

### From 'willing seller, willing buyer' to a people-driven land reform

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The concept of 'willing seller, willing buyer' has dominated the discourse on land reform in South Africa since 1994. Now, following the national Land Summit of July 2005, it appears that government is willing to abandon this approach, but there is little indication of what this might mean in practice. This paper explores the origins and meaning of the concept of 'willing seller, willing buyer' and the alternatives that might take its place.

#### Introduction

The concept of 'willing seller, willing buyer' (WSWB) has dominated the discourse on land reform in South Africa since 1994 – indeed, it can be described as one of the defining characteristics of the programme, distinguishing it from most other land reforms around the world. This simple-sounding concept has not just been central to government thinking on land reform, but has also become a key ideological battleground, assuming the status of a 'non-negotiable' among landowners and an object of contempt for landless people and their supporters. Yet, despite its prominence, this so-called principle has received remarkably little critical analysis, from either its supporters or its critics.

The concept of WSWB is widely attributed to the influence of the World Bank, but this is inaccurate in a number of respects. Since the early 1990s, the World Bank has indeed advocated what it calls market-assisted (or market-led, or market-based, or, more recently, 'negotiated') land reform in countries around the world, and was a key influence on the thinking of the African National Congress (ANC) during the transition to democracy. The approach advocated by the World Bank, however, has generally been part of a wider strategy that includes selective expropriation, land taxes, subdivision of landholdings, and negotiated 'exit strategies' for current landowners. Such an approach was set out in the key 1994 World Bank document, *South African agriculture: Structure, performance and options for the future*. In practice, the South African model has diverged considerably from the World Bank prescriptions, particularly in its reliance upon WSWB mechanisms.

#### WSWB in southern Africa

The term WSWB has some history of usage in South Africa, particularly around the operation of the Expropriation Act of 1975, under which the price paid for expropriated property is determined by reference to the price that would be paid for the property were it to be exchanged between a willing seller and a willing buyer. In this context, WSWB refers to an imaginary ideal, rather than an actual practice.

The concept of WSWB also appears to have been influenced by the course of land reform in Zimbabwe, where it had a very particular meaning rooted in the Lancaster House

Agreement of 1980. While the state was entitled to expropriate unused (and under-used) land, productive land in the hands of white owners could only be acquired if the state was willing to pay a 'market' price'. The state was granted first refusal on all land sales, but was not obliged to purchase any property that it was offered. The intended beneficiaries (that is, the landless) were not directly involved in the transaction, and could not, therefore, constitute a 'willing buyer' – this role was reserved for the state alone. The concept of WSWB in the Zimbabwean context, therefore, represented a state-led approach, whereby land would be acquired through a mix of expropriation (effectively nationalisation) and negotiated purchase, with compensation paid at the equivalent of market prices.

WSWB entered the discourse around land reform in South Africa gradually during the period 1993–1996. It was entirely absent from the ANC's *Ready to govern* document of 1992, which instead advocated expropriation and other non-market mechanisms. It was similarly absent from the Reconstruction and Development Programme of 1994. By the time of the White Paper on South African Land Policy of 1997, however, a market-based approach, and particularly the concept of WSWB, had become the cornerstone of government's land reform policy.

In South Africa, in the context of land reform, the concept of WSWB has come to mean something quite distinct. The willing sellers are again private landowners, but the choice available to them is not simply to sell or not to sell as it was in Zimbabwe. Rather, owners are free to sell to the highest bidder or the buyer of their choice. Thus, landowners can actively avoid offering their land for sale for land reform purposes, say on racist grounds, and still dispose of their land on the 'open market'. The state does not have the power of first refusal and the intended beneficiaries have to compete for available land on 'the open market', at market prices.

It is when we examine the concept of 'willing buyer', however, that we see the greatest divergence from past models, as the entire concept is transferred from the state to the intended beneficiaries. Simple 'willingness' on the part of landless people, however, is no guarantee that they will be able to enter the land market or that they will be able to secure the land they need. People in need of land are dependent not only on the co-operation of the land owners, but also on

the willingness of the state to approve their application and provide the necessary funding.

