Land reform and housing: Reaching for the rafters or struggling with foundations?

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Abstract

With regard to land reform and housing, the pressing question is whether South Africans have indeed reached their rafters (ie the structures which make up the main framework of all roofs) and are therefore in the process of fixing roofs and enjoying protection against the elements, or are they still struggling with foundations? Within the context of housing, this overarching question also reflects on what would constitute the 'foundation' in order to enable the eventual construction of rafters to support the roof. What is the link between the foundation, required to stabilise the building on the one hand; and land reform and housing on the other? Inevitably further questions follow: if there is a link between land reform and housing, how and why did it emerge? What does the link entail and how is it dealt with? What are the difficulties and shortcomings that threaten the link and how can these threats be addressed? Essentially the premise is that access to housing (the rafters that support the roof) cannot and will not be achieved if access to land (the foundation) is not realised. The more sound the foundation, the better the overall structure and inevitably, the rafters in support of the roof. As will be explained, various approaches to foundations exist, depending on the kind of building to be constructed, the location thereof and the environmental and geographical considerations. Similarly, access to land, forming the foundation, may be approached from various perspectives, including *inter alia* relational, economic, property law and land reform approaches. The conclusion is reached that as builders South Africans have to harness all the tools they have at their disposal: definitely land reform tools, but also property law, planning and construction and economic and financial mechanisms, mixed in with creativity and commitment. It is imperative that sufficient land, ideally located, is secured in time and in a constitutional manner, so that the walls can be built in order to finally, secure the roof so desperately needed.

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1 Introduction

Builders of houses, not necessarily master builders only, all agree that a roof cannot be fixed securely without rafters to form a sturdy network of connecting points.[1] Consequently, rafters make up the main framework of all roofs. Rafters, the inclined members, are fastened to the ridge or to another rafter, depending on the type of roof. Various types of rafters exist, depending on the kind of building,[2] and they rest on the top wall plates. To that end builders further agree that, in order to reach the rafters so that the roof can be fixed, strong walls have to be built, resting on solid, sound and stable foundations.[3] Therefore, in order to fix the roof to protect one against the elements, to provide safety and to finally 'have a roof over one's head', thereby constituting a home, a foundation is essential. Again, different types of foundations exist, depending on the kind of building, its location, the soil, weather conditions and environmental considerations.

Designing and constructing the correct foundation is an extremely technical matter that involves, amongst other things, standards and safety considerations. To that end the South African National Standards Regulations for Foundations caution from the outset that:[4]

> Foundations of any structure, large or small, must be built to safely transmit all loads of the building to the ground. If foundations are not correctly built, walls may crack and at worst, could even collapse.

and require specifically that:[5]

> The foundation of any building shall be designed and constructed to safely transmit all the actions which can reasonably be expected to occur from such building to the ground and in such a manner that any local damage (including

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[1] [United States, Department of the Army] (*s.d.*) 'Roof systems and coverings' (chapter 7) in *US Army carpentry field manual* (no pagination), retrieved from Construction Knowledge Database (Carpentry and Wood) on Construction Knowledge.net website available at http://www.constructionknowledge.net/public_domain_documents/Div_6_Woods_Plastics/Partial%20Carpentry%20pdfs/Roof_Framing_&_Roofing_%20Army_FM5-426.pdf (accessed 2015-03-04).

[2] United States, Department of the Army (n 1): Common rafters are framing rafters that extend at right angles from the plate line to the roof ridge. They are called common rafters because they are common to all types of roofs and are used as the basis for laying out other types of rafters. Other rafters include hip rafters (roof members that extend diagonally from the corner of the plate to the ridge) and valley rafters (extending from the plate to the ridge along the lines where two roofs intersect).

[3] Cook *Building in the 21st century* (2007) 6.

[4] 'Foundations: Regulations for foundations – Part H: A focus on safety' (2011) *SANS 10400 Building Regulations* website (South African National Standards), November available at http://sans10400.co.za/foundations/ (accessed 2015-07-17).

[5] *Ibid*.

> cracking), deformation or vibration do not compromise the efficient use of a building or the functioning of any element of a building or equipment within a building.

Although the base below a home or building is called a foundation, as explained, it is in reality a system of several integrated parts, usually consisting of the footing, the foundation walls (or slab) and internal structures and materials.[6] The footing is the base and constitutes the lowest point of the structure, designed to carry the weight of the building and rests on solid soil for stability. The foundation walls or slab are the partially visible portions which carry the loads from the floor and walls and are typically poured concrete, masonry blocks or other rigid materials. Internal structures and materials include cement, aggregate (sand and stones) and water. Usually within slabs of concrete one would also encounter steel mesh or bars. Combined, all of these elements comprise the foundation. While different foundations and types of buildings emerge, it is agreed that the more sound the foundation, the more lasting the construction or building. In this context effective foundations are critical.[7]

With regard to land reform and housing, the pressing question is whether we, as South Africans, have indeed reached our rafters and are therefore in the process of fixing roofs and enjoying protection against the elements, or are we still struggling with our foundations? Within the context of housing this overarching question also reflects on what would constitute the 'foundation' in order to enable the eventual erection of rafters to support the roof. What is the link between the foundation, required to stabilise the building on the one hand; and land reform and housing on the other? Inevitably further questions follow: if there is a link between land reform and housing, how and why did it emerge? What does the link entail and how is it dealt with? What are the difficulties and short-comings that threaten the link and how can these threats be addressed?

Essentially the premise is that access to housing (the rafters that support the roof) cannot and will not be achieved if access to land (the foundation) is not realised. The more sound the foundation, the better the overall structure and inevitably, the rafters in support of the roof. As explained, various approaches to foundations exist, depending on the kind of building to be constructed, the location thereof and the environmental and geographical considerations. Similarly, access to land, forming the foundation, may be approached from various perspectives, including *inter alia* relational, economic, property law and land reform approaches. While all of these approaches are relevant within the

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[6]Kayzar (2007) 'Best foundation for your home?' *Realty Times* (Consumer Advice), 11 September available at http://realtytimes.com/consumeradvice.buyersadvice1/item/6497-20070912_foundations (accessed 2015-03-04).

[7]Cook (n 3) 146.

context of housing, not all of these will be discussed and analysed fully in this contribution. In this regard some discussion of other legal mechanisms to broaden access to land takes place, but only to the extent necessary to better contextualise the main focus of this contribution, land reform as mechanism to broaden access to land. Accordingly, the contribution is subdivided into four main parts, setting out, first, the link between land reform and housing; followed by, secondly, an exposition of how the link between land reform and housing is dealt with. In order to contextualise the link between land reform and access to housing better, the introductory parts briefly reflect on historical considerations and terminology. Having set out the private and state land dimensions in the third part of the contribution, including the relevant rural and urban contexts, some of the difficulties and shortcomings that threaten the link are set out thereafter. Reflection and recommendations constitute the fourth substantial part, which precedes the final conclusion.

2 The link between land reform and housing

2.1 Background

Judge Albie Sachs identified the clear link between land reform and housing succinctly in the well-known judgment of *Port Elizabeth Municipality v Various Occupiers*[8] (*PE Municipality*) when he stated that:

> Land rights and the right to access to housing and of not being evicted arbitrarily are closely intertwined. The stronger the right to land, the greater the prospect of a secure home.

