

Land Reform:

The Constitution, implementation
and choices to be made



UNIVERSITY *of the*
WESTERN CAPE



Presentation to the Agri South Africa and Landbouweekblad 'Land Solutions' conference

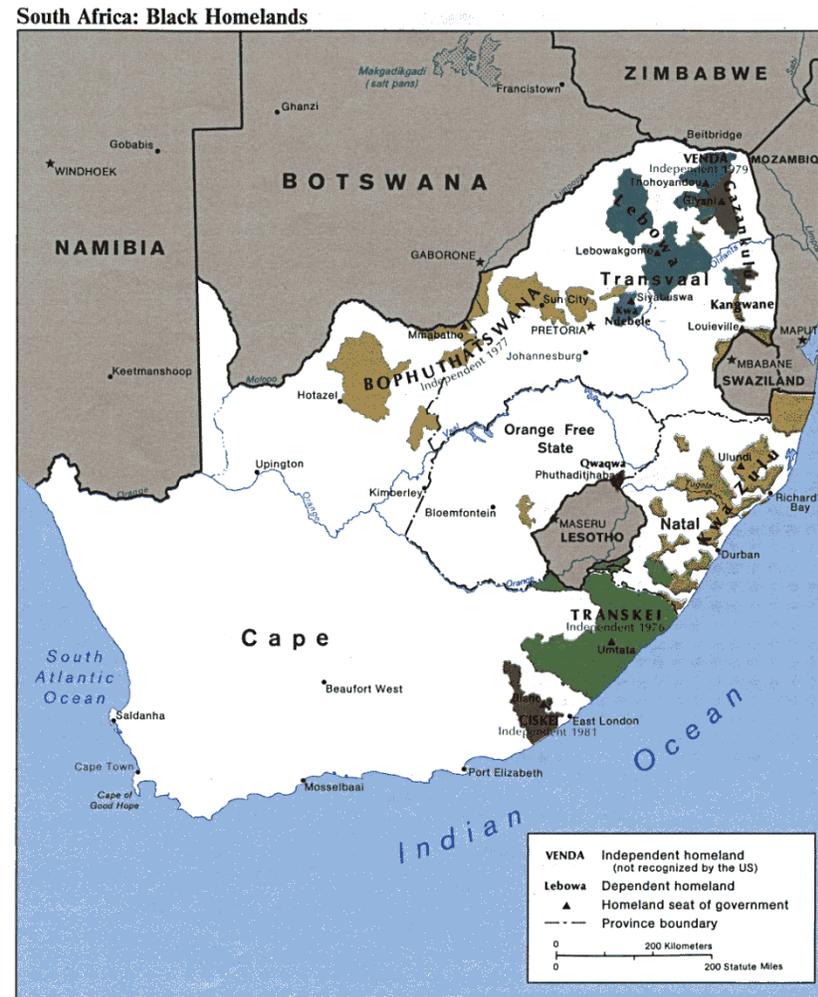
Bela-Bela

Ruth Hall

23 August 2018



What land, to be shared by whom, how, and with what outcomes?















Section 25: Property

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of **law of general application**
 - a) for a public purpose or **in the public interest**; and
 - b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be **just and equitable**, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including
 - a) the **current use** of the property;
 - b) the **history** of the acquisition and use of the property;
 - c) the **market value** of the property;
 - d) the extent of direct **state investment** and subsidy in the acquisition and beneficial capital improvement of the property; and
 - e) the **purpose** of the expropriation.
- (4) For the purposes of this section
 - a) the public interest includes the **nation's commitment to land reform**, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - b) property is **not limited to land**.



Section 25: Property

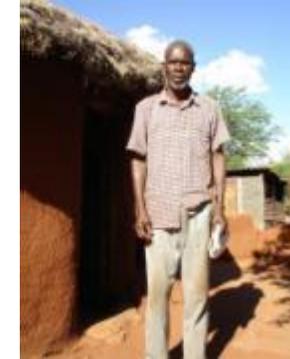
(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. [\[Land Redistribution\]](#)

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. [\[Tenure Reform\]](#)

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. [\[Land Restitution\]](#)

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1). [\['Over-ride clause'\]](#)

(9) Parliament must enact the legislation referred to in subsection (6).



Restitution

Restitution of Land Rights Act 22 of 1994

- Set out process by which people can realise their right to restitution. Offered:
 - Restoration of the land
 - “Comparable redress” which includes cash compensation, alternative land or developmental restitution
- Established two institutions
 - Commission on Restitution of Land Rights
 - Land Claims Court
- Deadline for claims lodgement
 - 31 December 1998 – **63,455** claims lodged
 - Reopened 1 July 2014 for 5 years – over **160,000** new claims
 - Lodgement ends June 2019
 - Estimate: **35 years** for old claims; **143 years** for new claims



