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Address PO Box 15, Cape Town 8000  
Committee **The Joint Constitutional Review Committee**

**From** Mr Peter Setou:  
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**Subject** **Review of section 25 of the Constitution and other sections  
where necessary, to make it possible for the State to  
expropriate land in the public interest without compensation**

**Due Date** Friday, 15 June 2018

Enclosed please find a submission by the Vumelana Advisory Fund to the Joint Constitutional Review Committee on the review of Section 25 of the Constitution. If the Committee believes it would be helpful we would be happy to make an oral presentation to the committee. The presentation will be made by Mr Peter Setou, Chief Executive and Mr Brian Whittaker, Director.

A handwritten signature in black ink, appearing to read "Peter Setou".

Peter Setou  
Chief Executive

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**Transaction advisory services for Community Private Partnerships**

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Chief Executive: Setou, GP; Company Secretary: McClure NH





**Submission to the Joint Constitutional Review Committee  
on the review of section 25 of the Constitution  
to make it possible for the State to expropriate land  
in the public interest without compensation.**

**14 June 2018**

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Vumelana Advisory Fund NPC (RF) Registration Number 2011/001855/08

Report            Submission to the Joint Constitutional Review Committee on the review of section 25 of the Constitution to make it possible for the state to expropriate land in the public interest without compensation

Date              15 June 2018

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Status            Final

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## **A. Background and summary**

### **A.1. Organisation**

A.1.1. This submission is organised into three parts. Part A summarises the brief of the Constitutional Review Committee as we understand it, describes Vumelana's interest in expropriation without compensation and provides a summary outline of our submission. Part B provides the rationale for the submission that it is not the Constitution that needs to be changed but institutional and operational matters that require urgent attention if land reform is to be accelerated. Part C is the conclusion.

### **A.2. Brief**

A.2.1. Parliament has instructed the Constitutional Review Committee to:

- (i) Review section 25 of the Constitution and other clauses where necessary
- (ii) Conduct public hearings to get the views of ordinary South Africans, policymakers, civil society organisations and academics, about the necessity of, and mechanisms for expropriating land without compensation
- (iii) Propose the necessary constitutional amendments where applicable with regards to the kind of future land tenure regime needed
- (iv) Report back to the National Assembly by no later than 30 August 2018.

### **A.3. Interest**

A.3.1. Vumelana is a non-profit, public benefit organisation established in 2011 to support South Africa's Land Reform Programme. Our entire interest is in the success of land reform in South Africa.

- (i) Successful land reform provides restitution to the dispossessed, redistribution of land to those formerly excluded and secure tenure for those who live on the land while maintaining or enhancing the usefulness of the land transferred.
- (ii) Our primary aim is to provide post-settlement support to communities that acquire rights to land under the land reform programme by enabling those communities to establish well-structured partnerships for the development of their land. We also provide pre-settlement support in some cases and work to strengthen Communal Property Institutions.

- (iii) Much (but not all) of our work is with communities with large claims on high-value land. Our perspectives are shaped by that experience. We are currently working with 40 communities around the country.

#### A.4. **Outline submission**

A.4.1. We submit that the Government should proceed with caution when considering an amendment to the Constitution in order to accelerate land reform because:

- (i) To focus on the Constitution as the key impediment to successful land reform is to misdiagnose the problem.
- (ii) A misdiagnosis of the problem will divert attention from the matters that require urgent attention.
- (iii) A failure to deal with matters requiring urgent attention will compound the difficulties of land reform, slow progress and fuel rising dissatisfaction.

A.4.2. In order to accelerate land reform, the Government should use the constitutional measures that are available to it and streamline legislation where required as indicated by the High-level Panel<sup>1</sup>.

A.4.3. However in our experience, as an operating agency working to support land reform in South Africa our primary submission is that it is the operational and institutional matters that impede land reform that require most urgent attention if land reform is to be accelerated and that an amendment to the Constitution will not address these matters.