Although the case involved matters linked to eviction from private land in the absence of mediation,[9] the complexity of the matters was funnelled to *one critical factor*, one simple truth: *there cannot be access to housing if there is no access to land.* The judgment provides a detailed backdrop against which present land and housing crises should be approached.[10] While the whole of the land history cannot be conveyed here and since it has been set out sufficiently in other

[8] 2005 1 SA 217 (CC) para 19.
[9] For more detail see Pienaar *Land reform* (2014) 667-670.
[10] *PE Municipality* (n 8) paras 9-17.

publications,[11] it is trite that the combined effects of (a) influx control measures;[12] (b) group areas legislation;[13] and (c) rigid enforcement of eviction measures[14] have had a lasting impact on land ownership and settlement patterns of which the remnants are still visible today. Within this context the mobility of persons was regulated strictly, impacting directly on rural-urban migration and settlement and correspondingly also on access to land and housing. Once movement between urban and rural areas was negotiated, settlement in urban areas was regulated strictly under group areas legislation[15] and finally, draconically enforced under squatting measures.[16] It is within this context that the link between land reform and housing is especially striking: in light of rigidly regulated and restricted access to land and therefore also housing, measures had to be drafted in particular to address existing and future gaps. In this regard the South African context underlined pertinently that access to land was imperative with regard to both urban and rural contexts and that access to land had to be promoted specifically and systematically.[17]

Within this context the Constitution, section 25(5) in particular, forming part of the property clause, provides for the following:

> The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

Consequently, the link between land reform and housing is simultaneously also the foundation on which the walls have to be constructed, right up to the rafters so that finally, the roof may be secured. That is the foundation or the basis

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[11] See ch 3 in general in Pienaar (n 9); van der Merwe 'Land tenure in South Africa: A brief history and some reform proposals' (1989) *TSAR* 679; Bennett 'African land: A history of dispossession' in Zimmerman and Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 65-94.

[12] Influx control measures, often also referred to as 'pass laws', were first formalised under the Natives (Urban Areas) Act 21 of 1923 and were extended further in the Natives (Urban Areas) Consolidation Act 25 of 1945 resulting in strict regulation of rural-urban movement. These measures were abolished under the Abolition of Influx Control Measures Act 68 of 1986.

[13] This entailed racial spatial planning in terms of which use and occupation of areas were racially-defined, eg, black group areas were earmarked for occupation by black persons only.

[14] Under the Prevention of Illegal Squatting Act 52 of 1951.

[15] Over the years various versions of the original 1950 Group Areas Act existed, including, Act 41 of 1950, Act 77 of 1957 and Act 36 of 1966. Group areas legislation was abolished under the Abolition of Racially Based Land Measures Act 108 of 1991.

[16] The Prevention of Illegal Squatting Act 52 of 1951 was in practice supplemented by other regulatory measures, including the Relocation of Blacks Act 19 of 1954, the Trespass Act 6 of 1959, the Slums Act 76 of 1979 and the Health Act 63 of 1977 – see Pienaar (n 9) 112.

[17] Initially incorporated in the White Paper on Land Reform of 1991 and subsequently endorsed in the White Paper on South African Land Policy of 1997.

that must be sound in order to progress and finally, to provide homes. Before the different approaches to broadening access to land are explored, finally focusing on the land reform dimension in particular, some contextualisation is required.

2.2 Contextualisation and terminology

Having established that there can be no housing except if access to land is achieved, the focus shifts to relevant terminology, including the concept of 'broadening access to land'. Promoting or broadening access to land – often also referred to as redistribution – is not a simple concept that is understood in exactly the same manner for all intents and purposes.[18] Apart from the fact that different jurisdictions may approach broadening access to land differently,[19] two further dimensions emerge: firstly, 'access' as a *mechanism or a tool* to promote access to housing in general; and secondly, 'access' as a *land reform concept*.

2.2.1 Access to land as a mechanism to promote access to housing in general

There are various ways to promote access to housing, including economic or financial methods[20] and planning and township establishment provisions.[21] Depending on the circumstances, individuals may also gain access to land *via* a set of relationships (or relational access). These may include spousal[22] and family

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[18]See especially Pienaar (n 9) 276-280.
[19]Pienaar (n 9) 281.
[20]For example by enabling financial assistance and the facilitation of loans and mortgage bonds.
[21]Providing for shorter planning and development procedures, eg, Less Formal Township Establishment Act 113 of 1991, see also Van Wyk *Planning law* (2012) 376.
[22]Traditionally marriage partners gain access to land and other immovable property on the basis of marriage arrangements. Eg, people married in community of property have access to the joint property, as well as being co-owners thereof. In instances where the marriage was concluded out of community of property, the asset may be registered in the name of one partner only in terms of which ownership is concentrated in that person, although the spouse and the rest of the household have access to the property as well. Simple co-ownership, in the absence of the marriage foundation, may also resort in co-ownership and co-access for both parties – see Mostert and Pope (eds) *Principles of the law of property* (2010) 96-99 and Van der Walt and Pienaar GJ *Introduction to the law of property* (2009) 45-58 for information regarding various forms of co-ownership. Traditionally, within customary law marriages wives used to gain access to land and immovable property *via* husbands (or other male relatives) – see Pienaar 'Broadening access to land: The case of African rural women in South Africa' (2002) *TSAR* 177-204. Conditions have changed since the commencement of the Recognition of Customary Marriages Act 120 of 1998 on 15 November 2000 in that provision has now been made for identical proprietary consequences for monogamous customary law and civil marriages – see ss 6 and 7 of the Act for the prevailing property regimes. See in particular Bennett *Customary law in South Africa* (2004) 254-258 for proprietary consequences of traditional customary law marriages and 260-263 for the reform that occurred under the Recognition of Customary Marriages Act. See with regard to access to land in particular 381-390. The law of succession and inheritance also enables access to land in that women living

relations on the household level[23] and community access[24] as well. While these are all valid mechanisms that contribute to 'opening up' housing and the housing sector, they are not the focus of this contribution and will therefore not be elaborated on further.

With regard to access to land as a mechanism to gain access to housing, further options arise within the legal domain: access to housing may be promoted by way of human rights instruments and measures; access to housing may be promoted by way of property law constructs; and thirdly, access to housing may be gained by way of land reform measures. While the focus of this contribution is on land reform as a mechanism to promote access to land, elaborated on in more detail below, the other two legal mechanisms identified here, warrant some discussion at this point.

Firstly, access to housing may also be promoted by way of human rights instruments and measures, functioning at both local and international levels. In this context the area of housing, (linked to access to land and tenure security and eviction), has a very distinctive transformative dimension. While much of this transformative thrust was developed in South Africa in light of the South African human rights context by way of case law[25] and academic writings,[26] other interesting developments had occurred precisely because of the international context and the relevant international documents and conventions.[27] The right to housing, in particular, is recognised in a number of international human rights

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in accordance with customary law can inherit land and other immovable property testate and intestate since the commencement of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 in the course of 2010. See with regard to more recent developments linked to land and customary law, Claassens and Mnisi 'Rural women redefining land rights in the context of living customary law' in Goldblatt and McLean (eds) *Women's social and economic rights: Developments in South Africa* (2011) 80-104.

[23] Descendants and dependants of titleholders gain access to land and immovable property *via* the titleholders, both in relation to customary law and common law arrangements – for more detail see Bennett (n 22) 254-258.

[24] Eg, access to the commonage for purposes of pasture and cultivation in certain conditions is part and parcel of customary property law for indigenous community members. Allocation of land (residential and for cultivation purposes) to community members is furthermore linked to traditional authorities' powers to allocate land (chiefs and headmen) – for more detail see Bennett (n 22) at 381-398; Cousins 'Characterising "communal" tenure: Nested systems and flexible boundaries' in Claassens and Cousins (eds) *Land, power and custom* (2008) 109-137.

