

## Compensation:

**What is fair and equitable in the context of land reform?**



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## 1. Context

The land debate is heating up in South Africa and compensation is a critical component in this regard. Should current land owners be compensated at all when their land is targeted for land reform purposes and, if so, what is fair and equitable?

There are apparently three broad schools of thought:

- No compensation;
- Market value compensation plus losses; and
- Just and equitable compensation as proposed in the Constitution.

The Economic Freedom Fighters (EFF) and groupings such as Black First Land First (BFLF) believe no compensation should be payable. Their point of departure is that the land was stolen by the ancestors of white land owners and should therefore be taken back without compensating the present owners. There is apparently also a faction within the ANC who favour this approach.

Financiers, land owners and organised agriculture would prefer an approach where compensation is determined at market value and where such land owners are also compensated for actual financial losses they may incur. This is also the approach followed in most countries when the state expropriates land. In 2008 the Food and Agricultural Organisation (FAO) of the United Nations' Land Tenure Studies Desk published a guide on best practice in the event of forced acquisitions.<sup>1</sup> In this guide the FAO states, among others, that:

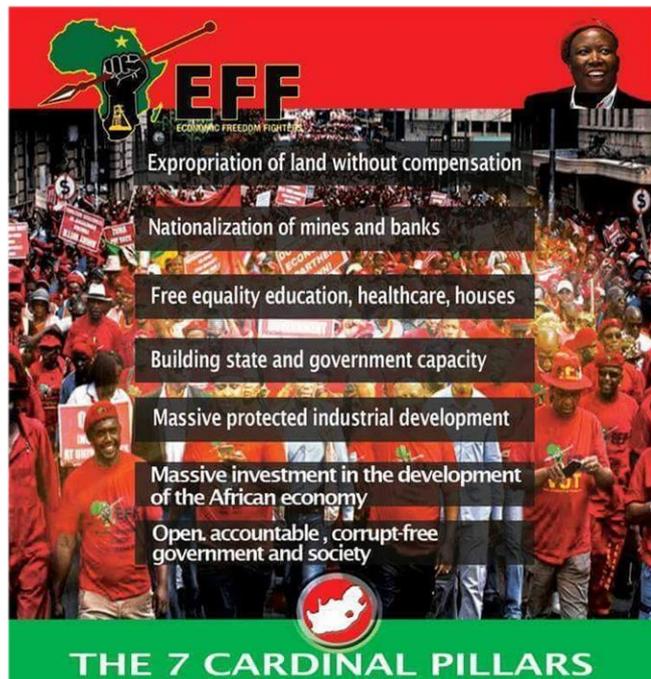
*"Compensation, whether in financial form or as replacement land or structures, is at the heart of compulsory acquisition. As a direct result of government action, people lose their homes, their land, and at times their means of livelihood. Compensation is to repay them for these losses, and should be based on principles of equity and equivalence. The principle of equivalence is crucial to determining compensation: affected owners and occupants should be neither enriched nor impoverished as a result of the compulsory acquisition."*

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<sup>1</sup> <http://www.fao.org/3/a-i0506e.pdf>

The Constitution requires that just and equitable compensation be paid and that a balance be found between the public interest and the interests of those who are affected. Although there is still no clarity as to how exactly these provisions of the Constitution should be applied, there have been a number of court rulings which will be dealt with in more detail in this article.

South African society will have to find a way to accommodate these three diverse views, namely full compensation, just and equitable compensation, and no compensation at all. This will be a critical choice which could have a significant impact on the future of every citizen of our fair land and on our collective future as South Africans.



## 2. International perspectives

There are certainly lessons to be learnt from the experience of other countries and the approach they followed with regard to compensation for land reform purposes and the consequences of the different approaches. The best-known example of land reform without compensation is of course Zimbabwe. Much has been written about the economic and other consequences of Zimbabwe's land reform programme. Some writers have even argued that there were also positive outcomes. However, there can be no doubt that the radical land reform programmes in Zimbabwe had totally destroyed agricultural exports, leading to large-scale starvation in the country, with an extremely negative impact on the Zimbabwean economy.

Bertus de Villiers writes in an article entitled *Land reform issues and challenges*:  
 "If land reform is pursued merely on the basis of political ideology and expediency, the economic and social costs will soon outstrip the perceived benefits of radical land acquisition."<sup>2</sup>

There are basically two broad approaches to land reform:

- State-driven land reform; and
- Market-driven land reform.

