like threat to their property rights. On the contrary, restitution is about respecting and upholding property rights. Blacks have a heavy burden of proof that they owned land and that it was misappropriated under apartheid. They are subject to an arbitrary and unjust cut-off date of 1913. In addition, once they discharge the burden of proof, they seldom get restitution. More commonly, they get offered alternative land or compensation. Redistribution has acquired the erroneous meaning of rural land being purchased from whites and redistributed to blacks when their restitution claim is rejected. This concept of restitution and redistribution is prohibitively costly, conflict-provoking and time-consuming.

9.8. A common misapprehension is that land reform has failed.

10. No time to waste

10.1. The Green Paper states that the main constraint of state organs' poor capacity to implement and public institutions' poor integration of effort must be overcome to enable the land-reform programme to proceed 'rapidly' as it must, and that they are constraints to effective 'speedy' resolution of the land question. Yet the Green Paper also says that overcoming these constraints will require 'time' and 'enduring' political effort.

10.2. We submit that it is inconsistent to say on the one hand that land reform must proceed ‘rapidly’ to a ‘speedy’ resolution, and on the other hand that fixing government poor capacity to implement reform will take ‘time’ and ‘enduring’ effort.

10.3. The Free Market Foundation submits that there is no time to waste. We respectfully recommend that the government should cease to pursue the ineffective, slow, costly and insignificant measures that it has attempted to implement to date.

11. Recommendations for land redistribution

11.1. We submit that by far the bigger, better and quicker prospect for land redistribution is for the government to distribute its land.

11.2. The government owns in historically-black rural and urban areas some five to fifteen million parcels of land (estimates vary). The government could immediately redistribute them all to existing occupiers at little cost. This would result in millions of new landowners.

11.3. We recommend that all land parcels lawfully or permanently held by black South Africans on government- or municipal-owned land should be summarily converted to full unambiguous freely-tradable ownership at zero cost to beneficiaries. All other government land not needed for public purposes should also be privatised. A small proportion of superfluous government land will suffice to provide, free, to all landless and homeless South Africans the full unambiguous freely-tradable ownership of a plot of urban residential land or viable agricultural land.

11.4. And the government should allow private owners with informal settlements on their land to convert that land, through private contracts with occupiers, to full unambiguous freely-tradable ownership, with nominal red tape and cost.

11.5. The Green Paper refers to communally-owned land, and contemplates communal tenure with institutionalised use rights. The document says that this will be treated in a separate policy articulation because there needs to be extensive consultations and constitutional compliance. We recommend that all community, traditional and tribal land should be unambiguously and democratically owned and controlled by the people concerned, who should be allowed to give to each lawful occupant if they wish the plot they hold, in full unambiguous freely-tradable ownership.

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Addendum 4: ***Current and apartheid land-tenure restrictions compared by Gary Moore***

Attorney Gary Moore was recently asked to explain the restriction that current critics of the government's land policy are talking about when they say that the government in substance imposes on blacks the same land-tenure restrictions as were imposed under apartheid. Mr Moore responded:

"We explain this as follows. The government now imposes conditions when granting property to land-reform beneficiaries, which stipulate that the property is liable to forfeiture for prescribed reasons, that disposal of the land to a third party requires official consent, and that officials may repossess the property if the holder does not use the property to official satisfaction or is not in personal occupation. These are substantially the same as restrictions which applied under apartheid. Under apartheid, there was no security of tenure, rights of occupation were subject to forfeiture for prescribed reasons, and disposals required official consent. The government or statutory bodies owned the land. These racially-based land measures have been formally abolished. Yet the government administratively imposes what are in our respectful view substantially the same restrictions.

For example, under apartheid, rural residential or arable allotments could not, without permission in writing of the commissioner, be used for any purpose other than that for which occupation was authorised. The rights of the holder in or to the allotment or any improvements thereon could not be transferred, mortgaged, leased or otherwise disposed of except in accordance with the commissioner's prior written approval. This permission in no case entitled the holder to compensation from the government's land Trust for any improvements on such land; and such improvements would as a rule upon termination of the holder's rights to the allotment, or cancellation of the permission to occupy, become property of the Trust without payment of compensation. A permission to occupy could be cancelled if the holder failed to comply with any of the conditions of such permission or no longer used the allotment for the purpose for which it was granted.

In 1991 all apartheid land laws were repealed by a statute for abolition of racially-based land measures. That statute provided for repeal or substitution of land-tenure proclamations and regulations made under the repealed laws in order to readjust matters in a non-racial manner. Yet the government continues administratively now to impose what are in our view substantially the same restrictions. Currently the government leases, and does not sell or grant outright, agricultural plots to land-reform beneficiaries, and ties the lessees to onerous lease obligations to farm the land or lose their rights. The government applies similar restrictive conditions and controls to residential housing allocated under the Reconstruction and Development Programme (RDP). These properties are commonly subject to an eight-year prohibition against selling or letting, and a condition that there be only one dwelling per property. Occupants are in the invidious position of not being able to realise their equity.