[25] Eg, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (*Grootboom*).

[26] See eg, Liebenberg's new eviction paradigm in *Socio-economic rights* (2010) 268-316. See also in general Van der Walt *Property in the margins* (2009).

[27] See in general McLean 'Housing' in Woolman *et al* (eds) *Constitutional law of South Africa* (2007) 55-31-55-41; Chenwi *Evictions in South Africa: Relevant international and national standards* (2008); Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African Law* LLD thesis (Stellenbosch) (2011).

instruments, some of which South Africa has ratified.[28] In this regard some international institutions have also developed detailed standards that have to be complied with, especially in relation to evictions.[29] Furthermore, section 39(1) of the Constitution provides that courts, when interpreting the Bill of Rights, have to take into account international law and foreign law, so as to promote the values that underlie an open and democratic society. Section 233 of the Constitution also requires courts to interpret legislation, as far as possible, to be consistent with international law.[30] While the courts have referred to international law and standards when interpreting the right to adequate housing in eviction cases, the actual weight attached to particular rules of international law has varied.[31]

At local level, the right to access to housing[32] is intrinsically linked with (a) the right to access to land;[33] (b) to secure tenure;[34] and (c) protection against arbitrary evictions.[35] The right to housing also resonates in the right to shelter, especially with respect to children.[36] Though section 26 provides the necessary impetus to change eviction law in particular,[37] it is clear that housing would not be provided automatically, for everyone, overnight. In this regard it is important that section 26 provides for a right *to access* to housing and not a right to housing *per se*. As found in *Government of the Republic of South Africa v Grootboom,*[38] section 26 did not entitle 'the respondents to claim shelter or housing immediately upon demand'.[39] Instead, the right to access to housing is to be realised progressively, linked to available resources.[40] Progressive realisation of housing rights clearly places duties and responsibilities on government,[41] having resulted, amongst other things, in the 'Housing Code' that embodies numerous legislative measures[42] and policy documents.[43] As a government-led initiative the housing

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[28]Chenwi (n 27) 6.
[29]In accordance with the Basic Principles and Guidelines of 2007 – see Chenwi (n 27) 11-13.
[30]Chenwi (n 27) 6.
[31]*Ibid*. See also *Grootboom* (n 25) para 26.
[32]Section 26(1) and (2).
[33]Section 25(5).
[34]Section 25(6).
[35]Section 26(3).
[36]Section 28.
[37]Bringing about a new paradigm for eviction – Liebenberg (n 26) at 270.
[38](N 25).
[39]*Id* para 95.
[40]See in general McLean (n 27) ch 5.
[41]These include both positive and negative duties. See also Currie and De Waal *Bill of Rights handbook* (2013) 568-584 generally and with regard to housing 584-591.
[42]The Housing Act 107 of 1997 and consecutive amendments thereto. Other legislative measures promulgated to provide for access to housing include: Rental Housing Act 50 of 1999 (the main thrust of the Act is to protect tenants from unscrupulous landlords and to provide for a Rental Housing Tribunal to mediate between tenants and landlords); the Home Loan and Mortgage Disclosure Act 63 of 2000 (it ensures that banks lend money to all communities and do not refuse

subsidy scheme is the single largest mechanism that is presently employed to realise access to housing.[44] It entails a grant from government to qualifying beneficiaries and results in either home ownership or rental accommodation.[45] The particular subsidy for which an applicant qualifies would depend on the category of housing subsidy the beneficiary is accessing and the relevant household income. Various categories of housing subsidies are available.[46] Combined, local and international human rights instruments and measures have provided immense impetus to broaden access to housing.

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to give mortgage bonds to some communities without good motivation); the Housing Consumer Protection Measures Act 95 of 1998 (the Act protects new homeowners from getting poor quality houses by making sure that all builders are registered with the National Home Builders Registration Council. It further provides that all new houses are enrolled under the Defect Warranty Scheme. House builders have to comply with certain building standards and houses have to be at least 30 square metres in size).

[43]The overall Housing Code embodies the following policies: Social Housing, Rental Housing, Emergency Housing and Human Settlement Redevelopment.

[44]Department of Human Settlement Annual Report 2013/2014 36-38.

[45]Beneficiaries have to comply with the following requirements:

(a) Married or financial dependants: An applicant must be married or constantly be living together with any other person. A single person with financial dependants (eg, children or family members) may also apply.
(b) Residents: The applicant has to be a South African citizen or be in possession of a permanent resident permit.
(c) Competent to contract: The age of majority is 18 years.
(d) Monthly household income: An applicant's gross monthly income must not exceed R3 500. Adequate proof of income must be submitted.
(e) Not yet benefited: An applicant or anyone in the household must not have received previous housing benefits from the government, except if the applicant qualifies for a Consolidation Subsidy or is a disabled person.
(f) First time property owner: Except for particular exceptions, the applicant may not currently own or have owned a house previously.

For more detail see: Republic of South Africa, Department: Human Settlements (2009) The National Housing Code: Financial interventions: Individual subsidies, Vol 3, pp 18-20, available at http://www.dhs.gov.za/sites/default/files/documents/national_housing_2009/3_Financial_Interventions/3%20%20Vol%203%20Part%203%20Individual%20Subsidies.pdf (accessed on 2015-03-04).

[46]Eg, *Individual subsidy* (this enables the applicant to acquire ownership of improved residential properties (stand and house) to acquire a house building contract which is not part of approved housing subsidy projects); *Discount benefit scheme* (this scheme promotes home ownership among tenants of state-financed rental stock, including formal housing and serviced sites. Tenants receive a maximum discount of up to R7 500 on the selling price of the property. Where the discount equals or exceeds the purchase price or loan balance, the property is transferred free of any further capital charges); *Rural subsidies* (this subsidy is available to beneficiaries who only enjoy functional tenure rights to the land that they occupy. The land belongs to the state and is usually governed by traditional authorities. The subsidies are available on a project basis and beneficiaries are supported by implementing agents. Beneficiaries also have the right to decide on how to use their subsidies – either for service provision, on building of houses or a combination thereof). See also http://www.dhs.gov.za?Content/Generic%20Subsidy%20Information/Subsidy%20Information/7%20National%20Housing%20Programmes%20per%20Intervention.pdf (accessed 2015-03-04).

Secondly, with regard to property law constructs employed in broadening access to housing, the improvisation and development of new or alternative forms of ownership, often referred to as fragmented ownership, have been instrumental.[47] Development has occurred from the point of departure that single, individual ownership is not and should not be the only form of ownership available.[48] Depending on the particular need, a different approach may result in a more suitable form of control.[49] In contrast to the land reform dimension below, the *property law dimension* did not directly result from the new constitutional dispensation. Instead, over many decades, the following alternative forms of ownership have come to the fore: sectional title schemes,[50] share block schemes[51] and later also further adaptations to the basic uses of sectional title and share block schemes.[52] These constructions developed due to, *inter alia*, the need for densification in the urban context, combating building costs, transport and infrastructure considerations and adapting to lifestyle changes and new demands of, especially, urban populations.[53] These developments became increasingly important since the inception thereof in the 1970s in South Africa. Although initially developed for the middle and higher income groups, fragmented ownership may in future be employed on a greater scale for the lower income groups as smaller land units are needed, construction costs are lower and the installation of basic services is generally more cost-effective.[54]