The World Bank is a strong proponent of the market-driven model. The difference between the two models was explained by Saturnino M Borrás as follows:<sup>3</sup>

#### State, market and community

Table 1: Key features of state- and market-led approaches based on the pro-market explanations

Issues	State-led	Market-led
<i>Getting access to land</i>		
Acquisition method	Coercive; cash-bond payments at below market price	Voluntary; 100% cash payment based on 100% market value of land
Beneficiaries	Supply-driven; beneficiaries state-selected	Demand-driven; self-selected
Implementation method	Statist-centralised; transparency and accountability – low degree	Privatised-decentralised; transparency and accountability – high degree
Pace and nature	Protracted; politically and legally contentious	Quick; politically and legally non-contentious
Land prices	Higher	Lower
Land markets	Land reform: cause and effect? aggravates land market distortions; progressive land tax and titling programme not required	Land reform: cause and effect of land market stimulation; progressive land tax and titling programme required
<i>Post-land transfer farm and beneficiary development</i>		
Programme sequence; development and extension service	Farm development plans after land redistribution; Protracted, uncertain and anaemic post-land transfer development; extension service statist-centralised = inefficient	Farm development plans before pace of redistribution; Quick, certain, and dynamic post-land transfer development; extension service privatised-decentralised = efficient
Credit and investments	Low credit supply and low investments	Increased credit and investments
Exit options	None	Ample
<i>Financing</i>		
Mechanism	State 'universal' subsidies; sovereign guarantee; beneficiaries pay subsidized land price; 'dole-out' mentality among beneficiaries	Flexible loan-grant mechanism; co-sharing of risks; beneficiaries shoulder full cost of land; farm development cost given via grant
Cost of reform	High	Low

Source: Borrás, 2003: 374.

<sup>2</sup> [http://www.kas.de/wf/doc/kas\\_2703-1522-2-30.pdf?040114114341](http://www.kas.de/wf/doc/kas_2703-1522-2-30.pdf?040114114341)

<sup>3</sup> Questioning Market-Led Agrarian Reform: Experiences from Brazil, Colombia and South Africa: Saturnino M Borrás: Journal of Agrarian Change: 3 June 2003

The market-driven approach therefore produces better results in virtually all respects. It is also possible to follow a combination of the market-driven and state-driven programmes.

A 2007 research paper released by the Rural Development Institute of the Asian Development Bank, provides an analysis of valuation and compensation in the case of resettlement, with particular reference to the experience of India, Cambodia and China.<sup>4</sup> In the article, reference is made to the negative impacts of forced relocation of those who are affected by it.

The article mentioned, among others, the following:

*“Development projects ultimately aim to improve people’s well-being. Yet, such projects frequently result in direct negative impacts on some portion of the population. Perhaps, chief among those negatively impacted are those whose assets are taken by the authorities as part of the project. This typically occurs because the project requires land. As such, those people living on, working on, or otherwise benefiting from the land and its related resources become “losers.” Frequently, such people become involuntarily displaced and have to resettle elsewhere. For those affected, involuntary displacement means a drastic disruption fraught with risks of impoverishment.”*

The research also focused on international experience regarding compensation for land expropriated for land reform and development purposes. The researchers found as follows:

*“Most countries have developed land expropriation or acquisition laws to restrict their government’s exercise of its eminent domain power and have accumulated instructive experience in implementing those laws. Such laws typically: (i) define the cases in which the government can exercise its power; (ii) describe the rights and participation of those persons whose assets are being taken; (iii) define the lost assets for which compensation is payable; and (iv) define the level of compensation that is payable for those assets. Until relatively recently, development-caused forced displacement of*

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<sup>4</sup> [http://www.landesa.org/wp-content/uploads/2011/01/ADB-RDI\\_Report\\_on\\_Land\\_Taking\\_Law\\_and\\_Practice\\_in\\_China\\_India\\_Cambodia.pdf](http://www.landesa.org/wp-content/uploads/2011/01/ADB-RDI_Report_on_Land_Taking_Law_and_Practice_in_China_India_Cambodia.pdf)

*a population was considered a "sacrifice" some people had to make for the larger good. The conventional "remedy" employed in projects to respond to resettlers' dispossession and economic and social disruption was compensation for lost assets. Resettlement programs in general were limited to statutory monetary compensation for land and other assets acquired as specified in the relevant expropriation law. Perceptions are changing, however, in large part because of a growing awareness of the actual and potential adverse social, economic, and environmental consequences of population displacement. Policy makers, planners, and practitioners are increasingly accepting that displaced persons should not bear any of the externality costs and that rather than trying to reduce some of the burden imposed on the displaced, the approach should focus on fully restoring, if not improving, the well-being of project-affected persons."*

With reference to compensation specifically, the article says:

*"Most countries around the world have constitutional and/or statutory standards that call for "market value" or "fair market value" compensation for lost assets that the state expropriates. Based on constitutional requirements, many countries have developed standards for determining "just compensation." Most high- and middle-income countries with well-functioning legal systems have adopted "fair market value" of the expropriated asset as the standard for determining compensation for state expropriations. The fair market value is commonly defined as "the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer. The underlying reason for adopting the fair market value standard is that the market is an objective gauge for assessing the value of the land."*

In sharp contrast to this is the call for expropriation without compensation by certain groups in South Africa. There is apparently an expectation on the part of these groups that certain individual commercial farmers must bear the total cost of something that is deemed to be for the greater good.