A leasing policy keeps the government in control of redistributed land and recipients. Officials repossess properties from land-reform recipients who are not using them to their satisfaction, or who are not in personal occupation. Blacks continue to get racially-inferior land tenure on farms and houses, not wealth-creating full ownership title. This prolongs the apartheid legacy. It perpetuates and exacerbates the problem of poverty in the new South Africa. It is assumed within the government that blacks act irresponsibly if they dispose of their property. But people sell or let their most valuable asset only after careful consideration. They usually need the money more than the property. They usually need the funds for legitimate reasons. Good reasons include moving elsewhere with better job prospects, starting a small business, educating children, or health care.

We submit that the government should not tie beneficiaries to the land by restricting their free right to dispose of the property. This imposes the government's view and ignores beneficiaries' own views of

what will best sustain their livelihoods, employment and incomes. The government should not retain ownership or control of disposals of land the way it did under apartheid. The government should immediately redistribute its own land. A small proportion of superfluous government land will suffice to provide, free, to all landless and homeless South Africans the full unambiguous freely-tradable ownership of a plot of urban residential land or viable agricultural land. All land parcels permanently held by black South Africans on government- or municipal-owned land should be summarily converted to full unambiguous freely-tradable ownership at zero cost to beneficiaries."

AUTHOR Gary Moore is a lawyer and specialist in the field of law reform. This article may be republished without prior consent but with acknowledgement to the author. The views expressed in the article are the author's and are not necessarily shared by the members of the Free market Foundation.

FMF Policy Bulletin / 29 November 2011

Addendum 5: ***Myths about land reform by Leon Louw***

Land reform is bedevilled by tenacious myths starting with the widely held view, especially amongst blacks, that it has failed.

Myth 1: Land reform revolves around restitution or redistribution of "rural" land
One of the most basic manifestations of progress is urbanisation, to the point, in advanced societies, where less than 5% of the population is in agriculture. Urbanisation is not only inevitable, but also highly desirable, resulting as it does in a reduced cost of housing and an increase in social and physical infrastructure, transport, and access to resources. Settlements in rural areas transform rapidly into towns and should no longer be considered "rural". South Africa's rural areas already have fully-fledged municipalities with all the trappings of urban life. Land reform should be concerned with access to land and housing in urban areas and the mindset that it is about rural land should be abandoned.

Myth 2: Access to land is an important component of black advancement and liberation
Most people in advanced countries do not own land, but live as tenants on someone else's land. Many of the wealthiest people in the world live in apartment blocks as tenants or sectional title owners. If South Africa is serious about wanting economic development, it should aspire to having land used efficiently rather than remaining obsessed with who owns parcels of land in "townships".

Myth 3: Land reform entails redistributing land from whites to blacks
Restitution is not always clearly understood, especially by whites who assume that it amounts to a Mugabe-like threat to their property rights. On the contrary, restitution is about respecting and upholding property rights. Blacks have a heavy burden of proof that they owned land and that it was misappropriated under apartheid. They are subject to an arbitrary and, in my view, unjust cut-off date of 1913. In addition, once they discharge the burden of proof, they seldom get restitution and more commonly, get offered alternative land or compensation.

Redistribution has acquired the erroneous meaning of rural land being purchased from whites and redistributed to blacks when their restitution claim is rejected. This concept of restitution and redistribution is prohibitively costly, time-consuming and conflict provoking. By far the bigger and best prospect for land redistribution is from government. Government is the primary owner of land in historically black areas ("homelands", "townships", "squatter settlements"): land that can be immediately redistributed to existing occupiers at virtually no cost. Estimates of the number of parcels of land vary widely but it appears to be somewhere between 5- and 15-million. In other words, redistribution from government, at virtually zero cost, could result in millions of black land owners with billions of rands of capital released into the hands of existing occupiers and unleashed into the economy where it can be traded, mortgaged, let and developed.

The second form of land that can be redistributed, is superfluous land owned by the government in one of its many forms. No one has any idea how much superfluous government land there is or even what proportion of land belongs to the government. Existing estimates are profoundly flawed in two senses. Firstly, there is an obsession with area rather than value. What matters is not how much blacks own as a proportion of South Africa's land area, but what they own as a proportion of land value (the high-value land obviously being urban). Secondly, a fundamental flaw in existing estimates is that organs of state owning land have been too narrowly defined; for example, municipal land is defined as private.

Thirdly, there is the mysterious and unquantified "reserved" government land. For more than a century developers have been required to reserve parcels of land for government purposes: parks, telephone exchanges, police stations, schools, post offices, transformers and so on. An investigation by the

Department of Works some time ago revealed that it was in possession of vast quantities of land, some in rural areas, defined as "depots", which were originally for road maintenance crews no longer in existence. The Department of Agriculture has similar land called "outspans"; originally where farmers could rest and graze livestock being driven to distant markets. Such depots and outspans are misleadingly reflected in the deeds registry as belonging to private owners.

Myth 4: The success or failure of low-income housing policy is measured by the number of RDP houses provided by the government

When the government publishes statistics on progress, it mentions only RDP housing supplied by government and does not include what is probably much more significant, ie, housing and land acquired by black people themselves. The truth is that the post-apartheid, deregulated market has supplied a substantial proportion of low-income housing. Paradoxically, the policy of allowing easier private property development and house construction was introduced by the late-Secretary of the Communist Party, then-Minister of Housing, Joe Slovo. His policy of privatisation and deregulation has been an extraordinary and largely unappreciated success.