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[47]See in general Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 3-4.
[48]See in general Pienaar (n 47) 3-4; Badenhorst, Pienaar JM and Mostert *Silberberg and Schoeman's law of property* (2006) 493-494.
[49]Mostert and Pope (n 22) 100-114.
[50]Sectional title schemes were introduced in the early 1970s and are regulated in terms of the Sectional Titles Act 95 of 1986. Sectional titles provide the basis for apartment ownership and are employed in densification of residential and commercial use of buildings. In this way several persons can simultaneously own the land and individually own a part of a building. A sectional title unit consists of a section of the building and an undivided co-ownership share in the common parts of the building and the land. The section is the principle component and the undivided share is the accessory. A further characteristic of sectional ownership is the compulsory membership of the juristic person responsible for the management of the sectional title scheme. Accordingly, the unit is a statutory form of immovable property. See in particular Pienaar (n 47) 57-286.
[51]A share block scheme is where a juristic person, the particular share block company, owns or leases a building and the members of that juristic person (the block shareholders) acquire a right of use in relation to a part of the building on the basis of their shareholding. The particular part of the building to which a right is vested, can be eg, a flat or apartment. This form of landholding is governed by the Share Blocks Control Act 59 of 1980. See for more detail Pienaar (n 47) 287-410.
[52]A modification of either the sectional title option or a share block option may entail timeshare. In South Africa timeshare seems to be a popular option for the recreational use of property eg, different holiday resorts around the country. The Property Time-sharing Control Act 75 of 1983 regulates timeshare in South Africa. See for historical background Pienaar (n 47) 4-22; Badenhorst, Pienaar and Mostert (n 48) 441-446.
[53]Pienaar (n 47) 10-13.
[54]*Id* 8-9.

Accordingly, various mechanisms, spanning the broad spectrum of legal (including human rights and property law) and non-legal mechanisms (economic and financial) co-exist in the endeavour to broaden access to land. Given that the main focus of this contribution is on land reform as a mechanism to broaden access to land in light of housing needs and demands, this particular dimension is explored forthwith.

2.2.2 'Access to land' as a land reform concept

Having regard to the former racially-based land control system, the all-encompassing South African land reform programme can be divided broadly into (a) historically-based redress; and (b) redistributive justice.[55] The first kind of land reform is mainly dealt with by way of the restitution programme[56] and is a close-ended and more concise part of the overall land reform programme.[57] The other two sub-programmes of the overall land reform programme – redistribution and tenure reform[58] – are somewhat different in the sense that they straddle both historic and redistributive redress by dealing with present-day inequalities, which are largely ascribed to the former, pre-constitutional approach to land, as alluded to above.[59]

The land reform programme, embodied in the property clause, section 25 of the Constitution, provides specifically for broadening access to land in section 25(5). In this regard specific duties are placed on the state with the aim of achieving access to land on an equitable basis by way of legislative and other measures.

While the White Paper on Land Reform of 1991 declared that access to land was a basic human right,[60] section 25(5) does not, however, constitute *a right to land* as such. Nor does it guarantee that everyone will in fact receive land. 'Access' in this context is thus the 'opening up' of the land base in order to derive some benefit from it, thereby incorporating the *ability* to derive or the *possibility*

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[55]See in detail Pienaar (n 9) ch 3.

[56]Provided for in s 25(7) of the Constitution which entails the lodging of claims for land or rights in land that were dispossessed after 19 June 1913 as a result of racially discriminatory laws or practices. See for more detail Pienaar (n 9) ch 9; see also 3.5 below.

[57]It is close-ended in that the requirements have been set out clearly in s 2 of the Restitution of Land Rights Act 22 of 1994 and because the class of applicants may be ascertained quite clearly beforehand. It is open-ended in the sense that the final phase of restitution may take more than a generation to be completed. In the latter regard no end date for restitution can be set. Furthermore, the re-opening of claims has recently been announced under the Amendment of the Restitution of Land Rights Act 15 of 2014, embodying a new deadline for the submission of land claims: 30 June 2019.

[58]As provided for in s 25(6), read with 25(9) of the Constitution.

[59]See 2.1 above.

[60]See 1-2.

of deriving a benefit and not a *right* to derive a benefit, as explained.[61] Consequently, connected issues would include *who* would be able to benefit, *how* that person, community or institution enters into the arena to stand a chance of qualifying, *what* the benefits would be and *when* or in *which circumstances* the benefits would accrue. In order for the system to work, these key issues (the 'who', 'how', 'what' and 'when' elements) have to be dealt with clearly in policy documents and relevant legislation and have to be implemented effectively.

While the granting of ownership as a mechanism to broaden access to land would also alter land ownership patterns, broadening access to land by way of lease or leasehold would ultimately not alter land ownership patterns. Consequently, in this respect 'broadening access' to land and 'redistribution', with the ultimate aim of altering land ownership patterns, are not necessarily identical. With regard to the latter, especially from a government perspective, particular targets and approaches also enter into the picture. Included herewith is the target to redistribute 30% of agricultural land[62] and suggestions to place ceilings on how much land one individual or entity may hold.[63]

It is furthermore important to note that access to *land* is not the only component that is at stake. Because the pre-constitutional overarching network of subsidies, financial and other infrastructural support systems[64] was dominated by the white minority, access to this overarching network is furthermore required. Consequently, apart from the land base that has to be unlocked, the overarching network impacting on and regulating the land base has to be unlocked as well. This means that the whole 'land system' had to be opened up: land as a finite resource and the organisational grid or network that supports it. How these statutory frameworks and legislative measures, emanating from the overarching land reform programme, link access to land and housing in particular, is explored in more detail below.

3 Access to land within the land reform paradigm

3.1 Background

Having set out the basic premise that there can be no access to housing if there is no access to land and having established that land reform provides specifically for broadening access to land under section 25(5) of the Constitution, this section explores the precise link between land reform and housing. Promoting access to

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[61] See in particular Ribot and Peluso 'A theory of access' (2003) *Rural Sociology* 153-181.
[62] Walker 'Redistributive land reform: For what and for whom?' in Ntsebeza and Hall (eds) *The land question in South Africa* (2007) 132-151.
[63] Agricultural Landholding Policy Framework (July 2013).
[64] Eg, government funded loans and subsidies, marketing boards, co-operatives and agricultural price management structures.

land, as a sub-programme, has very particular and rather unique characteristics. A brief exposition of these characteristics provides the backdrop for the elaboration on the housing link that follows later.

Firstly, in contrast to the other land reform sub-programmes like restitution and tenure reform, much of the detail is not found in legislation – though important legislative measures have been promulgated – but is found largely in policy and departmental documents. This means that the actual mechanics that 'open up' land may be slightly more difficult and complex to ascertain, compared to the other sub-programmes. Inevitably, this may impact on the accessibility and overall efficacy of this sub-programme.

Secondly, this sub-programme, as provided for in section 25(5) of the Constitution, highlights *citizens* and their rights in particular. This emphasis has recently resulted in statements that land ownership by foreigners may be prohibited.[65]

Thirdly, while the accessibility of the South African market had been influenced previously by race, it had become less restricted immediately following the new political dispensation in 1994. In that regard land markets were generally open and unregulated and essentially functioned on a market-based or market-assisted approach.[66] However, recent developments seem to indicate a shift towards a more regulated approach. In this regard a possible ceiling of how much land one individual or entity may hold in ownership, constituting 12 000 ha or two farms, is envisaged.[67] Inevitably, a more regulated approach to land may also impact on access to housing.

Finally, the duty to broaden access to land impacts on all land, including private and state land and relates to both urban and rural contexts. In this context the potential of this sub-programme is immense.

