

Against whom is a land claim really made?

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Land claims are part and parcel of South Africa's land reform programme, authorised by Section 25 of the *Constitution of the Republic of South Africa, 1996* (Act 108 of 1996, or the *Constitution*). The primary purpose of land claims is to bring about recovery or compensation for persons who, on the one hand, have been deprived of land-related rights as a result of race-based legislation and practices. On the other hand, it is aimed at securing tenure or achieving a balance in the racial composition of people who own land and/or have access to land through a programme of land redistribution.

Applicable legislation

The most important legislation permitting land claims is the *Restitution of Land Rights Act, 1994* (Act 22 of 1994, or the *Restitution Act*) and the *Land Reform (Labour Tenants) Act, 1996* (Act 3 of 1996, or the *Labour Tenants Act*).

Claims under the *Restitution Act* must have been filed with the Commission on Restitution of Land Rights on or before 31 December 1998. Claims under the *Labour Tenants Act* must have been filed with the Department of Rural Development and Land Reform as prescribed, on or before 31 March 2001.

Against the state or the landowner?

A question that often arises during discussions about land reform is who is, in fact, the party against whom a land claim is being lodged? The perception and probably the first response to this question, is that it is a claim against the existing owner of the claimed land. In practice, this is also the experience of many a landowner.

The fact, however, is that land claims are filed against the state within the framework of existing legislation. Because the state is the respondent in respect of land claims, it must meet or settle the claims, depending on their scope and validity. This duty resting on the state, is a constitutional and statutory one.

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The state's fulfilment of the abovementioned obligation only has consequences for private land and private landowners in such cases where the state must use specific private land to meet its obligation to pay or settle a claim. This also applies where the limited rights of tenant labourers on private land are converted into full-title rights because the tenant labourers occupied, cultivated and grazed the land.

Compensation vs expropriation

In cases where private land is compromised during the settlement of land claims, the state must acquire the land from the existing private owner. The *Constitution* places an obligation on the state to compensate the owner fairly and equitably.

The state's obligation to pay fair and equitable compensation for private land causes the state, for the purposes of settling a claim, to acquire the land through a negotiated purchase agreement or, alternatively, a more forced process known as expropriation. This is also why the issue surrounding the proposed

amendment to the *Constitution* to allow for expropriation without compensation under certain circumstances, is currently such a contentious one.

Obstacles during negotiations

In the case of claims lodged under the *Restitution Act*, in addition to acquiring private land to settle claims, the state also has the right to offer alternative state land and/or cash compensation. There are several court cases in which the courts have clarified the circumstances in which the state, rather than acquiring private land, should settle claims by making alternative state land available or by paying a cash compensation.

One of the main reasons why private land would not be considered an appropriate method of settlement, is the underlying principle that claimants should not benefit more from the settlement of a claim than what they lost when they were deprived of their rights in the past.

Private landowners need to be extremely cautious when conducting any settlement negotiations in cases where their land may be compromised as a result of the abovementioned circumstances. Currently, several pieces of legislation have an influence on the manner in which the state should proceed in dealing with such matters.

In most cases, it will be wise to be accompanied by a legal representative at all times during negotiations with the state. It should preferably be someone who has a good basic knowledge of the relevant legislation and the legal environment in which these claims are handled. 📍

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