A.4.4. We, therefore, submit that the Constitutional Review Committee should conclude that an amendment to the Constitution is not required to accelerate land reform but that to do so the government should:

- (i) Encourage all South Africans to acknowledge the impact of historical dispossession and the need for reform – because with broader social support the programme could proceed more rapidly. This is addressed in section B.1 below.
- (ii) Affirm the protection of property rights, the rule of law and the payment of just and equitable compensation – because these rights, rules and principles of justice and equity affect all South Africans, including those that the land reform programme is designed to assist and doubt about these matters will impede progress. This is addressed in section B.2.

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<sup>1</sup> High Level Panel on the assessment of key legislation and the acceleration of fundamental change Commissioned by the Speakers Forum of the Legislative Sector in 2015

- (iii) Clarify what land reform should achieve acknowledging both Urban and rural dimensions and the need for progress to be systematically measured - because as the country contemplates changing its constitution because of a lack of progress on land reform there is a lack of consensus on what would constitute progress and on what has been achieved to date. This is addressed in section B.3.
- (iv) Balance concern for the manner in which land is acquired with the manner in which it is used- because by paying attention to the manner in which land will be used to meet the needs of those who acquire it, the implementation delays now so prevalent will be reduced. This is addressed in section B.4
- (v) Streamline the restitution process – because the anticipated escalation of demands on the restitution system could be more rapidly addressed with streamlined procedures. This is addressed in section B.5
- (vi) Make the Redistribution Programme more transparent – because the present opaque system leaves ordinary South Africans confused and suspicious about who acquires land and provides insufficient guidance to officials to encourage speedy action. This is addressed in section B.6
- (vii) Improve post-settlement conditions– because the high failure rate of land transferred requires continuing intervention by the state. This increases the cost and slows the pace of land reform. This is addressed in section B.7
- (viii) Resolve the conflicts associated with tenure reform – because a high proportion of South Africans live under conditions of insecure tenure and there is an opportunity to accelerate the pace of land reform by securing tenure on land which is already occupied. This is addressed in section B.8
- (ix) Develop innovative mechanisms for financing the land reform process – because the task of land reform exceeds the public resources available and land reform beneficiaries require access to the financial system if they are to be sustainable. This is addressed in section B.9
- (x) Increase the capacity of the State and prioritise spending – because limited state capacity and a lack of clarity on spending priorities slow progress. This is addressed in section B.10

A.4.5. Section B provides the rationale for the submission that it is not the Constitution but the institutions, policies and practices that need to be changed if land reform is to be accelerated. We base this on our experience of working with a wide range of

communities, the Department of Rural Development and Land Reform, the Commission on the Restitution of Land Rights, other Government Departments and private landowners around the country.

## **B. The rationale for the submission based on our experience**

### **B.1. Encourage all South Africans to acknowledge the impact of historical dispossession and the need for reform**

- B.1.1. Dispossession of the land following 1913 changed the destiny of South Africans. It not only removed people from the land but resulted in the confiscation of their property (such as cattle) reduced those affected to serfs and undermined their dignity.
- B.1.2. The impact of historical dispossession goes beyond the use of land as an economic asset. It affects the sense of place of those dispossessed. It robs the dispossessed of their dignity and land stands as a symbol of dispossession across many dimensions which are not necessarily linked to the land.
- B.1.3. The restoration of land has thus been at the core of the struggle for liberation and for many, there is a sense of continuing injustice in the idea that those who have profited from the land from which the original occupants were removed without compensation should keep their profits and be compensated for the land they are now required to give up.
- B.1.4. The process of dispossession has resulted in structural conditions that now need reform
- (i) The ownership of land is concentrated in the hands of too few individuals and organisations. Thus, reform is required to spread ownership more widely.
  - (ii) The racial profile of landowners reflects South Africa's colonial and apartheid past. Thus, reform is required to change the racial balance of land ownership in favour of black South Africans.
- B.1.5. However, when people are dispossessed of their land they lose much more than the land. They lose access to capital, skills and networks that are required to put the land to effective use. Thus the return of the land without access to these other factors of production leaves beneficiaries with "dead capital" – land that cannot be effectively used.
- B.1.6. By contrast, a broad commitment to land reform opens the possibility of building productive relationships between the beneficiaries of the land reform and the owners of

other forms of capital that are needed to use the land productively and can sustain such relationships in difficult times.

