

Baleka

ep/resti

UNMANDATED DRAFT

RESTITUTION OF LAND RIGHTS

- (1) Any person who, or any community which, at any time after a date fixed by an Act of Parliament (which date shall not be earlier than 1 January 1910/1948)*, was dispossessed of a right in land under, or for the purpose of furthering the object of, any law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession, shall be entitled to claim restitution in respect of such right from the state.
- (2) Any claim under subsection (1) shall be subject to such conditions and limitations as may be prescribed by the said Act and shall be justiciable in accordance with such Act by a competent court of law or a tribunal established for the purpose of such claims by such Act.
- (3) If the land in question is still in the possession of the state, the court or such tribunal may order the state to restore the relevant right to the claimant if the state certifies that such restoration is feasible: Provided that if such restoration is not feasible, the court or such tribunal may order the state -

* ANC = 1 January 1910
 SAG = 1 January 1948

- (a) to grant the claimant an appropriate right in available alternative state-owned land designated by the State to the satisfaction of the court or such tribunal;
- (b) to pay the claimant, subject to subsection (5), just and equitable compensation; or
- (c) to grant the claimant alternative relief.

(4) If the land in question is in the possession of a private owner and the state certifies that the ^{*}~~purchase~~ purchase and acquisition of such land by the state is not feasible, the court or such tribunal may order the state -

- (a) to grant the claimant an appropriate right in available alternative state-owned land designated by the State to the satisfaction of the court or such tribunal;
- (b) to pay the claimant, subject to subsection (5), just and equitable compensation; or
- (c) to grant the claimant alternative relief.

(5) The compensation referred to in subsection (3)(b) or (4)(b) shall be determined by the court or the said tribunal as just

* ANC's preferred wording: "purchase or expropriation"

SAG: "purchase and acquisition"

and equitable, taking into account all such factors as may be prescribed by the said Act, including any compensation that was paid upon such dispossession.

(6) (a) This section shall not apply to any rights in land expropriated under the Expropriation Act, 1975 (Act No. 63 or 1975), or any other law incorporating the Expropriation Act, 1975, or its provisions with regard to compensation, if just and equitable compensation as contemplated in subsection (5) was paid in respect of such expropriation.

(b) In this section "Expropriation Act, 1975)" shall include any expropriation law repealed by that Act.

(7) No claims under this section shall be lodged before the passing of the Act of Parliament contemplated herein.

For Discussions Purposes Only

FOURTH OPTION

4. [RESTORATION OF LAND]

Subject to clauses 1, 2 and 3 above, every person who was dispossessed of rights in land as a consequence of any racially discriminatory policy [within a period to be fixed by Parliament] according to certain specified statutes shall have the right to [the restoration of such rights in land according to law or to compensation or any other remedy according to law where such restoration is not feasible] restitution of ~~such~~ rights in land according to law if such rights are state owned and if feasible. If such land is not state owned, such a person shall be entitled to just and equitable compensation to the extent that such compensation has not been paid.

[Provided that Parliament shall first have enacted the conditions under which and the procedures and mechanisms by which this right may be enforced, and the method by which the amount of compensation is to be determined].

South African Govt Suggestion

14/10/93

ep/land

(For possible inclusion in the Constitution but not in Chapter 3)

Land claims

(1) Any person or group of persons who was dispossessed of any rights in land as a consequence of the implementation by the state of a racially discriminatory policy at any time after 1948 and who was not compensated or adequately compensated for the loss of such rights, shall upon production of proof of the said facts before a court of law or any tribunal that may be established for the purpose of this section by an Act of Parliament, be entitled -

- (a) to the restoration of such rights provided the land in question is still in a substantially unaltered state in the possession of the state and is not used or required for essential public purposes and provided further the restoration of such rights is feasible; or
- (b) to compensation or adequate compensation, as the case may be, for the loss of such rights if the land is no longer in the possession of the state, or if the land is still in the possession of the state but the person or group of persons concerned is not in terms of paragraph (a) entitled to the restoration of such rights.

① NB: The SAG has no problem with restoration of land rights, but the instruction from FW, according to Sheila Cameron is that this is not a human rights issue. Robie Coetzee will not help in this regard therefore. Besides the SAG wants a foundation more or less along the lines suggested in this document. ② For the SAG, S. 28(3) is out

③ Sections 10-21 of Act 63 of 1975 deal with the question of payment of compensation. Section 11 requires that 80% of compensation be paid in cash, upfront. Section 10, 11 and 12 in particular are the crux of the matter; they together define "prompt or expeditious payment" of compensation.

(2) The compensation referred to in subsection (1)(b) shall be as agreed upon or, failing agreement, be determined by the court or such tribunal -

(a) in accordance with the provisions of an Act of Parliament that may be passed for such purpose; or

(b) if no such Act is passed, in accordance with the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), as if the dispossession of the rights in question at the time were effected under that Act.

(3) This section shall not apply to any rights in land expropriated under the Expropriation Act, 1975, or any other law incorporating the Expropriation Act, 1975, or its provisions with regard to compensation.

[Note: The reasons for subsection (3) are two-fold. Firstly, one can assume that proper and adequate compensation was paid in respect of all expropriations under the Expropriation Act. Secondly, if such expropriations are not excluded the courts could be flooded with applications of former property owners claiming restoration of land expropriated from them under that Act in terms of the homelands consolidation scheme. These farms are mostly still in the hands of the state (homelands authorities), which means that the proposed subclause (1)(a) could apply to them.]