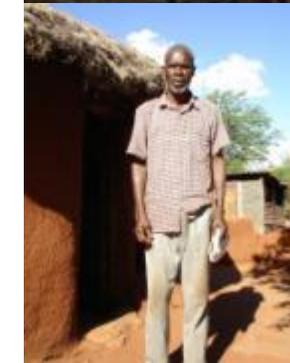
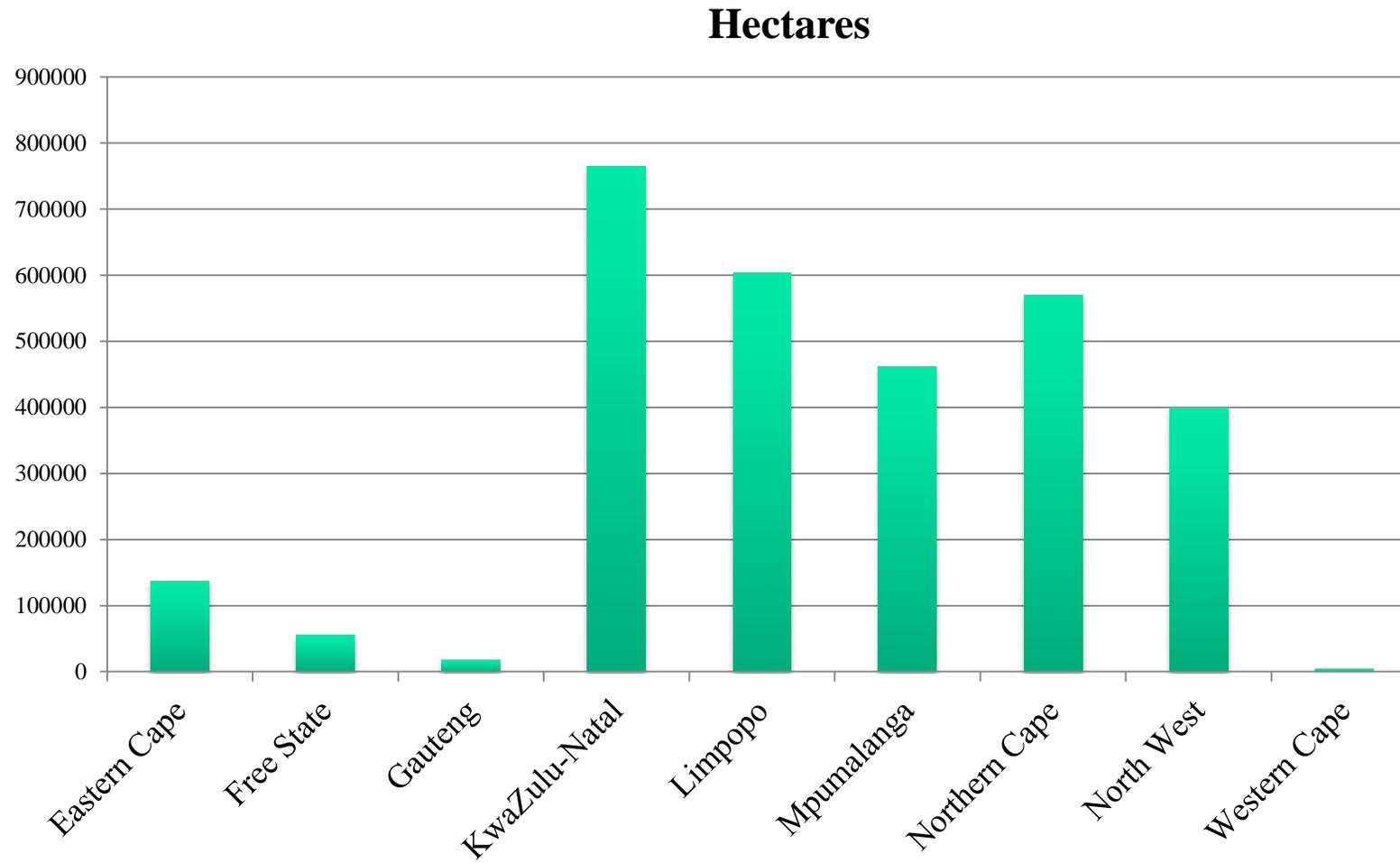
Nearly 30,000 old claims are not yet finalized

Status of claims	Number of claims
Ungazetted	7226
Gazetted but not yet settled	1507
Settled (claims as lodged) – claim forms	59415
Settled (claims as settled) – combination of claim forms and rights	79582
In process of being implemented	20592
Implementation finalised	58990



- Chief Land Claims Commissioner, 19 August 2013

Land restitution: 1995 - 2013



- own calculations, based on Chief Land Claims Commissioner, 19 August 2013

Redistribution

Redistribution policy

- 1994-1999: Settlement Land Acquisition Grant
 - R16,000 household grants
 - Large group, whole-farm projects
 - Priority on settlement and multiple livelihoods
- 2000-2011: Land Redistribution for Agric Devt
 - R20,000 -100,000 individual grants
 - Small group, whole-farm projects
 - Priority on commercial farming, but also 'safety net'
- 2011-2018: Proactive Land Acquisition Strategy
 - State purchase of land (started from 2006)
 - State Land Lease & Disposal Policy of 2013
 - Allocation on leasehold: 3 years to 30 – 50 years
 - Pay rent to the state (5% of net turnover)
 - Priority unclear; hierarchy of those who can get title

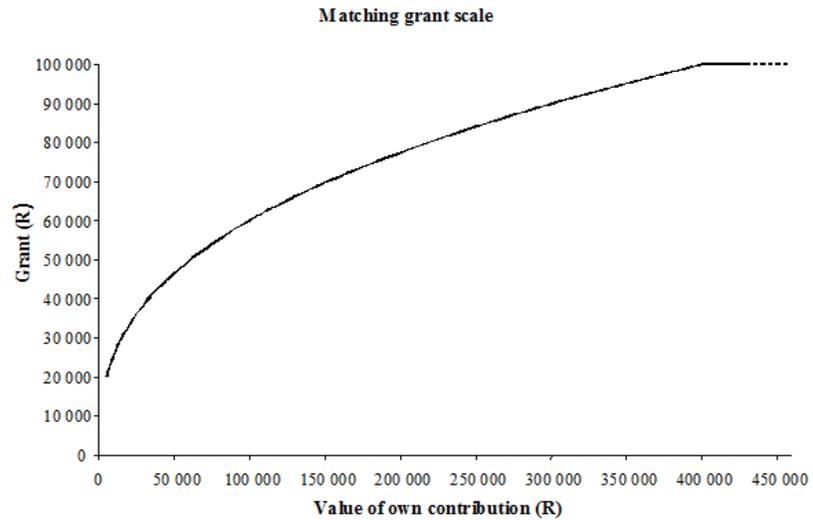


LRAD: from means test to a sliding scale

Land Redistribution for Agricultural Development

Box 1: Sliding scale of grants and own contribution

The minimum grant amount is R20 000 which can be accessed with an own contribution of R5 000. The maximum grant is R100 000, which will require an own contribution of at least R400 000. If the participant contributes more than this amount(s) he/she still can only access a grant of R100 000. Between the minimum and maximum amount, a continuum of grant amounts is available, depending on the participants' own contribution (as highlighted in the graph).



Taking a range of own contributions as illustration, we have the following:

Own contribution R	Matching grant R	Proportion of total cost %	
		Own contribution	Grant
5 000	20 000	20	80
35 000	40 871	46	54
145 000	68 888	68	32
400 000	100 000	80	20



Policy changes over time

	Acquisition	Tenure	Class agenda	Land use
SLAG (1995-2000)	Market-based purchase	Transfer of title	Means-tested (ie. pro-poor)	Multiple livelihoods
LRAD (2000-2010)	Market-based purchase	Transfer of title	Not means-tested (unclear)	Agriculture only
PLAS (2006-now)	Market-based purchase	No transfer of title	Not means-tested (unclear)	Agriculture only



Policy changes over time

	Acquisition	Tenure	Class agenda	Land use
SLAG (1995-2000)	Market-based purchase	Transfer of title	Means-tested (ie. pro-poor)	Multiple livelihoods
LRAD (2000-2010)	Market-based purchase	Transfer of title	Not means-tested (unclear)	Agriculture only
PLAS (2006-now)	Market-based purchase	No transfer of title	Not means-tested (unclear)	Agriculture only

Plus:

1. Municipal Commonage
2. Farm Worker Equity Schemes
3. Recapitalisation and Development Programme
4. The One Household One Hectare Policy
5. The '50/50 Policy': Strengthening the Relative Rights of People Who Work the Land



Scale

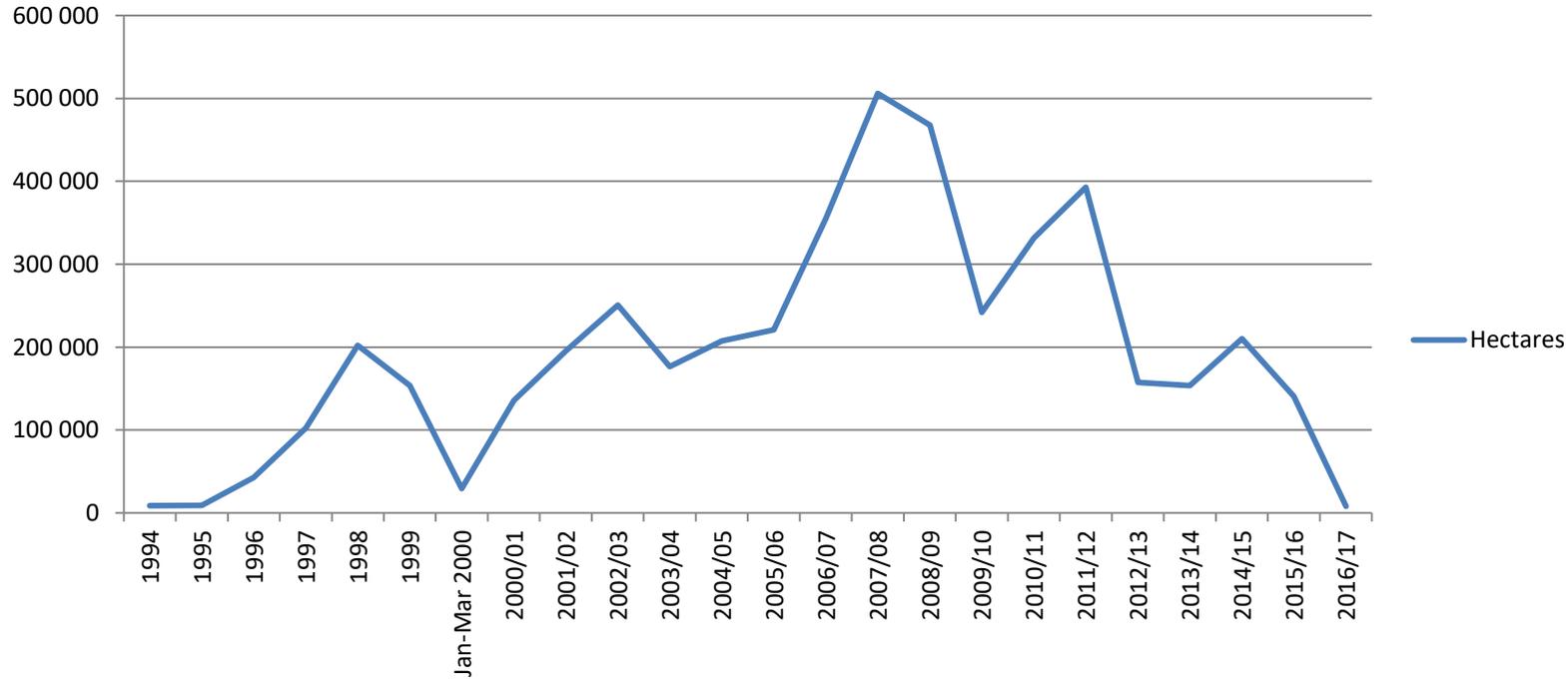
Land area of South Africa	Commercial agricultural land	Land redistribution	Land restitution	Land reform as % of commercial agricultural land
122 mill ha	86 mill ha	4.8 mill ha	3.5 mill ha	9.7%

Source: various, including DRDLR 2016: 4 and Minister's Budget & Policy Speech, 11 May 2018



Pace

Hectares redistributed by year, nationally (1994-2016)