### 3. South African Constitution

South Africa's Constitution makes provision for fair and equitable compensation, with a good balance between the public interest and the interests of those who are affected by expropriation. The Constitution allows no room for expropriation without compensation. As soon as an action can be defined as expropriation, compensation becomes payable.

And, by the way, it is also not possible to amend the provisions of the Constitution that protect property rights by way of a referendum, as recently suggested by President Zuma. A fundamental right that is protected by the Constitution can only be amended if the process prescribed in section 74 of the Constitution is followed. This requires that a two-thirds majority in the National Assembly must vote in favour thereof and, furthermore, that six of the nine provinces in the National Council of Provinces must also vote in favour thereof.

It is important to note that section 39 of the Constitution, which deals with the interpretation of the bill of rights, stipulates that a court must, when interpreting any fundamental rights (of which property rights is one), take international law into account. The courts must consider the values of an open and democratic society based on human dignity, equality and freedom, and may also consider foreign law. Property rights are protected in many international law instruments such as the United Nations' Declaration of Human Rights.



Much has been written about just and equitable compensation and what is possible and not possible in terms of the Constitution. The Constitution states clearly that market value is not the only measure for determining compensation. Section 25(3) requires that all relevant factors be considered when determining fair and equitable compensation, and then goes on to mention five specific factors:

- Current use of the property;
- The history of the acquisition of the property;
- The market value of the property;
- The size of direct investment and the subsidy paid by the state for the acquisition and improvement of the property; and
- The purpose of expropriation.

The Constitutional Court gave its interpretation of section 25(3) in the case of *Du Toit v Minister of Transport*.<sup>5</sup> The Court found that market value should be used as point of departure, after which amounts that are fair and equitable could possibly be deducted.

Doctoral theses have been written on compensation in the event of expropriation in terms of the South African Constitution.<sup>6</sup> Elmien du Plessis makes out a case in her doctoral thesis for so-called "demoralisation costs" rather than market value as the basis for compensation, and says our Constitution requires a proportional approach where the rights of the affected individual are balanced against those of the community. She argues that market value will usually be higher than demoralisation costs. An American economist, Frank Michelman, came up with the concept of 'demoralisation' costs. He argues that if expropriation is necessary in the public interest, compensation below market value may be justified. The demoralisation argument is based on the assumption that people have expectations about what they will get out of the situation (outputs) depending on the inputs that they make. When the expected output is not realised, people become demotivated and demoralised.

The Land Claims Court recently in the case *Msiza v Uys* allowed an arbitrary deduction from the agreed-upon agricultural value of R1,8 million on the basis that it was justified to deduct an amount of R300 000 because the land was being expropriated for land reform purposes.<sup>7</sup> However, the case will now go on appeal and Agri SA has become involved as a friend of the court. Agri SA will argue, among other things, that the purpose of compensation, as required by the Constitution, was to compensate the affected land owner for the loss of his or her property. Market value is the only basis on which the extent of the loss can be determined. Therefore, market value should be the point of departure for any determination of just and equitable compensation. An approach where deductions can be made at random is unfair, irrational and arbitrary. Any deductions from market value should be properly quantified and substantiated. The cost of land reform which is in the public interest must be borne by taxpayers in general and should not be for the account of individual land owners. Agri SA hopes to obtain a clear interpretation from the Appeal Court of how just and equitable compensation should be calculated in terms of the Constitution.

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<sup>5</sup> <http://www.saflii.org/za/cases/ZACC/2005/9.pdf>