**“Shared vision sustains commitment”**

**Our experience** is that where there is a general acknowledgement of the impact of historical dispossession and of the need for reform, especially by current landowners or private companies with the capacity to enter into partnerships with land reform beneficiaries, then the process of finalising claims and maintaining relationships that put the land to effective use is eased.

- In a case that Vumelana worked on with a claimant community on the Wild Coast positive relationships were developed between the community and a group of eco-tourism investors. An agreement was structured to develop a lodge that would be based on an investment of R100m. 100 jobs would be created and some 350 households would benefit. After the agreements were signed unexpected delays emerged. These included the need for ministerial approval under the Sub-division of Agricultural land Act which caused a delay of over a year. Because of the commitment of the private parties and the relationships built the project has continued under circumstances where investors with less commitment might have withdrawn and the project collapsed.

**B.2. Affirm the protection of property rights, the rule of law and the payment of just and equitable compensation**

B.2.1. Acemoglu and Robinson<sup>2</sup> observe that “Inclusive economic institutions require secure property rights and economic opportunities not just for the elite but for a broad cross-section of society.” While there may be different means of securing property rights, these should one way or the other be subject to the rule of law rather than political interest or administrative discretion.

B.2.2. Section 25(2) of the Constitution currently states that property may be expropriated only in terms of law of general application for a public purpose or in the public interest; and subject to compensation.

<sup>2</sup> Acemoglu D and Robinson J; Why Nations: Fail The origins of power, prosperity and poverty 2012

- B.2.3. Section 25(3) makes it clear that the amount of compensation need not be equal to the market value of the property.
- B.2.4. Legal analysts point out that “to allow for no compensation to be paid, or to oust the jurisdiction of the court to have a final say in the expropriation would require an amendment of various parts of section 25 of the Constitution”<sup>3</sup>.
- B.2.5. The challenge is to find ways to speed up land reform within a constitutional framework that protects the rights of all citizens in a manner that is regulated by the courts and avoids the trap of victimizing current landowners.
- B.2.6. This challenge must be faced in the light of historical dispossession and its continuing impact on South African society and the fact that there is seldom a direct line between current landowners and the original dispossession. Aliber found that between 1994 and 2008 about 63% of all privately owned commercial farmland changed hands through the market<sup>4</sup>.
- B.2.7. The Restitution of Land Rights Act strikes the balance by protecting those with a right to restitution from having to pay for the land and those who currently own it from having to surrender it without compensation. The redistribution programme has a similar effect. The compromise is that the taxpayers carry the cost.
- B.2.8. How those costs should be calculated and compensation assessed in a just and equitable manner is provided for in sec 25 of the Constitution by having regard to all the relevant circumstances including:
- (i) the current use of the property;
  - (ii) the history of the acquisition and use of the property;
  - (iii) the market value of the property;
  - (iv) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - (v) the purpose of the expropriation.
- B.2.9. The Constitution thus allows for a wide range of factors beyond market value to be taken into account when calculating compensation and opens the possibility for expropriation without compensation where that is shown to be just and equitable in particular circumstances.

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<sup>3</sup>Pierre de Vos <https://constitutionallyspeaking.co.za/expropriation-without-compensation-how-to-change-the-constitution>

<sup>4</sup> MICHAEL ALIBER Unravelling the ‘willing buyer, willing seller’ question. Land divided Land restored Jacana 2015

B.2.10. Any proposal for Constitutional or legislative amendments to provide further support for expropriation without compensation would have to show how a different arrangement would produce a better result while upholding the values in the Constitution and observing the commitments to act in a way that “does not impact on agricultural production, food production, food security or other sectors of the economy”<sup>5</sup>

B.2.11. In order to achieve those results such amendments would have to be:

- Limited to defined circumstances such as:
  - Unused land
  - Acquired by illegal means (corruption or fraud)
  - Acquired by a state grant
  - Developed with large state subsidy
- With the compensation assessment
  - Based on the principles of justice and equity accepting that in defined circumstances the just and equitable compensation may be zero
  - Determined by the courts
- Applied to land for land reform purposes only
- Regulated
  - By expropriation legislation (setting out procedures, powers of the state, rights of landowners and beneficiaries); and
  - Subject to judicial review

B.2.12. Before moving to such amendments three questions should be considered:

- (i) Are prices paid for land acquired for land reform purposes excessive?
- (ii) If the price at which land is required is a major inhibitor of land reform why has the Government not used the existing provisions in the Constitution to lower prices where it believes the prices to be excessive?
- (iii) Would expropriation without compensation result in the rapid acceleration of land reform?