Myth 5: "Delivery" is what the government gives blacks

My housekeeper, Gladys, complains that the government is not "delivering". I pointed out that she is the proud owner of a house in Ivory Park. She said: "Yes, but I bought and built it myself." In her mind, government does not deliver by creating an environment in which black South Africans become land and home owners and enjoy other benefits by their own efforts through a liberated market, but only when it literally gives blacks benefits largely at the expense of whites. Perversely, the government seems to share this view (see Myth 4).

Myth 6: Blacks don't have land; under apartheid blacks had only 13% of the land

When I was an anti-apartheid activist, I regarded the cliché that blacks had "only 13% of the land" as an objective truth and assumed, like everyone else, that it was based on some incontestable fact with a dependable source. This myth lives on and I now realise that it is and always was nonsense. Firstly, the so-called 13% was the land held by homeland governments. This land did not in any meaningful sense belong to black South Africans, but to the apartheid regime. That 13% is for practical purposes still not owned by blacks, but by the apartheid regime's successor. Secondly, the land concerned was 13% by area and a great deal less by value. By far the most valuable historically black land was and remains urban. There has never, to my knowledge, been a reliable estimate of either the area or value of such land. Thirdly, homeland land included "consolidation" land, which comprised large tracts of land bought and expropriated from white farmers by the apartheid regime and never transferred to homeland governments.

Myth 7: Freehold title is a Euro-centric, cultural idea not shared by Africans

Needless to say this view is racist in the extreme. Traditional southern African land tenure systems had private ownership as an integral part of tribal law. So-called "communal" land existed only in the "commonage" used primarily for grazing. Even there, access was highly privatised, protected and valued, usually by way of grazing right quotas allocated by the chief-in-council or headman-in-council. All other land – residential, kraals, bomas, arable allotments, trading sites, light industry – was privately allotted in perpetuity. Subject to significant variations from one tribe or village to another, land could be traded and inherited. In some tribal systems, extra voting rights were granted to land owners. The removal and corruption of traditional land ownership systems is a legacy of colonialism. Under apartheid, control over land was centralised in the hands of chiefs as a means of subjugating blacks. In all pre-industrial, primitive societies, there were forms of land tenure and allocation that were communal in some contexts and private in others. All modern, prosperous societies, regardless of history, culture or race, convert traditional tenure into modern tradable ownership. Any suggestion that black South Africans should not enjoy such progress is not just racist, but counter-revolutionary and retrograde.

Myth 8: The proportion of land held by whites, blacks, government, etc, is inappropriately measured by area

To the limited and inaccurate extent that estimates have been made of the proportion of land held by black South Africans, it refers to land by area rather than by purpose or value – both of which are more important. It is also presumed that land owned by private business is "white". A more honest and realistic assessment would start by regarding land held by government as held indirectly by or on behalf of black South Africans in that they constitute the majority of voters in a democracy. Land held by companies should either be regarded as non-racial or, for those who are obsessed with race, according to the proportion of beneficial owners of different races. Beneficial owners of most listed companies, by value, are increasingly black through "institutional" investment on behalf of trade unions, medical schemes, unemployment funds, policy holders, depositors in banks and the like. In some of these areas the rapid growth of black participation has passed 50%.

Myth 9: That land reform and land restitution has restored land or redistributed land to black South Africans

The myth was exposed when the Minister of Land Affairs recently announced the intention to repossess land not being used to the government's satisfaction. What this exposes is the fact that black South Africans in post-apartheid South Africa are still being treated as inferior and being given inferior title. One of the reasons they are not using the land to the satisfaction of government and critics is that they are not free to dispose of it. If black South Africans had the title they should have in a truly non-racial post-apartheid South Africa, they would be free to sell the land to people who would pay good prices for it because they attach or can extract higher value. The legacy of apartheid lives on in that even the post-apartheid regime has not fully embraced treating black South Africans the way people are treated in historically white areas.

Having exposed and disposed of these myths, the proverbial bottom line is that all land lawfully or permanently held by black South Africans in predominantly "black" areas, should firstly, be summarily converted to full, unambiguous, freely tradable ownership at zero cost to beneficiaries. Secondly, the law should be amended to allow private owners with informal settlements on their land, to convert that land through private contracts with occupiers, with nominal red tape and cost, to full, unambiguous, freely tradable ownership. Thirdly, a small proportion of superfluous government land will be sufficient to provide all landless and homeless South Africans with a free residential plot of urban land or a viable portion of agricultural land and full, unambiguous, freely tradable ownership. This should be done immediately and excuses and obfuscation should be dismissed. Finally, community, traditional and tribal land should be unambiguously and democratically owned and controlled by the people concerned, who should be empowered, as envisaged in the Communal Land Rights Act, to convert the land of each lawful occupant, if they wish, to full, unambiguous, freely tradable ownership.

FMF Policy Bulletin / 23 June 2009