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[65]With regard to foreigners' land ownership the Green Paper on Land Reform (2011) provided for 'freehold, but precarious tenure'. However, while 'freehold' entails ownership rights, the President announced a prohibition on foreigners' ownership during the State of the Nation Address on 12 February 2015 – see eg, Anon (2015) 'Limiting foreign ownership of land in SA' *property24*, 16 February available at http://www.property24.com/articles/limiting-foreign-ownership-of-land-in-sa/21496 (accessed 20 February 2015).

[66]Lahiff '"Willing buyer-willing seller": South Africa's failed experiment in market-led agrarian reform' (2007) *Third World Quarterly* 1577-1579.

[67]Anon (2015) 'ANC calls for faster land reform' *fin24*, 29 January available at http://www.fin24.com/Economy/ANC-calls-for-faster-land-reform-20150129 (accessed 2015-07-17); Groenewald (2015) 'ANC threatens property rights and food security with land proposals: FF Plus' *politicsweb*, 29 January available at http://www.politicsweb.co.za/news-and-analysis/anc-threatens-property-rights-and-food-security-wi?sn=Marketingweb+detail (accessed 20 February 2015); Hunter 'ANC wants land cap of 12 000 hectares or two farms' *Mail & Guardian* (2015-01-28) at 17 and available at http://mg.co.za/article/2015-01-28-anc-wants-land-cap-of-12-000-hectares-or-two-farms (accessed 2015-07-17).

Having regard to the outstanding characteristics above, the particular link between land reform and housing is explored further. In this regard private land is set out first, followed by a brief overview of state land.

3.2 Land reform and housing: private land

With regard to private land, various legislative measures have been promulgated to deal with rural and urban contexts respectively. While some of these measures pre-date the all-encompassing land reform programme that was embarked on in 1994,[68] the majority of these measures were developed in particular to transform existing land control systems in line with the transformative thrust that is embodied in the property clause.[69] Herewith follows an overview of the most important legislative measures that impact on the link between access to land and housing within the land reform paradigm.

3.2.1 Rural context

While the Land Reform: Provision of Land and Assistance Act 126 of 1993[70] pre-dates the all-encompassing land reform programme, it has been adapted and changed regularly to address particular needs and demands. In this regard the Act provides for the designation of certain land; to regulate the subdivision of such land and the *settlement of persons thereon*; to provide for the acquisition, maintenance, planning, development, improvement and disposal of property and the provision of financial assistance for land reform purposes; and to provide for matters connected therewith. Specific aims of the Act[71] furthermore include the promotion, facilitation and the provision of support regarding the maintenance, planning, sustainable use, development and improvement of property contemplated in the Act; contributing to poverty alleviation; and the promotion of economic growth and the empowerment of historically disadvantaged persons.

Broadening access to land is achieved under section 2(1)(c) where the Minister,[72] subject to certain provisions, designates for purposes of settlement any land which has been made available for such purposes by the owner. Such

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[68]Two phases of land reform may be distinguished: an exploratory or first phase land reform programme that was embarked on by the former De Klerk-government in 1991; and a second phase or all-encompassing land reform programme that was embarked on following a new constitutional dispensation. Not only is the all-encompassing programme more in-depth, it is also constitutionally-grounded.

[69]See especially Van der Walt *Constitutional property law* (2011) 16; Pienaar (n 9) 174-176.

[70]It was originally the Provision of Certain Land for Settlement Act 126 of 1993, which was amended in 1998 and renamed as the Provision of Land and Assistance Act and has since been amended and updated regularly.

[71]Section 1A of the Land Reform: Provision of Land and Assistance Act 126 of 1993.

[72]Minister of Rural Development and Land Reform.

designation is announced in the *Government Gazette*.[73] The usual laws regulating the subdivision of land are exempted, unless the Minister directs otherwise.[74] The idea is that the land is to be subdivided into smaller portions for purposes pertinent to rural areas, which include *inter alia* small-scale farming, *residential,* public, community or business purposes. Because of its rural and small-scale farming dimension, the Act is probably not integral in large-scale promotion of access to housing, although it does in principle enable access to land, including for residential purposes.

While the Development Facilitation Act 67 of 1995 (hereafter the DFA) was initially drafted to provide great impetus to development generally – both with regard to urban[75] and small-scale farming developments,[76] it has recently been replaced by the Spatial Planning and Land Use Management Act 16 of 2013 (hereafter SPLUMA).[77] Having regard to transitional provisions effectively extending the DFA for some time yet,[78] the full impact of the new legislation is yet to be experienced. However, compared to the DFA it is certainly more transformation-oriented, underlining its potential to broaden access to land with respect to both rural and urban contexts, on an equitable basis.[79] In the new Act five basic principles underpin spatial planning and development, namely, the principles of (a) spatial justice; (b) spatial sustainability; (c) efficiency; (d) spatial resilience; and (e) good administration. The first principle is especially pertinent to broadening access to land, both in rural and urban contexts. In this regard broadening access, coupled with inclusion, is underlined. The underlying idea is that all future development frameworks have to address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlement, former homeland areas and areas characterised by widespread poverty and deprivation. In this regard particular emphasis is furthermore placed on the fact that spatial planning mechanisms, including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons.[80] Land development procedures must furthermore include provisions that accommodate access to secure tenure and incremental upgrading of informal areas.[81] With regard to the principle of spatial sustainability,

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[73]Section 2(2).
[74]Section 2(4); see also s 10(2).
[75]Chapter V.
[76]Chapter VI.
[77]*Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 63 declared chapters V and VI unconstitutional, eventually resulting in the promulgation of the SPLUMA in 2013. See also Van Wyk (n 21) 105-109.
[78]Section 60 provides for numerous transitional provisions.
[79]Sections 7-8.
[80]Section 7(1)(a)(iii).
[81]Section 7(1)(a)(v).

special emphasis is placed on the protection of prime and unique agricultural land[82] and the promotion of the effective and equitable functioning of land markets.[83] Once all provisions are operative and have been implemented effectively, it is thus possible that this measure can contribute greatly to forging a more effective link between land reform and housing. In this context the Act is not only a planning instrument, it also has a distinctive land reform dimension.

It is especially with respect to commercial farmland that broadening access to land and promoting redistribution has been most contentious. In this regard two legislative measures were promulgated to deal with these issues in particular: the Land Reform (Labour Tenants) Act 31 of 1996 and the Extension of Security of Tenure Act 62 of 1997, known as ESTA. Having regard to the main focus of this contribution, namely the link between land reform and access to housing, an in-depth analysis of these two legislative measures falls outside the present scope.[84]

Both these overarching legislative measures are aimed at specific beneficiaries, thereby encapsulating particular scopes, definitions and requirements.[85] With regard to both sets of beneficiaries protective measures provide for occupational rights while residing on land, while also providing specifically for the vesting of land rights on a more permanent basis. With regard to labour tenants, beneficiaries involve persons who have resided on land and who have had cropping and grazing rights in exchange for which labour was provided and whose parents or grandparents had similar or identical rights.[86] Accordingly, with respect to occupation, pasture and cultivation, *access to land* has already occurred, for two generations at least. Yet, access alone would not address land ownership patterns, thereby calling for additional measures to not only provide access to land, but to formalise access on a more secure and more permanent basis. With respect to occupational rights, residence is protected by way of strict eviction procedures and requirements that have to be complied with.[87] In this context access to housing is protected as long as both parties (land owner and labour tenant) comply with the terms of labour tenancy.[88]

Regarding more permanent rights, both sets of measures provide for the acquisition of land rights. With regard to labour tenants, Chapter III of the Act provides for a process whereby labour tenants can claim land that has been occupied and used by them for at least two generations, or for alternative land.[89]

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[82]Section 7(1)(b)(ii).
[83]Section 7(1)(b)(iv).
[84]See for more detail Pienaar (n 9) ch 7 and ch 8, respectively.
[85]Labour tenants under labour tenancy legislation and occupiers under ESTA comprise different categories of rural dwellers with different technical definitions and varied implications linked thereto.
[86]See definition of 'labour tenant' in s 1 of the Act.
[87]Section 6 regarding normal eviction proceedings and s 15 regarding urgent eviction proceedings.
[88]See eg, *Brown v Mbhense* [2008] 4 All SA 26 (SCA).
[89]Sections 16-17.