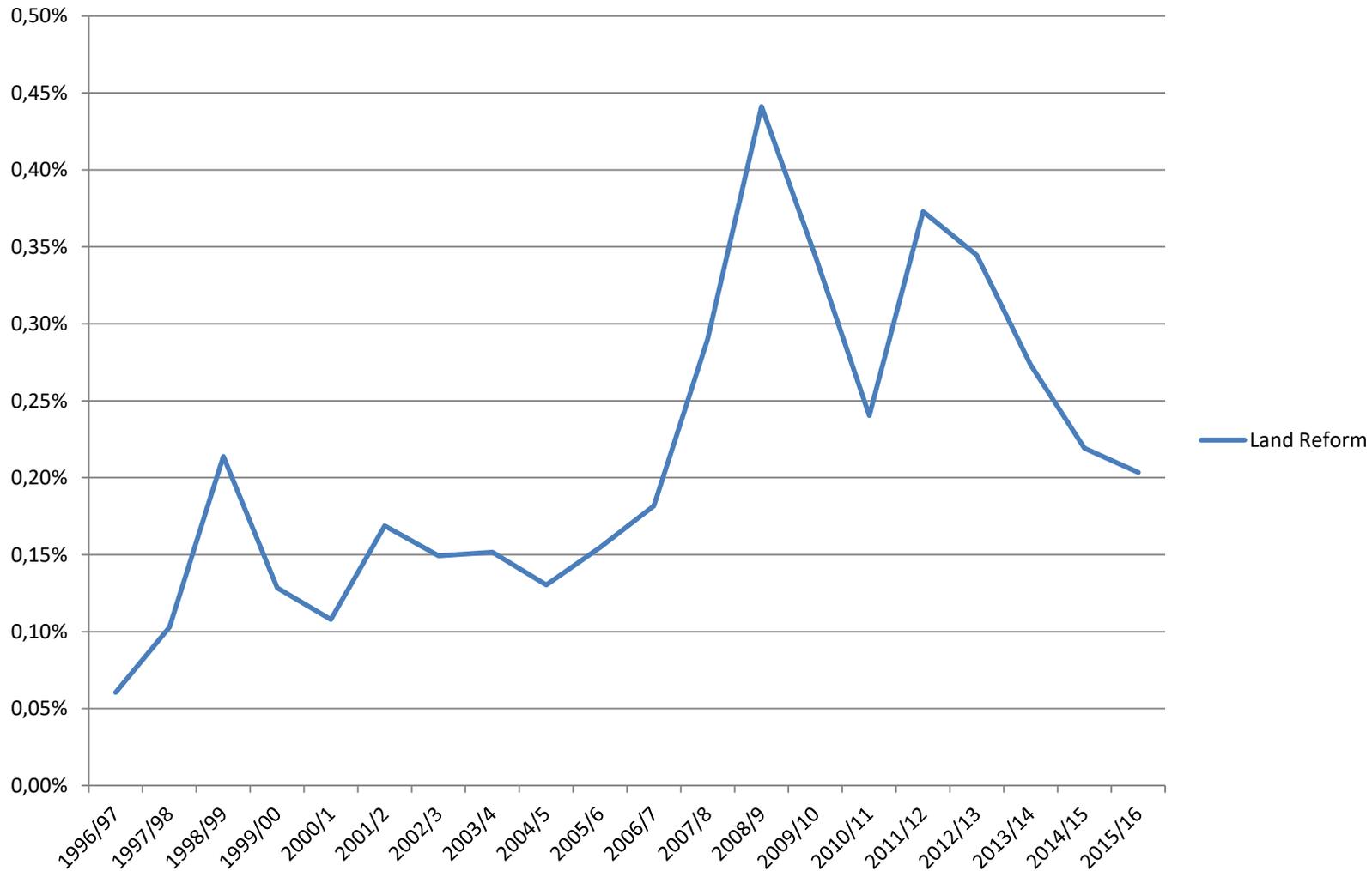


Source: various, including DRDLR 2016: 4



Budget

Land Reform budget as percent of National Expenditure (adjusted)



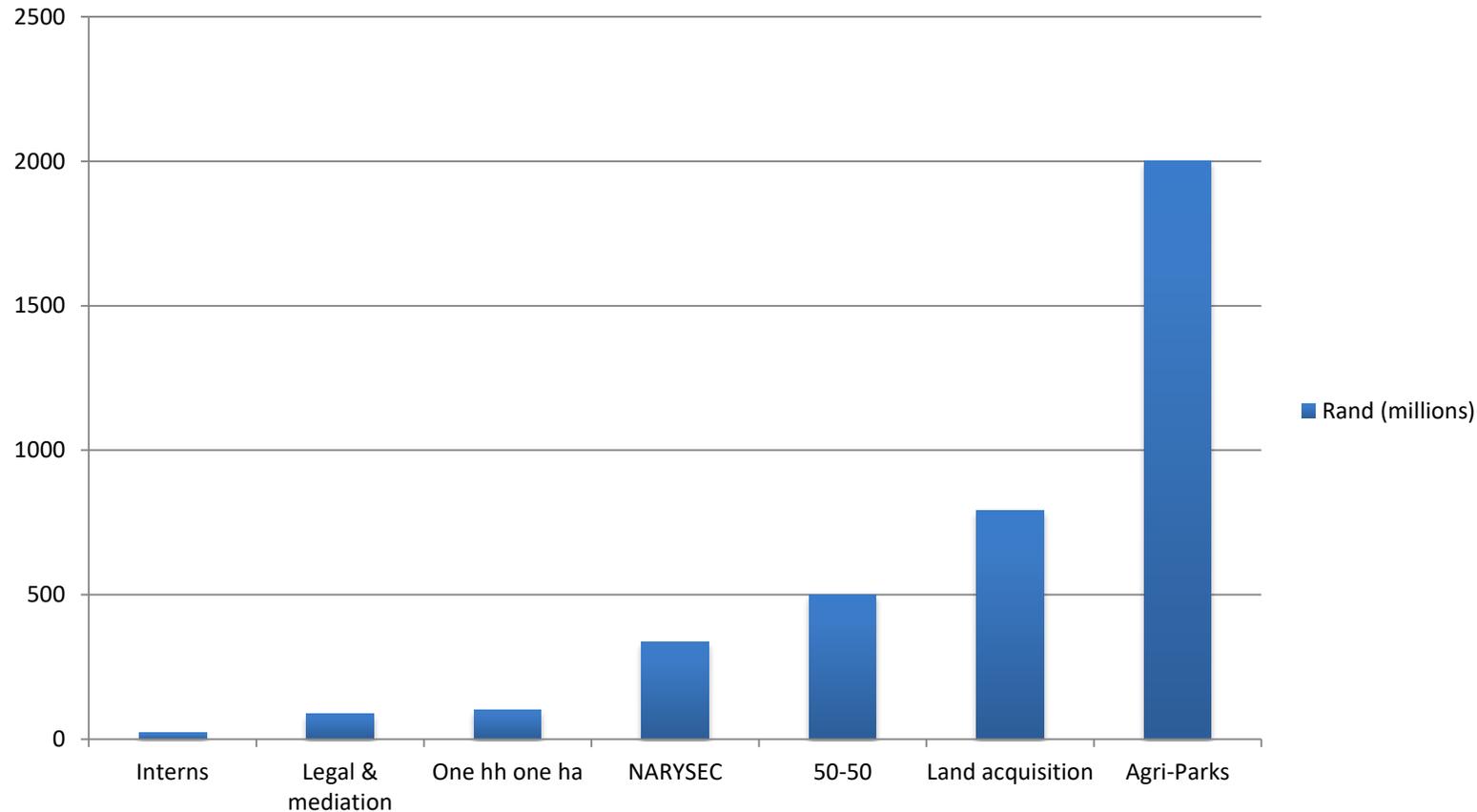
Source: National Treasury, various.



Budget: redirection of land reform funds

Re-allocation of Land Reform budget, 2016/17

Rand (millions)