While the state has (in theory) the power and the resources to enter the land market on behalf of beneficiaries, it has chosen not to do so. Rather, it provides grants to would-be beneficiaries who themselves must enter the market, identify a 'willing seller' (that is, a property for sale) and secure an agreement from the owner to sell at an agreed price. If a 'willing buyer' is said to exist, it may refer neither to the state (which does not buy land on its own behalf or own initiative) nor to the intended beneficiaries (who only become *effective* buyers once they secure state approval and funding). Rather, it represents an abstract concept, a hybrid of state and would-be beneficiaries, supposedly acting in unison.

'Willing seller' accurately denotes the lack of compulsion on landowners, but 'willing buyer' offers no guarantees to the landless that they will acquire the land they want, or indeed any land at all. The concept of 'willing seller' (and the payment of market prices) fully protects the interests of existing landowners, as it neither compels them to sell against their will nor at a price with which they are not fully satisfied. No such guarantees or protections are offered to would-be beneficiaries, who continue to depend on state approval of their grant applications and the willingness of owners to transact with them.

We can therefore conclude that the South African land reform programme can best be described as a 'willing seller' programme; it would appear that the element of 'willing buyer' was added in a frivolous attempt at rhetorical symmetry, suggesting (spuriously) that the interests of buyers and sellers are equally protected, and perhaps symbolising a (non-existent) harmony at the heart of our land reform policy.

## **Moving beyond the market**

WSWB, as applied in South Africa, has three main elements – the discretionary powers of landowners (the landowner veto), the price (compensation) paid to landowners, and the role of the state in assisting would-be beneficiaries to acquire land. Debates to date have tended to focus largely around the first two, with landless people and their supporters calling for the state to take a more interventionist approach, both in terms of identification of suitable land and the level of compensation paid to owners. Implicit in this demand is a new relationship between the state and the landless, whereby the state would still be guided by the demands expressed by landless people (that is, the call is not for a 'supply-led' approach) but would intervene more decisively on their behalf in order to acquire the land they need. This suggests a radical overhaul not only of the concept of 'willing seller', but also of 'willing buyer'.

WSWB has granted enormous discretionary power to landowners to influence the pace and direction of land reform in South Africa, tantamount to a veto over the land reform process. Under the redistribution programme – but also, to a considerable extent under restitution and tenure reform – landowners may choose whether to sell or not sell their property, to whom they will sell, and at what price. If

a landowner is not interested in selling, there is effectively nothing that can be done within the WBWS framework to change the situation.

If landowners want to sell their land, but not to land reform beneficiaries, they are within their rights to do so. If landowners do not accept the prices offered by government/beneficiaries (*who* exactly drives the negotiation with the landowner is a matter of debate), they are free to refuse to sell or to withdraw from the transaction; they are fully within their rights to choose their own preferred buyer, even if this is not the highest bidder. In a worst case scenario, a co-ordinated effort by landowners to refuse to sell to any land reform beneficiary could bring the entire land redistribution programme to a halt. Such is the power that has been granted to landowners under the WSWB policy.

Closely related to the discretionary power of landowners to sell or not to sell is the matter of price. WSWB has been interpreted to mean that 'full market value' will be paid by the state for all land reform transactions. Full market value is variously interpreted as the asking price of the seller or the estimate of market value made by an independent valuer. In theory, the latter should provide a reliable indication as to what price the land in question would fetch if it was offered for sale on 'the open market'. In many cases, however, this is a purely notional amount, as the state may be the only interested buyer, as in restitution cases or in cases where owners cannot find another buyer due to encroachment of informal settlements. Thus, the current policy can best be described as the payment of 'market equivalent price', regardless of what the land might realistically fetch on the open market.

Land reform in South Africa is widely claimed to be 'demand-led', but under WSWB this has been interpreted to mean a minimal role for the state, no matter what the level of 'demand' expressed by landless people within a particular area. In practice, the state's role has been limited to processing grant applications from those capable of following the approved procedure, and releasing funds, subject to the reaching of agreements with landowners and the availability of funds within the specific year (not always a certainty). The state does not accept responsibility for the identification or acquisition of land for the landless, or for overcoming landowner resistance.