The granting of land rights results in ownership, thereby redistributing land that was formerly registered in the name of one (white) landowner. In this context land and housing would form a unit and access to land would ultimately also result in access to housing and land for cultivation. Not only would access to land have been formalised, but ultimately, ownership patterns in relation to land and housing would have been altered in relevant rural areas.[90]

An 'occupier' under ESTA is a person who resides on land belonging to another, with explicit or tacit consent[91] or who has another right in law to occupy.[92] Concerning occupiers, usually farm-workers, the situation is possibly more complex because access to land and housing is usually linked to employment.[93] Loss of employment would therefore usually result in loss of housing. While in occupation on the farm, strict eviction requirements prevail, rendering eviction only possible on compliance with procedural and substantive requirements and only if the eviction is just and equitable.[94] Additional protection is built in by way of automatic review proceedings by the Land Claims Court of all eviction orders that were granted by lower courts.[95] Regarding more permanent rights, particular development processes have to be embarked on, involving either 'on the farm' or 'off the farm' development, provided for specifically under Chapter II of the Act.[96] Unfortunately efforts to promote more secure tenure and thereby also housing have not been nearly as successful as was envisaged when ESTA commenced.[97] Various reasons exist for this sad state of affairs, including continued unlawful eviction,[98] eradication of housing opportunities on farms[99] and livelihood issues causing persons to 'sell' their occupational rights to landowners in order to secure an eviction order.[100] The loss of housing in agricultural areas, thereby

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[90]Due to historical reasons labour tenancy is more pronounced in KwaZulu-Natal and in Mpumalanga provinces – see Pienaar (n 9) 305-306.

[91]See *Randfontein Municipality v Grobler* [2010] 2 All SA 40 (SCA) where an application for appeal was postponed in order for the court *a quo* to hear oral evidence regarding the fact whether tacit consent was granted or not.

[92]Section 1 of the Act. See also V*enter v Claasen* 2001 1 SA 720 (LCC).

[93]See eg, *Kiepersol Poultry Farm v Phasiya* 2010 3 SA 152 (SCA).

[94]See Pienaar (n 9) 400-409.

[95]Section 19(3) of ESTA.

[96]See s 4.

[97]See Pienaar (n 9) 436-440.

[98]Unlawful eviction constitutes an eviction without following the procedures set out in the Act. In this regard a difference is made between persons who became occupiers before February 1997 who have to be evicted under s 10 of the Act and persons who became occupiers after that date who have to be evicted under s 11 of the Act. Long-term occupiers who meet the requirements of s 8(4) (persons who are 60 years of age and who have been in occupation for at least 10 years) may usually not be evicted, except under very limited circumstances.

[99]Eg, when farming enterprises are rationalised and concomitant housing demolished.

[100]See the study conducted by Shirinda *In or out? Strategies for resolving farm tenure disputes in Limpopo province, South Africa* LLM thesis (University of the Western Cape) (2012).

exacerbating existing housing shortages in towns and peri-urban areas is a great concern.[101] Duties and responsibilities of local authorities and private landowners in this context are furthermore sensitive and contentious to delineate.[102]

3.2.2 Urban context

Concerning private land and urban contexts different legislative measures have been promulgated, with varied success. Also within this arena the DFA[103] has been superseded by SPLUMA, alluded to above. With the great emphasis on rural development, especially since 2009,[104] access to land within urban and peri-urban areas may have fallen between the cracks and have exposed the gap between access to land and secure tenure in these areas.[105]

3.3 Land reform and housing: State land

The duty to broaden access to land is not limited to private land only.[106] Though there is a technical difference between state land[107] and public land,[108] essentially access to land has to be broadened with regard to state land generally, in the broadest sense.[109] In this context the Land Reform: Provision of Land and Assistance Act of 1993, set out above, again gets relevant.[110] Other measures that also come into play include *inter alia*, the Distribution and Transfer of Certain

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[101]Pienaar (n 9) 439-440.
[102]*Pietersen v Van Deventer* [2010] JOL 25380 (LCC); *Coetzee v Dees* [2013] JOL 30336 (LCC) para 16; see also Van Wyk 'The role of local government in evictions' (2011) *PER* 14:3.
[103]Chapter V provided for urban development applications.
[104]Du Plessis, Pienaar and Olivier 'Land Matters and rural development' (2009) 2 *SAPL/PR* 608-610.
[105]See Boggenpoel and Pienaar 'The continued relevance of the *mandament van spolie*: Recent developments relating to dispossession and eviction' (2013) 4 *De Jure* 998 with regard to shortcomings in the grid of measures regulating eviction.
[106]White Paper on Land Policy (1997) 69. The total land area of South Africa comprises 122 081 300 hectares of which 12.6 million hectares is state land – *PLAAS*, Fact Check, Land Reform – no 3, March 2013.
[107]Mostert, Pienaar and Van Wyk 'Land' in Joubert *et al* (eds) *Law of South Africa* (2010) para 35. State land is land of which ownership vests in the President of the Republic and includes land outside the national boundaries that belongs to the South African government.
[108]Public land includes land belonging to the national and provincial governments, local authorities, parastatals and enterprises wholly owned by the government; 'state land' is land held by the national and provincial governments only. The latter also includes land that was formerly held in trust by the South African Development Trust as well as land that had in the meantime been allocated to communities or individuals in the former homeland areas and coloured rural areas.
[109]Including land held in trust which is registered in the name of the government or the relevant Minister.
[110]The processes and procedures set out above regarding private land are similar in the state-context and are not repeated here. See for more detail Pienaar (n 9) 322-323.

State Land Act 119 of 1993[111] and the Transformation of Certain Rural Areas Act 94 of 1998.[112] Technically, communities living in the various coloured rural areas in the Western, Northern and Eastern Cape and the Free State, have had access to land while it was being held in trust by the state. The Transformation Act provides the legal mechanism to formalise such access and to restructure it so that physical access to land is linked to a legal basis with concomitant legal tenure and structure. Furthermore, local government measures dealing with commonages and access to land at local government level may also bring about better access to land.[113] Unfortunately, with regard to commonages, much land is presently locked in long-term lease agreements, thereby hampering the potential of this mechanism somewhat.[114]

Although the state is probably one of the largest landowners in the country, it is not possible to pinpoint exactly how much land is owned or where the land is located. That is the case because the land audit that was conducted[115] in the course of 2013 was questioned to such an extent that the process is being repeated.[116] Accordingly, while state land has great potential to alleviate the need for access to land and concomitant access to housing, its exact potential is unclear.

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[111]Pienaar (n 9) 325-326.

[112]See also Pienaar 'Lessons from the Cape: Beyond South Africa's Transformation Act' in Godden and Tehan *Comparative perspectives on communal lands and individual ownership* (2010) 186-212.