B.2.13. The position of the Government when acquiring land for restitution is different from that of redistribution. Restitution focuses on a particular claimed property where the Government is a forced buyer whereas redistribution purchases give the Government

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<sup>5</sup> Statement by the head of the ANC Economic Transformation Committee  
[https://www.youtube.com/watch?v=iwsViBMx\\_WY](https://www.youtube.com/watch?v=iwsViBMx_WY)

as buyer more options. Aliber<sup>6</sup> found that in the Capricorn and Vhembe districts: for the three-year period 2006–8, redistribution land was acquired at approximately the same price per hectare as the market average..... whereas restitution prices were almost three times greater. This may be explained by the fact that 85% of the farms acquired for restitution were actively farmed up to the time of transfer, versus 28% of those acquired through redistribution. But it may also be the case that with Government as a forced buyer, prices were inflated.

B.2.14. It is also not clear why the Government has not used the Constitutional provisions at its disposal in cases where it might have been able to lower the prices paid by doing so. One of the reasons may be that the Government does not have the capacity to deal with the legal, administrative and procedural requirements of doing so. It appears to conclude that it is easier and possibly more cost effective to settle rather than to try to apply the constitutional provisions. The point seemed to be underscored by Deputy Chief Justice Moseneke who is reported to have said “Sitting where I do, as a judge, I must tell you the objectives of the legislation may have fallen victim to over-lawyering,' 'Restitution cases are few. They wind their way slowly through the courts, starting with the Land Claims Court. Every legal point is being taken up to the highest (level). In short, restitution of land is smothered under the burden of legal formalism and low access to courts and bureaucratic bungles,' He went on to say “One would have imagined that a court such as ours would see a reasonable flow of disputes on expropriation or fair value of expropriated land. We have seen virtually none in 20 years of the court's existence.”<sup>7</sup>

B.2.15. It is not clear that expropriation without compensation would result in the rapid acceleration of land reform. The possibility of lowering the price of land and therefore increasing the amount of land that could be acquired would have to be offset by an increased administrative burden and protracted court cases. The Diagnostic Report for the High-Level Panel suggested that “At prices much lower than say, 15-20% below market value, land reform might be slowed to a crawl by court action”. By contrast, it is suggested that “If the budget for land reform increased from its present level (of less than 1%) to, say, 2-3% of the total, then land purchase would be more affordable”<sup>8</sup>.

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<sup>6</sup> Ibid

<sup>7</sup> The Mercury 16 May 2013

<sup>8</sup> Diagnostic Report on Land Reform in South Africa Commissioned by the High Level Panel on the assessment of key legislation and the acceleration of fundamental change. Plaas 2016

- B.2.16. It is thus uncertain that expropriation without compensation will have a dramatic impact on the pace of land reform bearing in mind the facts that: the majority of restitution claims have been settled by financial compensation; It has not been clearly shown that the redistribution of land has been held up by high prices; the price of land has not been the key issue in tenure reform, and that expropriation remains an onerous and time-consuming process.
- B.2.17. By comparison, the risks associated with introducing constitutional changes that may weaken property rights, undermine the rule of law and compromise the principles of justice and equity could have consequences well beyond the land question for society as a whole.
- B.2.18. Most problematically, the argument that land reform is slowed by the high prices demanded by sellers hides the fact that land reform is slowed most significantly by inadequate budgetary, institutional and human resources.
- B.2.19. Land reform would thus best be advanced by the Government affirming the protection of property rights, the rule of law and the payment of just and equitable compensation and addressing the urgent institutional and resource requirements for successful land reform.