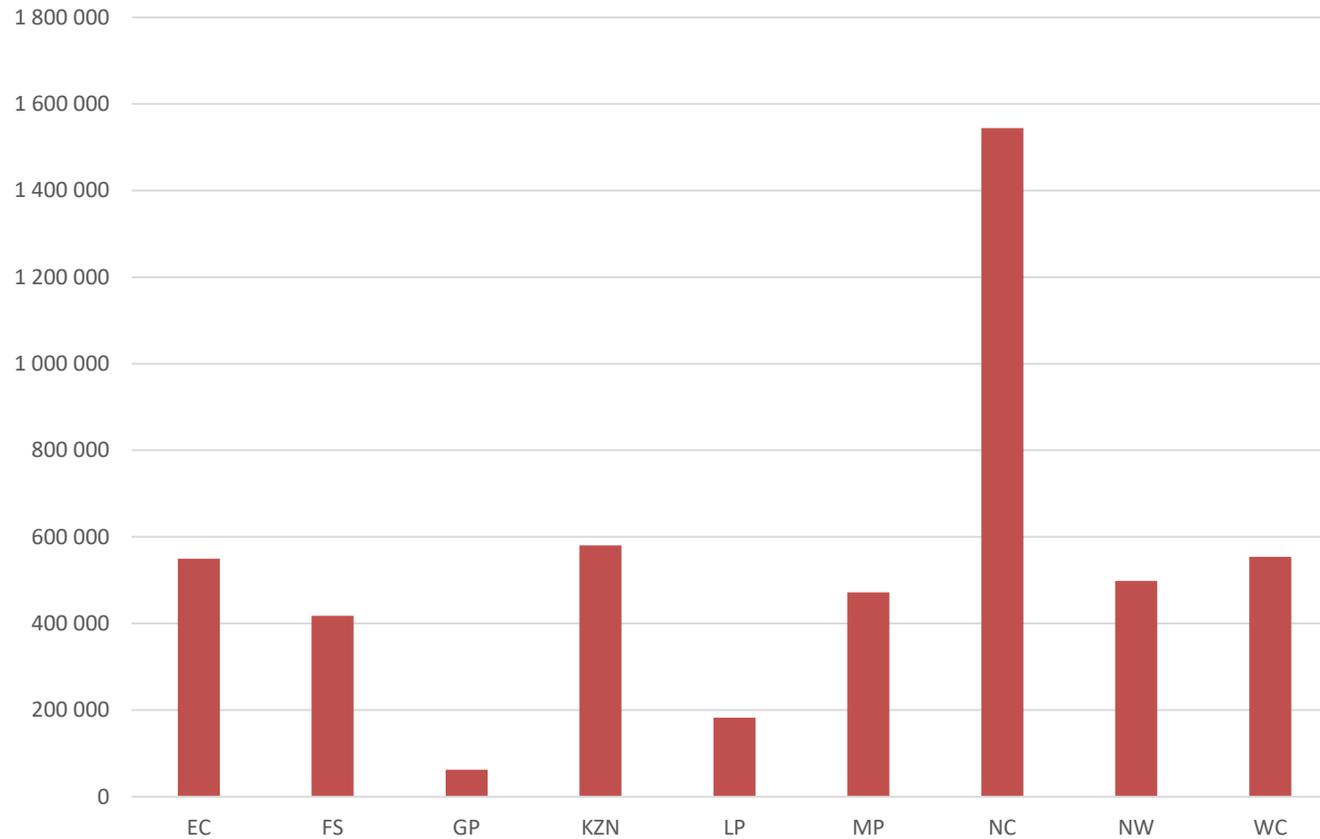


Source: MRDLR 2016 (author's calculations). Ministry of Rural Development and Land Reform. 2016. Government serious about speeding up land reform. Statement. 6 May 2016. <http://www.drdir.gov.za/news-room/news-flash/file/4414> (accessed 28 September 2016)



Redistribution by province (hectares)