[113]Legal Resources Centre *Municipal commonage: How to access and use it* (2010) 4; Anderson and Pienaar K *Evaluating land and agrarian reform in South Africa* Occasional Paper no 5: Municipal Commonage (*PLAAS*) (2003) 6.

[114]Pienaar (n 9) 333.

[115]Announced on 21 February 2013, Nkwinti (2013) Speech by the Minister of Rural Development and Land Reform: 2013 budget – Policy speech: 'Building vibrant, equitable, and sustainable rural communities' available at http://oscar.caxtonmagsapps.co.za/img/fwf20136314319Speech_by_the_Minister-of_Rural_development_and_Land_Reform-2013.pdf (accessed 2015-02-20).

[116]Parliamentary Monitoring Group (2013) Ad Hoc Committee on the 1913 Native Land Act: 1913 Native Land Act Centenary Workshop with parliamentary committees, MPLs and other stakehodlers: Day 2, 8 June available at http://www.pmg.org.za>NativeLandActCentenary Workshop and https://pmg.org.za/committee-meeting/15990/ (accessed 2015-07017), indicated that a renewed audit would start in July 2013 and would be completed by the end of 2014. See also Anon (2013) 'State not sure if it owns 8,360,527ha of land: Gugile Nkwinti' *politicsweb*, 9 July available at http://www.politicsweb.co.za/view/politicsweb/en/page71654?oid=389911&sn=Detail&pid=71654 (accessed 2015-02-20); Sapa 'TAU SA calls for "credible" land audit' *Times Live* (2013-07-18) available at http://www.timeslive.co.za/politics/2013/07/18/tau-sa-calls-for-credible-land-audit 18 July 2013 (accessed 2015-02-20); Administrator (2013) 'TAU SA demands land audit before land claims reopening' TLU SA/TAU SA website (Transvaalse Landbou Unie/Transvaal Agricultural Union), 18 July available at http://www.tlu.co.za/index.php/en/2012-03-05-06-29-7/latest-news/355-tau-sa-demands-land-audit-before-land-claims-reopening.html (accessed 2015-02-20).

3.4 Indirect (and interim) access to land and housing

Though not focused on broadening access to land *per se*, the application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereafter PIE) may, depending on the particular facts and circumstances of the case, result in access to land.[117] That may be case where the granting of an eviction order is prevented on the basis that it is not just and equitable[118] or where the order was granted but cannot be executed, for various reasons.[119] In these particular instances the impact of PIE would thus be that (unlawful) occupiers would have effectively gained access to land (and housing), albeit usually for an interim period only.

3.5 Regaining access to land and housing

While the majority of legislative measures referred to above provide in principle for landless persons to gain access to land or for persons who already enjoy access to land informally, to formalise such access, the question arises as to the position of persons who did have access to land and lived in homes and dwellings, but who lost it under the former racial approach to land. How are these persons to regain lost access under the land reform programme? These individuals, families and communities are catered for specifically in the restitution programme[120] that aims to restore land or rights in land and, if this proves impossible, to provide for equitable redress. In order to be successful with a claim, the claimant has to show that a right in land had been lost after 19 June 1913 as a result of racially discriminatory laws or practices.[121] Though restoring

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[117]The Act is aimed at the regulation of unlawful occupation of land and provides various substantive and procedural protective measures. In this regard three procedures become relevant, namely the s 4 procedure employed by private landowners or persons in control of property that is being occupied unlawfully, s 6 procedures available to organs of state and s 5, available to both private persons and the state in urgent eviction applications. See for more detail Pienaar (n 9) 688-734; Liebenberg (n 26) at 271-273; Badenhorst, Pienaar and Mostert (n 48) 654-656.

[118]Eviction orders may only be granted if all requirements had been met and if the granting thereof is indeed just and equitable in the circumstances. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) the following two factors were considered in particular in determining whether the granting of an eviction order would be just and equitable: namely (a) the risk of homelessness; and (b) the availability of suitable alternative accommodation. See also *Johannesburg Housing Corporation (Pty) Ltd v The Unlawful Occupiers of the Newtown Urban Village* [2013] 1 All SA 192 (GSJ).

[119]In *President of the RSA, Minister of Agriculture and Land Affairs v Modderklip Boerdery Bpk (Pty) Ltd* 2005 5 SA 3 (CC) an eviction order was granted but could not be executed due to the absence of suitable alternative accommodation. To that end constitutional damages were awarded to the relevant land owner – see Pienaar (n 9) 772-776.

[120]Provided for in s 25(7) of the Constitution.

[121]See for a detailed analysis of the restitution programme Pienaar (n 9) ch 9.

the exact parcel of land or particular house that was lost is ideal,[122] it is not always possible. Apart from the fact that there is no constitutional right to specific restoration,[123] a variety of factors, including existing development and public interest generally, could result in specific restoration not being possible or viable.[124] To that end alternative land and monetary compensation or a combination of both, is also resorted to.[125]

To date the programme has had mixed results:[126] in some instances people have returned to their roots[127] and in other instances monetary compensation or 'check book' restitution occurred.[128] Though some beneficiaries have mentioned the symbolic value of restoration, many have conveyed the loss of a home as something that can never be restored – not ever.[129]

4 Difficulties and shortcomings

Having established the clear link between land reform, broadening access to land and housing, the focus shifts to the difficulties and problems inherent in this link that are threatening to sever it.

Despite confirming that access to land has to be broadened with regard to both rural and urban areas,[130] the impression is gained that rural areas and agricultural land have been focused on in particular.[131] While the focus is understandable (and necessary), it may have been to the detriment of access to land for housing purposes or access to land within towns and in urban contexts.

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[122] *The Baphiring Community v Tshwaranani Projects CC* Case number 806/12, [2013] ZASCA 99, 6 September 2013.

[123] Confirmed in *Concerned Land Claimants' Organisation v PELCRA* 2007 2 SA 371 (CC).

[124] See eg for the non-restoration of land in the public interest, *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* 1998 1 SA 78 (LCC); *Khosis Community, Lohatla Battle School v Minister of Defence* 2004 5 SA 494 (SCA).

[125] See the array of court orders provided for in s 35 of the Restitution of Land Rights Act 22 of 1994, as guided by the factors listed in s 33.

[126] See Pienaar (n 9) 641-656 for issues pertinent to the South African restitution programme.

[127] Hall 'Reconciling the past, present and the future' in Walker *et al* (eds) *Land, memory, reconstruction and justice* (2010) 34.

[128] Bohlin 'A price on the past: Cash as compensation in South African land restitution' (2004) 3 *Canadian Association of African Studies* 672-687.

[129] See generally Gibson 'Land redistribution/restitution in South Africa: A model of multiple values as the past meets the present' (2010) *British J of Political Science* 135-169.

[130] White Paper on Land Policy (1997) 69-70.

[131] Much emphasis has been placed on broadening access to agricultural land generally, including most recently by the President during his State of the National Address on 12 February 2015 – see eg Anon (2015) 'Limiting foreign ownership of land in SA' *property24*, 16 February, available at http://www.property24.com/articles/limiting-foreign-ownership-of-land-in-sa/21496 (accessed 2015-02-20); Anon (2015) 'ANC calls for faster land reform' *fin24*, 29 January, available at http://www.fin24.com/Economy/ANC-calls-for-faster-land-reform-20150129 (accessed 2015-07-17).