A departure from WSWB could mean changes in all three of the above areas, but it does not necessarily mean a complete departure from 'the market', or 'market-based' land reform, as some commentators have suggested. How this might work in practice is considered next.

## **Ending the landowner veto**

The choice of whether or not to make land available for land reform currently rests almost entirely with landowners. This power – effectively a veto over land reform – needs to be addressed, both to increase the supply of land for land reform purposes, and to ensure that sufficient land is made available in areas where it is most needed. This could be achieved by means of selective expropriations in areas where sufficient

land is not coming onto the market, or where negotiations with landowners are not fruitful, or where excessive prices are being demanded. Such expropriations (with compensation) are adequately provided for in the Constitution.

There does not appear to be a compelling argument for widespread expropriation at this stage. Rather, selective expropriations as part of a concerted land acquisition strategy (still based largely on market purchases and negotiated sales), should be sufficient to increase the overall supply of land and to ensure that land is available in areas of acute need. The key requirement is a credible threat of expropriation, which in turn requires that expropriation is actually used from time to time.

An additional step would be to grant the state the right of first refusal on all land sales. This would be a major undertaking, as it would involve the state in every land transaction in the country, the majority of which would probably not result in land reform purchases. Furthermore, it would not, on its own, ensure that sufficient land would be made available, or that the right land (that is, land of adequate quantity and quality in areas of high demand) would be made available. There is also no guarantee that the price of land would be reduced as a result of such an approach, and disagreement over price would again raise the need for expropriation. Moreover, the bureaucratic complexity and potential disruption to the land market resulting from the right of first refusal could be much greater than selective expropriation as outlined above.

Another option that has been discussed since before 1994 is a land tax. This would not remove the landowner veto over sales, but it would be expected to increase pressure on landowners to release land onto the market, and could also serve to dampen land prices. Arguments for and against land tax extend well beyond land reform, but it is generally held to be anomalous that South Africa, with a high concentration of land ownership in the hands of a small minority, and a stated policy of land redistribution, does not have such a tax in place. A land tax could, of course, be used in combination with the other options outlined above.

### **Just and equitable compensation**

Compensation for landowners is arguably the core issue in the WSWB debate. Representatives of landowners have indicated that they might tolerate some restrictions on the free market in land as long as they were compensated in line with market values. Among the landless, the payment of sub-market prices has become almost an article of faith, with some voices calling for minimal or no compensation for landowners.

The Constitution is clear when it comes to payment for land acquired by means of expropriation. Compensation must be 'just and equitable', striking a balance between the interests of all affected parties. Market value is just one factor that must be taken into consideration when calculating compensation, the others being the current use of the property, the history of acquisition and use, past state subsidies and the purpose of the expropriation.

Compensation based on such a formula is likely to be considerably below the prices currently being paid, but would

meet the constitutional requirement of 'just and equitable compensation'.

An alternative would be to pay productive value rather than market value. Productive value is based on the estimated productivity of the land when used for agricultural purposes, and is typically somewhat below the prevailing market value. Productive value is widely used by the commercial banks as a basis for calculating the collateral value of a farm, and has been used internationally as a basis for compensation in land reform. It is likely that the use of productive values would be resisted by landowners, and be seen as a form of expropriation, but it provides a well-established basis (perhaps as one of a range of factors) that could be used in the calculation of compensation that is 'just and equitable'. Here and elsewhere a distinction would have to be made between payment for the land itself and the fixed improvements that have been added by the landowner.

### **Empowering the landless**

Whatever the method of land acquisition, or the form of compensation paid, major questions remain as how the supply of land can be matched to the demand for land from the landless and land hungry. Currently, this is left to the 'invisible hand' of the market which, in practice, makes it the responsibility of the landless themselves to identify land that is for sale and enter into negotiations with the landowner. This is a fundamental weakness of current land reform policy, based as it is on major inequalities of power and resources between potential buyers (typically first-time buyers) and sellers (typically experienced landowners and market operators).