Hectares redistributed per province
1994-Dec 2017

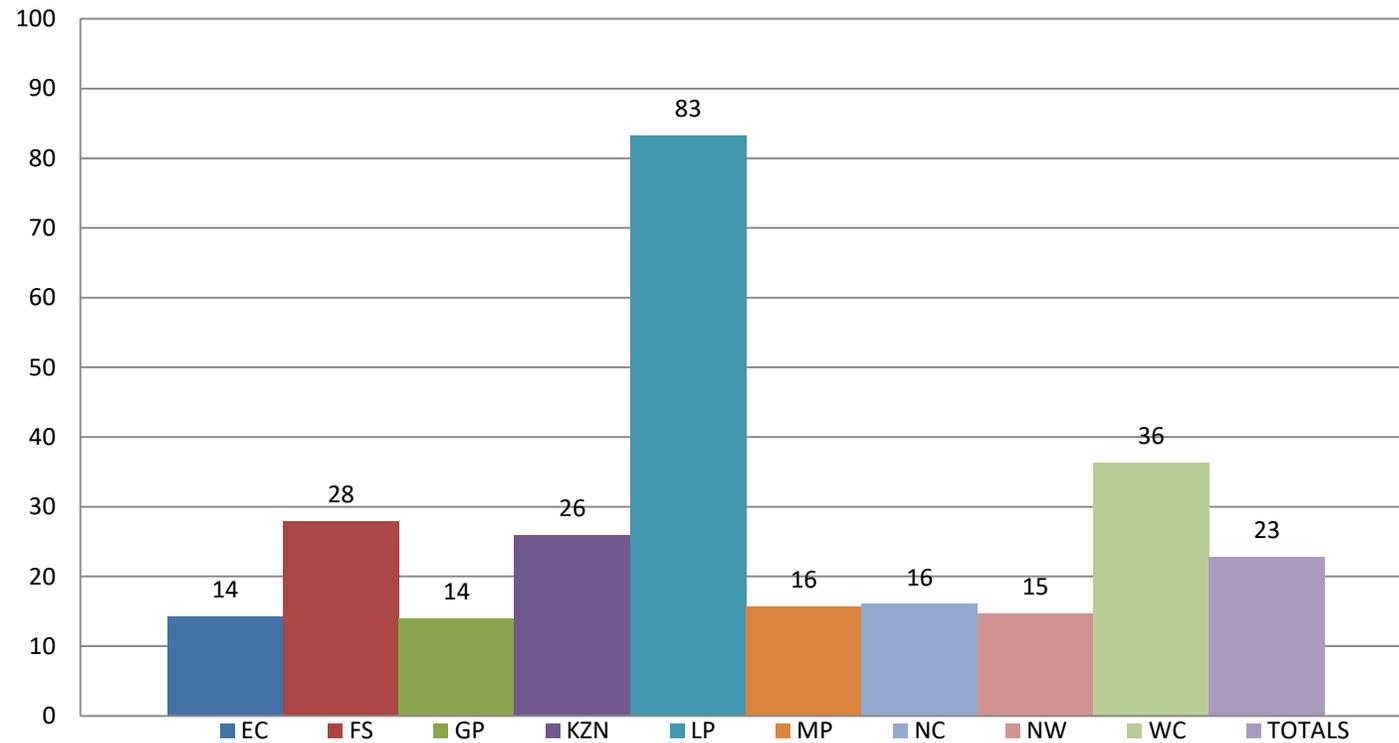


Source: various, including DRDLR 2016: 4

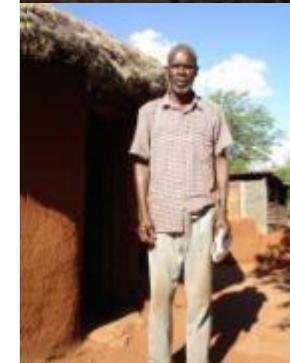


Gender distribution

Women as % of total beneficiaries, 1994-2016



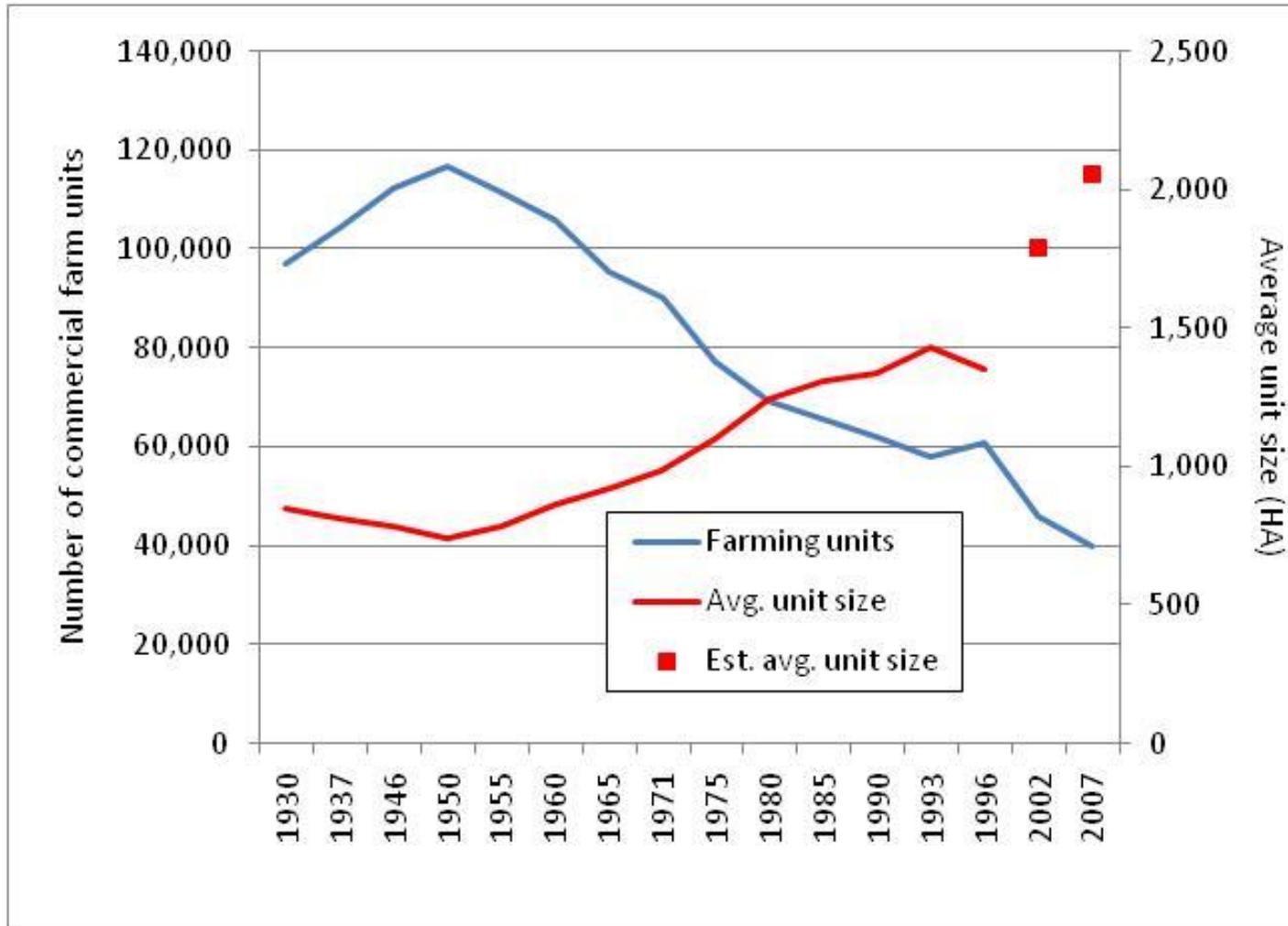
Source: various, including DRDLR 2016: 4



Farm workers & dwellers

Changing nature of agriculture

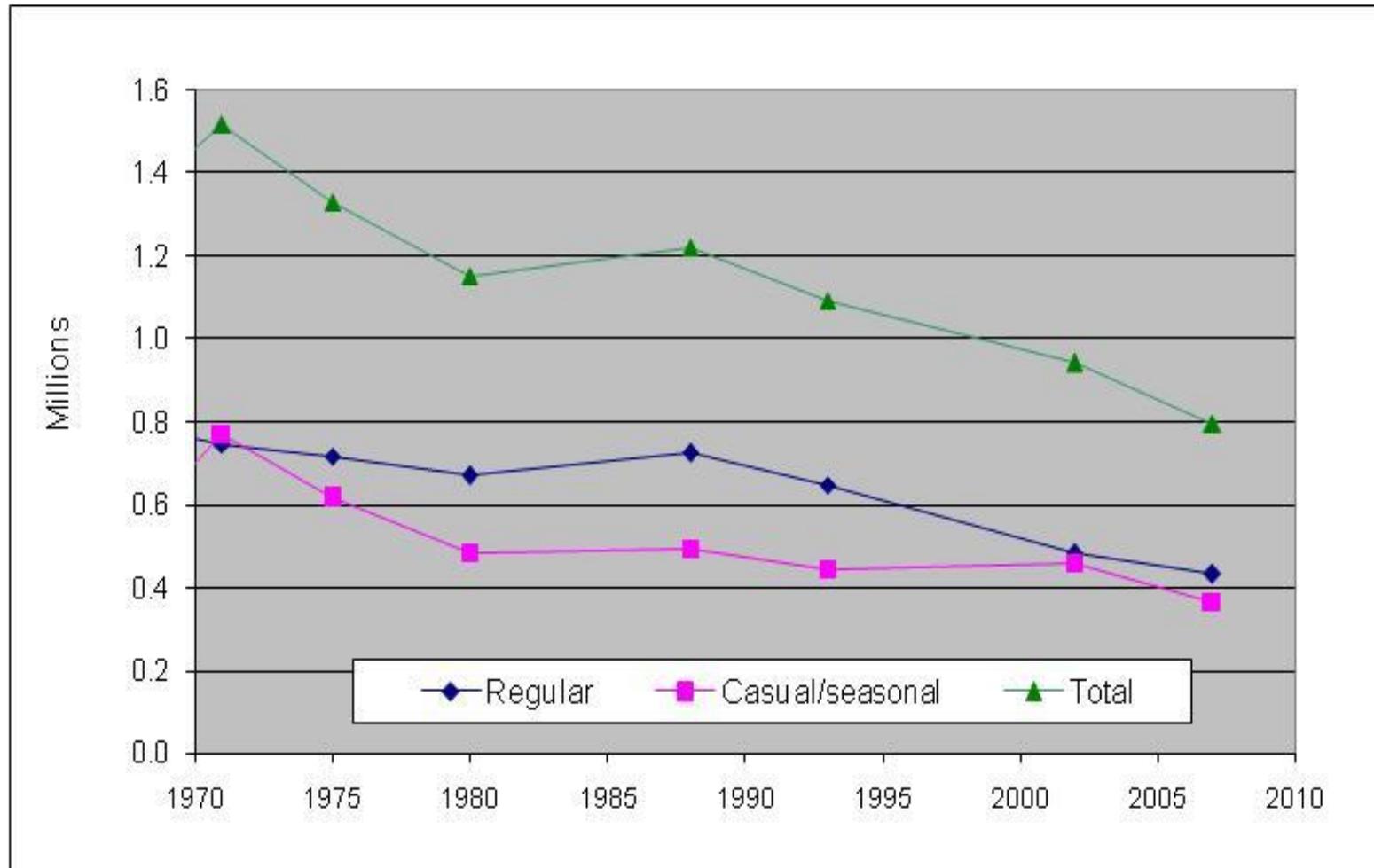
South Africa's commercial farm sector, 1930-2007