The restructuring of the Department in 2009 resulting in the Department of Rural Development and Land Reform may have provided further impetus to the urban/rural divide.[132] Much energy, time and effort are focused on rural land reform issues, including the questions linked to small- or large-scale farming, the subdivision of agricultural land, the issue of collective production and communal property associations.[133] Recent developments have fuelled the debate further, calling for, amongst other things, constituting 'floors' and placing 'ceilings' on agricultural land holding, thereby limiting the amount of land one individual or entity may hold to 12 000 ha or two farms,[134] prohibiting land ownership for foreigners[135] and developing the 50-50% farm ownership plans.[136]

Various draft Bills are apparently underway that impact, in greater or lesser degrees, on the above-mentioned issues. Yet, no clear policy guidelines emerge that are aligned with existing and planned documents.[137] Instead, measures drafted within one field or area often conflict with other provisions or expose glaring gaps and disconnects.[138] In this regard only three examples will be highlighted: firstly, in the 2013 Land Manifesto[139] much emphasis was placed on adjusting the inequitable land ownership pattern. However, announcements incorporated in the 2013 State Land Lease and Leasehold Policy Framework entail that land is in future to be granted in leasehold only. This means that, while more persons gain access to land *via* lease and leasehold, ownership remains

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[132] Hall 'A fresh start for rural development and agrarian reform?' *PLAAS Policy Brief* 29 (July 2009) 3.
[133] Pienaar (n 9) 348-353.
[134] See the Agricultural Landholding Policy Framework of July 2013 and the discussion thereof by Pienaar (n 9) 259-263.
[135] This was initially provided for in the Green Paper on Land Reform in 2011 by constituting a 'single four tier tenure system', including 'freehold, but precarious tenure, with obligations and conditions' as a third category tenure form available to foreigners. See for a discussion of this issue Pienaar (n 9) 244-246.
[136] First made public in the Final Policy Proposals on 'strengthening the relative rights of people working the land' in April 2014, which were then placed on the backburner in October 2014 and unexpectedly mentioned again in the State of the Nation Address by the President in February 2015. See Pienaar 'Land reform' 2014 (2) *Juta Quarterly Review* regarding the April 2014 provisions.
[137] Eg, measures incorporated in the State Land Lease and Leasehold Policy Framework of July 2013 do not necessarily correspond to measures and categories incorporated in the Agricultural Landholding Policy Framework of July 2013. Hence different sets or categories of landowners may emerge – for more detail see Pienaar (n 9) 255-263.
[138] See for a detailed exposition of the particular gaps and disconnects Pienaar 'Reflections on the South African land reform programme: Characteristics, dichotomies and tensions (part 2)' (2014) 4 *TSAR* 689-705.
[139] Land Manifesto published in celebration of Nelson Mandela's 95th birthday, published on 22 July 2013 by the Department of Rural Development and Land Reform, was available online at http://www.dla.gov.za/phocadownload/1913/DRDLR_2009Manifesto_Report.pdf at 19 (accessed 2015-02-20) (hard copy with author).

with the state, resulting in ownership patterns remaining, after all, unaltered. Secondly, announcements that citizens' land ownership will be restricted to 12 000 ha or two farms have not been aligned with issues pertinent to food security. While the Food Security Policy/Zero Hunger Programme, published in March 2012, highlights the link between food security, and land tenure, no alignment with regard to land or parcel sizes in particular emerge. Yet, the whole approach of the new announcements is based on limiting land sizes. Thirdly, prohibiting foreigners from land ownership was motivated, *inter alia*, by concerns about foreign ownership of land in coastal areas; 'wealthy foreigners snapping up top-end properties on Cape Town's Atlantic seaboard'[140] and foreigners 'splashing out on homes costing about R20-million.'[141] Yet, the prohibition seems to be levelled at farm and agricultural land and not residential property *per se*. To that end the housing market would not be impacted. Consequently, due to inherent contradictions within programmes and disconnects between relevant policy frameworks and measures emanating therefrom, it is quite possible that extant and envisaged measures will not, after all, broaden access to land and housing. To that end, neither access to land nor land ownership patterns would have been altered for the better.

Access to information is inherently problematic. These dichotomies and disconnects may be identified if one is fortunate enough to gain access to policy documents, draft legislation and data. In many instances this is extremely difficult, relegating land reform and connected issues to rumours, websites and what is announced in the media, which is often misleading and invariably sensational. This leads to great uncertainty, resulting in owners and potential beneficiaries being unable to plan pro-actively and causing mistrust and fear. Combined, the disconnects, the gaps, the uncertainty and the unavailability of data and information impact extremely negatively on the promotion of access to land in a legitimate and constitutional fashion.

5 Reflection and recommendations

As referred to above, foundations consist of footings, foundation walls and internal structures and materials. All of these elements are integral to providing sound and solid foundations that would withstand weight and geographical shifts. What is required with regard to land reform, to constitute sturdy and effective foundations?

It is imperative that more emphasis is placed on broadening access to land in urban and peri-urban areas, concerning both private and state land, linked to

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[140] Mabuza, Strydom and Dlamini (2015) 'Land offensive' *Times live* (2015-01-29), available at http://www.timeslive.co.za/thetimes/2015/01/29land-offensive (accessed 2015-02-20).
[141] *Ibid.*

secure tenure. The same sense of urgency that is currently experienced with regard to rural and agricultural areas, (and which is necessary), has to be extended to urban and peri-urban contexts as well. The wheel need not be re-invented. On the contrary: the footing of the foundation has already been laid.[142] To some extent shortcomings in existing legislation with respect to both rural and urban contexts have already been exposed in judgments and in academic publications. In this regard it is critical that the shortcomings are addressed, that implementation is effected and that budgeting is sufficient and aligned accordingly. While the footing has been provided, to some degree, the absence of a detailed and up-to-date land register, indicating the amount and location of state, public and private land, including foreign landownership, exposes a major gap. That has to be addressed urgently.

Once the footing has been stabilised, the foundation walls become relevant. Again, the walls are already extant: it is the Constitution that guides, frames and balances the footing. The parameters of the land reform programme are already set out in section 25, the property clause, and with regard to broadening access to land, in section 25(5) specifically. Whatever is provided for in policy frameworks and legislation has to pass constitutional muster.

As soon as the footing is in order, (including stopping the gaps) and after being balanced and guided by the Constitution, the final component of a solid foundation emerges: internal structures and materials usually comprising sand, stones, steel mesh or grids. While this arguably can include basically anything, providing a solid foundation within the South African context calls for a dose of rationality, common sense and commitment. Mixed into the solid foundation is therefore the realisation that attempts to broaden access to land must be made carefully and with consideration. Land and access to it are and have always been contentious issues in South Africa. It will be no use to dash off in one direction only to back-pedal later. Neither does it make sense to rush through legislative measures only to face an unconstitutionality finding at a later stage. And it helps no one if fears and emotions are exploited.

What is required is a considered process that acknowledges the mistakes that were made, including recent mistakes, coupled with the realisation that existing owners as well as potential beneficiaries need to be actively involved, participating and debating. In this context access to information and data is paramount.

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[142] Included (in the footing) is the research that has already been done by academics, socio-legal researchers, field workers and practitioners in terms of which existing gaps and shortcomings have already been exposed.

6 Conclusion

As South Africans we have to aim for the rafters – but we need to establish a solid foundation first. As builders we have to harness all the tools we have at our disposal: definitely land reform tools, but also property law, planning and construction and economic and financial mechanisms, mixed in with creativity and commitment. It is imperative that sufficient land, ideally located, is secured in time and in a constitutional manner, so that the walls can be built in order to finally, secure the roof so desperately needed.