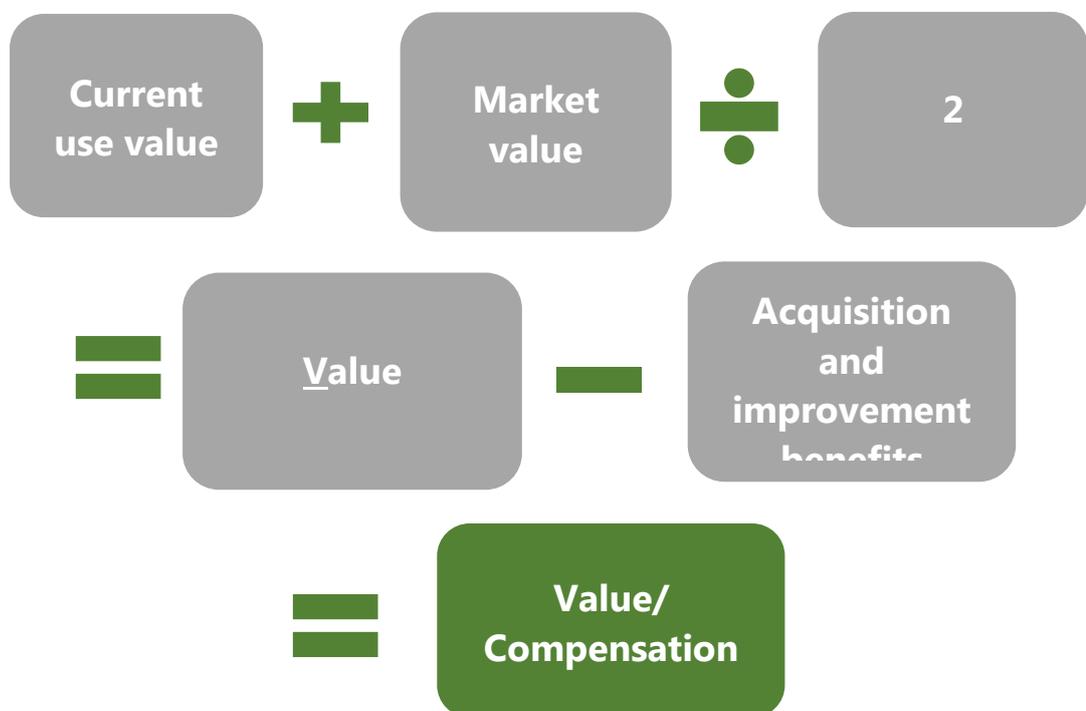
<sup>6</sup> Compensation for Expropriation under the Constitution: Wilhelmina Jacoba du Plessis: 2009: Stellenbosch Universiteit;

<sup>7</sup> *Msiza v Director-General for the Department of Rural Development and Land Reform and Others* (LCC133/2012) [2016] ZALCC 12; 2016 (5) SA 513 (LCC) (5 July 2016)

#### 4. Regulations in terms of the Property Valuation Act

In 2014 Parliament approved the Property Valuation Act in terms of which the state may not acquire any land for land reform purposes unless the valuation has been approved by the Office of the Valuer-General. This legislation authorises the Minister of Rural Development and Land Affairs to issue regulations which include the criteria, procedure and guidelines for the valuation of property. These regulations, which were published in draft form on 21 April 2017 for public commentary, attempt, among other things, to give substance to the factors mentioned in section 25(3) of the Constitution and also prescribe how the value should be determined. The proposed method for calculating value is as follows: Current use value (in essence production value) plus market value, divided by 2, less benefits derived from state subsidies and assistance. It is feared that this method could seriously prejudice certain farmers. Agri SA is also concerned that the regulations could be used to attach a certain interpretation to the factors in the Constitution which should in fact be interpreted and developed by the courts.

The Valuer-General held intensive consultations with Agri SA's structures on the regulations where comprehensive input was provided. The final regulations are awaited.



## 5. Conclusion

Compensation for land owners who are deprived of their land for land reform purposes must be determined based on considerations of fairness and equity and in line with international best practice, and may not be dictated by short-term opportunism, vengeance or unaffordability resulting from inadequate budgets or inappropriate expenditure. Short cuts aimed at under-compensating such land owners could hold serious implications for the agricultural sector and the economy as a whole. International best practice is based on the principle of equivalence,<sup>8</sup> which assumes that a person should be compensated for the real and actual loss that he or she suffered. The intention is to place a person in the same position as he or she would have been in had they not been deprived of their property.

There is not sufficient clarity regarding the interpretation and application of the principles of just and equitable compensation in terms of our Constitution. Ultimately only our courts can provide greater clarity in this regard. Agri SA plans to continue playing a directional role in this process to ensure that a sustainable and fair approach is followed in the interest of South Africa's long-term future.



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<sup>8</sup> Law of Compulsory Purchase and Compensation: Michael Barnes: Hart Publishing 2014:  
[https://books.google.co.za/books?id=9dOdBQAAQBAJ&pg=PA86&lpg=PA86&dq=equivalence+in+compensation&source=bl&ots=K5JGbHszEA&sig=mBKFILeuHveIEV1f7a1\\_usItOcQ&hl=en&sa=X&ved=0ahUKewjstflwIPVAhUICMAKHZQABMwQ6AEIMzAD#v=onepage&q=equivalence%20in%20compensation&f=false](https://books.google.co.za/books?id=9dOdBQAAQBAJ&pg=PA86&lpg=PA86&dq=equivalence+in+compensation&source=bl&ots=K5JGbHszEA&sig=mBKFILeuHveIEV1f7a1_usItOcQ&hl=en&sa=X&ved=0ahUKewjstflwIPVAhUICMAKHZQABMwQ6AEIMzAD#v=onepage&q=equivalence%20in%20compensation&f=false)

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