**“ Justice and equity underpin systematic land reform”**

**Our experience** underscores the importance of upholding the constitutional principles.

- Vumelana is currently engaged in a large scale project with 8 claimant communities and one of South Africa’s leading fruit and timber companies to transfer the land currently owned by the company to the claimants. The landowner has agreed not to oppose the claims, to cooperate with the Commission and the claimant communities to settle the claims and to build long-term partnerships with the communities that will provide a stake for the communities in a business with global operations. The agreement to work together is founded on the rights of communities dispossessed of their land to have it returned under the Restitution Programme and to the rights of the landowners to just and equitable compensation. Without an affirmation of the rights of the parties, to the rule of law and to just and equitable compensation the programme would not be possible.

### **B.3. Clarify what land reform should achieve acknowledging both Urban and rural dimensions and the need for progress to be systematically measured**

B.3.1 Land reform must change the racial profile of land ownership in South Africa. It seeks to do this by providing restitution to those who can show historical dispossession, redistribution to those who were previously excluded from land ownership and secure tenure for large numbers of people whose land rights are insecure.

B.3.2 But land reform is also intended to address the increasing concentration of land ownership and to meet wider social objectives to improve the lives of the poor and contribute to the achievement of national objectives. The 1997 White Paper said that “Land reform aims to contribute to economic development, both by giving households the opportunity to engage in productive land use and by increasing employment opportunities through encouraging greater investment”. It went on to say “We envisage land reform which results in a rural landscape consisting of small, medium and large farms; one which promotes both equity and efficiency through a combined agrarian and industrial strategy in which land reform is a spark to the engine of growth<sup>9</sup> Land reform was conceptualised as a project of rural development and agrarian reform. The Department responsible for land reform is the Department of Rural Development and Land Reform. The key land redistribution target has been to redistribute 30% of South Africa’s agricultural land.

B.3.3 But over 60% of the South African population is urbanised and this figure is projected to reach 70% by 2030 and as the HSRC<sup>10</sup> has pointed out “there is a damaging spatial divide between where most people live and where jobs and resources are located.” They go on to say that “This spatial mismatch applies at both the regional scale (between the major cities and well-populated rural areas) and at the urban scale (between the main business districts or industrial centres and the largest townships. There is a growing belief that land reform should seek to address these divisions underscored by the rising number of land invasions in urban areas. It was reported that there were 3990 land invasions in the city of Tshwane in the 2016/17 and 2017/8 financial years.<sup>11</sup>

B.3.4 Thus over and above changing the racial profile of land ownership, land reform has multiple broader social objectives. These might include rural development and agrarian

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<sup>9</sup> White Paper on South African Land Policy. Department of Land Affairs 1997

<sup>10</sup> Reducing Spatial Inequalities through Better Regulation. Report to the High Level Panel Human Sciences Research Council 21st August 2017

<sup>11</sup> <http://www.politicsweb.co.za/politics/dept-fails-to-clamp-down-on-illegal-land-invasions>

reform, urban integration and the establishment of a new commercial landowning class. In the face of limited resources, there have thus been shifting priorities with some analysts believing that the programme is at risk of elite capture as it moves away from prioritising the needs of the poor.

B.3.5 There is thus a need for clearer policy priorities but however these are set there is also a need to clarify the basis on which progress is to be measured.

B.3.6 **In the case of restitution** for persons or communities dispossessed of rights in land after 19 June 1913 as a result of past racially discriminatory laws and practices restitution may be by way of the restitution of property or equitable redress as provided in the Constitution of the Republic of South Africa (Act no 108 of 1996). But there is uncertainty about the manner in which equitable redress by means other than the transfer of land (including financial compensation) should be calculated when measuring the progress of land reform. In practice, restitution takes the form of land restoration, the provision of alternative state-owned land; or the payment of financial compensation. In 2017 the Commission on the Restitution of Land Rights reported to parliament that 79 212 claims had been settled as at 31 December 2016. This had resulted in 3.3 million hectares of land being transferred under the Restitution programme. But the report went on to say that “if the claimants who opted for financial compensation had chosen land restoration an additional 2.7 million hectares would have been restored” taking the figure from 3,3m Ha to 6m Ha.<sup>12</sup> Should we use the figure of 3.3m ha or 6m ha when assessing the progress of the Restitution Programme?