Despite its key role in funding the land reform process, under WSWB the state has not taken responsibility for identifying land on behalf of the landless nor for initiating negotiations with landowners. Nor does it accept land that is offered to it by landowners, regardless of the price, on the basis that land can only be acquired on behalf of identified, and approved, beneficiaries. Experience of land reform since 1994 suggests there is a need for the state to play a much more active intermediary role in order to better match supply and demand. This does not necessarily mean a departure from market principles (or market prices), but rather that the state shifts from being a passive to an active participant in land transactions.

For example, the state could take responsibility for acquiring land once a clear demand has been identified in a particular area. Similarly, the state could proactively enter negotiations with landowners in order to assess the potential supply of land and the cost implications. In such scenarios, there would be no need for direct negotiations (or even contact) between sellers and beneficiaries. The conventional argument that the state must under no circumstances become the owner of land, even temporarily, is a major obstacle to effective land reform and must be challenged.

More indirect methods that do not require direct negotiation with landowners should also be used to acquire

land. Much agricultural land is currently sold by means of public auction but, due to the complex approval process for land reform grants, would-be beneficiaries are incapable of participating in such sales. The state should, therefore, find a means by which it can participate on behalf of the landless, either directly or through an agent.

Another source of land, which has not been adequately utilised to date, is property repossessed by the state-owned Land Bank and other commercial bank. Government should develop agreements with all the banks to enable it to secure such properties, perhaps through a right of first refusal, guided, as always, by clearly identified needs in particular areas. Considerable cost savings can be expected through this route, as repossessed farms are often sold at below 'market value'.

A proactive land redistribution programme with an actively engaged Department of Land Affairs (DLA) in the driving seat presupposes clear strategies based on detailed assessment of land needs in particular areas and for acquiring land by various means. This requires that planning for land reform needs to be done for every municipal area in the country, and that DLA needs to build close working relationships with both landowners and the landless. It also points to a much greater role for municipalities in developing land reform plans for their respective areas (ideally, as part of their integrated development plans – IDPs) and facilitating dialogue between the various stakeholders. Formal responsibility for land reform would still rest with national government, as stipulated in the Constitution, but identification of land needs and solutions should be driven by local participatory processes at the municipality level.

## Conclusion

This paper has sketched some of the challenges associated with the transition from a 'willing seller, willing buyer' model of land reform to a more proactive and people-driven approach that can better match land supply and demand and meet the needs of radical agrarian transformation. A realistic alternative to WSWB requires that all key elements are addressed – abolishing the landowner veto, drawing up practical guidelines for 'just and equitable' compensation, and proactive engagement by national government (through DLA) with landowners, the landless, and the range of state and non-state agencies capable of playing a supporting role in land reform.

An important first step would be an unambiguous message from government that it is committed to reaching the land reform targets that it has set, and that it will make use of a range of instruments to bring this about. In other words, it must serve notice on landowners that the veto powers they have enjoyed over land reform up to now have been revoked and that it is in their interest to find a negotiated solution to large-scale land redistribution.

For this to be convincing, and effective, government must address the question of resources, both human and financial. It is unlikely that the current staff complement of DLA – in

terms of numbers and skills – is sufficient to manage a large-scale, proactive programme of land reform. In addition, the budget for redistribution has been allowed to stagnate and, regardless of the methods of land acquisition to be used in future, will need to be increased.

Furthermore, government must make a realistic assessment of the legal instruments at its disposal, and develop procedures to allow these to be used effectively (with legislative amendments where necessary). Policies and procedures that cause lengthy delays in the processing of land reform applications, and release of funds, and that discriminate against very poor applicants requiring small areas of land for 'subsistence' purposes, will also require review. In other words, the state must equip itself with the resources and policies necessary to be an effective agent of pro-poor land reform.

The lessons of the past eleven years show that the free market and a laissez-faire state cannot deal effectively with all these elements. The Constitution places clear responsibility on the state to bring about land reform, and no other institution in South Africa can possibly play this role. The challenge, therefore, is not to abandon 'the market' entirely, but to end the *market fundamentalism* that has characterised land policy since 1994; to bring the state back in to land reform, to play the central role that most stakeholder believe it should, and of which only it is capable.

## Endnote

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## Selected reading

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