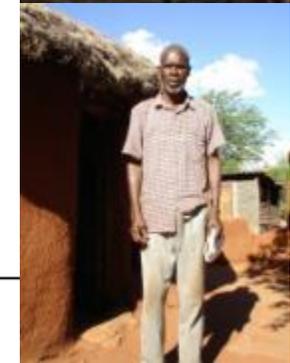
Source: agricultural censuses, various (with thanks to M. Aliber)



Long-term trend towards job shedding



Source: agricultural censuses, various (with thanks to M. Aliber)



Legislation on farm dwellers' rights

- Government policy is aimed at securing tenure rights for people living on farms, but tries to balance the interests of landowners and people living on farms.
- Two laws that establish tenure rights for farm dwellers are:
 - **Extension of Security of Tenure Act** (ESTA) 62 of 1997
 - **Land Reform (Labour Tenants) Act** (LTA) 3 of 1996
- Neither aim to stop evictions, but regulate when and how evictions can happen.
- Any eviction without an order from the magistrate's court is illegal.
- Both provide options for long-term tenure.



Estimate: people displaced & evicted

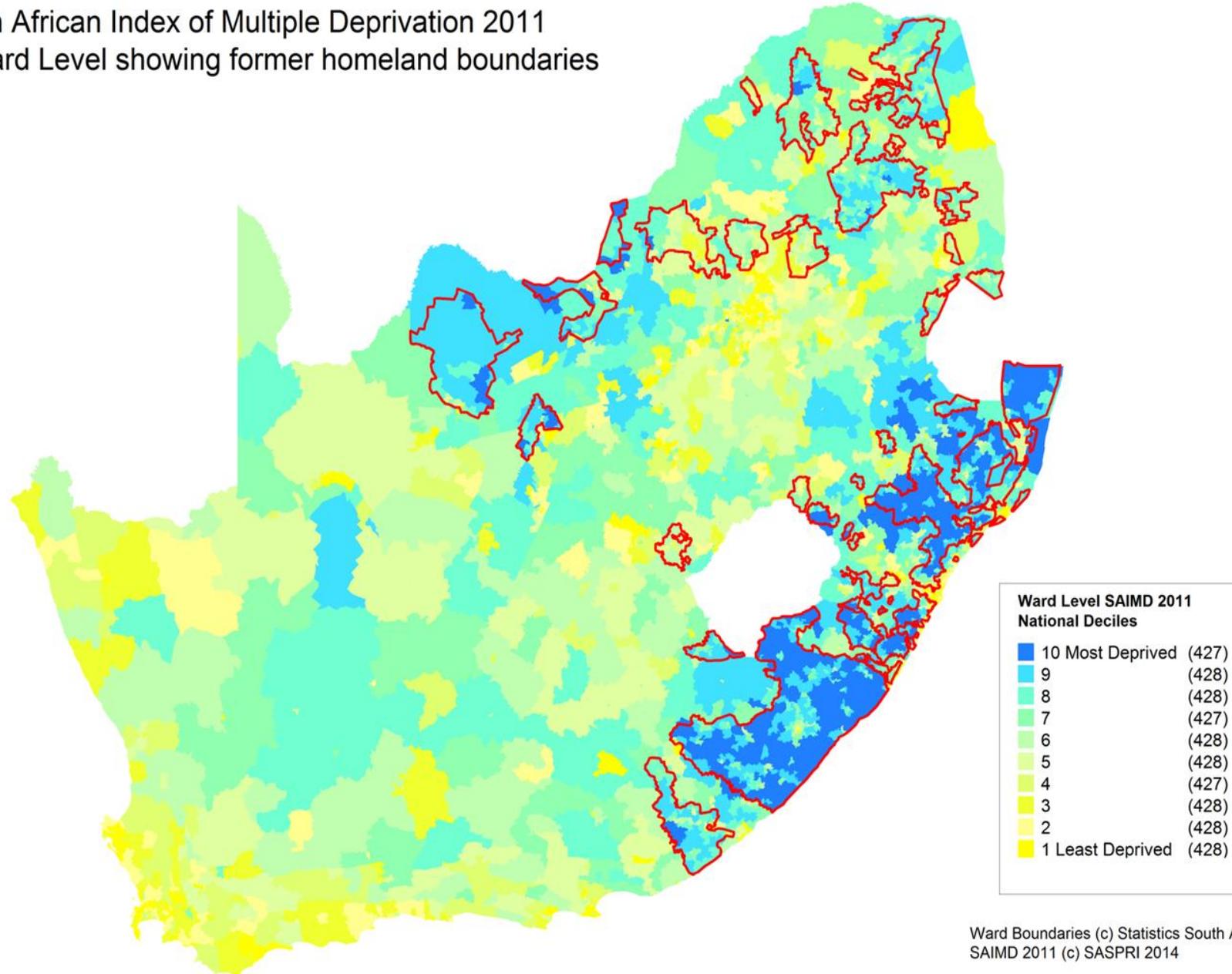
	Displaced from farms	Evicted from farms
1984 to end 1993	1 832 000	737 000
1994 to end 2004	2 351 000	942 000
Total	4 183 000	1 679 000
Now on other farms	469 000	93 000
Permanently off farms	3 716 000	1 586 000

Wegerif, M., B. Russell, and I. Grundling. 2005. *Still searching for security: The reality of farm dweller evictions in South Africa*. Johannesburg & Polokwane: Social Surveys Africa and Nkuzi Development Assoc.



Communal tenure

South African Index of Multiple Deprivation 2011
at Ward Level showing former homeland boundaries



Communal areas & customary tenure

- 30% of the population – approx. 22 mill. people
- Without legally secure land rights
- **Interim Protection of Informal Land Rights Act** of 1996 (IPIIRA)
- Massive commercial interest
 - Mining
 - Commercial agriculture
 - Tourism
 - Etc
- Transactions involving traditional leaders / councils
- Corrupt and unaccountable for revenue, eg. Mining
 - Bakgatla Ba Kgafela / Bapo Ba Mogale cases
 - Xolobeni case – community resisting dispossession
- Question: do de facto owners have **a right to say 'no'?**
 - Free Prior and Informed Consent (FPIC) principle in international law
- **Ingonyama Trust** (est. 24 April 1994): King = only trustee
 - Conversion of customary ownership to leasehold
 - Rental payable to the Trust at R1,000 p.a.
 - 10% increment p.a.
- Enormous and volatile, regionally specific politics



What does state ownership & leasehold look like on the ground?



PLAS in the Eastern Cape: types of projects

- 1. Stymied middle class**
- 2. Agribusiness securing supply**
- 3. Abandoned farm workers**



PLAS in the Eastern Cape: types of projects

- 1. Stymied middle class**
- 2. Agribusiness securing supply**
- 3. Abandoned farm workers**
- 4. Elite capture by non-farmers**



Key messages from Amathole fieldwork

1. Elite capture

- Businessmen getting land over the heads of (a) farm workers and (b) farmers in communal areas

2. Job losses

- Farm workers losing their jobs when beneficiaries move in (or strip infrastructure)
- But also some getting jobs where there were none before

3. Multiple allocations of farms

- without subdivision, causing conflict. Also, re-allocation from person to person; dispossession of beneficiaries (officials are ‘bullying’)

4. Allegations of corruption

- System set up for corruption; officials soliciting bribes to allocate, even dispossessing & re-allocating farms.



Key messages from Amathole fieldwork

5. Absence of leases

- **We cannot find any valid leases as yet.** Instead, there are (a) expired leases and (b) expired caretakerships. There is a myth that people get land rights; the reality on the ground is insecure tenure on state land. No access to credit.

6. Electricity

- When the state takes transfer of the farm, electricity often gets disconnected, which severely disrupts production. The state as owner needs to formalize transfer of the account to the tenant (which means tenancy has to be formalized). Tenants without leases can't connect electricity.

7. All are frustrated; only a few are grateful

- Some people are grateful to government for the allocation of farms, but most are angry because of corrupt or badly designed projects, and general neglect. Everyone is frustrated by a lack of farming support, and the unavailability of immediate support, even if modest.



So what do we know?

1. Land redistribution **is slowing down** quite dramatically.
2. **Budgets have declined**, and the rate of delivering access to land has declined faster, as available funds are diverted to purposes other than acquiring land and securing rights.
3. State purchase of land means that budgets can be spent and land acquired **without any redistribution** of land rights taking place.
4. Selection of beneficiaries is **wholly untransparent** (in redistribution).
5. Allocation of Recap funds is similarly **untransparent** and most accessible to commercial strategic partners – not to ordinary farmers.
6. The extent of elite capture is unknown at a national level, largely due to the **absence of a national monitoring and evaluation** system to determine the class character of beneficiaries and track change over time.



Knowledge gaps: what do we not know?

1. Is land reform **reducing poverty and inequality**?
2. How equitable or inequitable is the **distribution of budget & land**?
3. How many farms 'redistributed' have been lost again due to **foreclosure on debts** (especially under LRAD)?
4. How many beneficiaries have been **evicted by the state**?
5. How many **long-term leases** are in place on state-acquired farms?
6. How does **beneficiary selection** actually occur, how are competing needs assessed and prioritized in district, provincial and national land allocation decisions?
7. To what degree have **successful land claimants** occupied and are using their land?
8. How many poor black South Africans have lost land in **ongoing land dispossessions** in communal, farm and urban spaces?



The real choices to be made

Choices	Possible answers
Who is it for?	Priority for landless and land-poor farmers; farm workers; peri-urban landless (ie. not commercial farmers except via commercial lending, and not agribusiness) – ie. <i>'equitable access' and not elite capture</i>
What is it for?	Smallholdings for individuals / small groups plus worker cooperatives on larger farms, for food production, and smallholdings for non-agric purposes – ie. <i>not replicating the big-farm model</i>
Where?	Strategically located land in highest demand, including commonage and private land, urban and peri-urban, subdivided where needed – ie. <i>get the land needed, <u>not</u> the land offered on the market</i>
With what tenure?	Priority on long-term secure rights, like private title or 30 year leases, to CPAs, cooperatives or family trusts – ie. <i>not 'caretakerships' or mere absence of leases</i>
How is it decided?	Identification of people – and the land they need – via participatory processes at local level – ie. <i>democratise land reform and beneficiary selection.</i>



What would be the good signs?

1. Clarificatory **amendment to S25**
2. Expedite the **Expropriation Bill** (with amendments)
3. Move towards a **Land Records Bill**
4. Draft and expedite a **Redistribution Bill**
5. **Test cases** (Msiza case appeal to ConCourt?)
6. **Urban land**: rapid land release
7. Strong political **leadership** & fixing **institutions**



Amend & pass the Expropriation Bill

- Expropriation Bill is consistent with property clause, unlike existing Expropriation Act of 1975
 - **Public interest** as well as public purposes
 - **Just & equitable** compensation r/t market price
- Indicate a spectrum of circumstances to operationalize the criteria in S25(3)
 - **Zero** compensation
 - **Partial** compensation
 - **Market-related** compensation
 - **Premium** above market price
- This could provide a means of advancing EWC in certain circumstances, providing policy and legal certainty, subject to judicial review.



Proposed Land Records Bill

- Recognise **inclusive forms of ownership** – eg list all family members, not just household head
- Use **quick and affordable technologies**, that can be rolled out at scale, unlike deeds registry system. World wide trend to record off-register forms of property
- Record **shared rights** using blockchain technology
- Immediately record **current occupation and use**
- Incrementally clarify content of rights – but **record asap**
- Will require substantial **investment in land administration** – but technologies are available to link local offices with national register



Proposed Redistribution Bill

A new Bill to:

1. Operationalise and **define 'equitable access'**
2. Set legal criteria for **beneficiary selection**
3. Determine how **land acquisition** should happen
4. Promote **transparency and accountability**
5. Establish criteria and **mechanisms for subdivision**
6. Oblige municipalities to **make commonage available**
7. Ensure people get **long-term use and benefit rights**
8. Establish **transversal principles** for land reform
9. Promote **alternative dispute resolutions**
10. Establish a **Land Rights Protector** as an ombudsperson



Thank you for your attention..