B.3.7 **In the In the case of redistribution**, 4.7m Ha has been transferred under the government programme. The Government does not take account of land transferred by private transactions. The amount of land transferred by private transaction does not include race classification so it is difficult to track. In 2013 Lyne estimated the figure at 4.5m ha.<sup>13</sup> In 2017 AgriSa<sup>14</sup> estimated the figure at 4.4m Ha. While these figures are subject to question, the point to be noted is that what is measured as a land transfer by way of the Government redistribution programme is only part of what is redistributed. If

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<sup>12</sup> Annual performance plan 2017/2018: Presentation to the Portfolio Committee on Rural Development and Land Reform 02 May 2017. It was reported that 79 212 claims had been settled as at 31 December 2016. This has resulted in 3.3 million hectares of land, and 11.63 billion rand financial compensation, being awarded to 2.03 million beneficiaries from 408 231 (of which 328 852 are female headed) households. Had the claimants who opted for financial compensation chosen land restoration an additional 2.7 million hectares would have been restored. The total cost of the settlement of these claims is R36.5 billion.

<sup>13</sup> M Lyne Tomlinson lecture 2013 Two decades of land reform in South Africa. Insights from an agricultural economists perspective.

<sup>14</sup> Agri SA 2017 Land Audit: A transaction approach

private transfers are included, according to some analysts the official figure would almost double. Should the private transfer of land be encouraged and the figures included in the land reform process or should these figures be excluded?

**B.3.8 In the case of tenure reform**, the problem is difficult to quantify because there is little agreement on what constitutes secure tenure. It is however generally accepted that tenure security should include the protection of customary and informal rights and that tenure security is a problem for four categories of rights holders<sup>15</sup>:

- (i) Farm labourers and their families living on privately owned land
- (ii) People living on former mission stations
- (iv) People living in backyard dwellings and informal settlements in urban areas; and
- (v) People living under customary tenure systems in former homelands

To put the scale of the problem of tenure insecurity into context it is estimated that:

- (i) 17m people live in the former homelands under customary tenure systems. The high-level panel found that “parliament has not yet met this obligation in respect of the 17 million South Africans who live in the former homelands”.
- (iii) 4.2m people were displaced from farms between 1994 and 2005 (1.7m of those were evictions)<sup>16</sup> Social Surveys and the Nkuzi Development Foundation estimated that more people were evicted from farms in the 10 years after 1994 than in the ten years before<sup>17</sup>
- (iv) By 2011 according to the 2011 Census, 592 298 households with a population of 2 078 723 people lived on farms<sup>18</sup>.

**B.3.10** Tenure reform thus presents an opportunity to improve the lives of millions of South Africans and accelerate the progress of the land reform programme.

**B.3.11** For the purpose of this submission the point to be made is that as the Country contemplates changing its constitution because of a lack of progress on land reform it must be noted that there is a lack of agreement on what land reform should achieve, what would constitute progress and on how far the country has progressed in respect of key components of the programme.

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<sup>15</sup> Hull and Whittall February 2018: Addressing the shortcomings of land tenure reform in customary land rights

<sup>16</sup> Wegrif, Russell and Grundling 2005 SEARCHING FOR SECURITY: The reality of farm dweller evictions in South Africa

<sup>17</sup> Ibid

<sup>18</sup> Margaret Visser - Stuart Ferrer On farm workers' living and working conditions in SA – ILO 21 July 2015

**Lack of common purpose leads to failed expectations**

**In our experience**, the barrage of alternative interpretations of the purpose of land reform and uncertainty about what to prioritise and what to measure plays out in the way the success of land reform projects is evaluated.

- In a case where a community won a claim on a high-value tourism facility in which a partnership was structured with the former owners for its on-going marketing and management an analyst reviewing the impact of the project looked for improvements in the lives of poor people residing in a nearby township. She wanted to see potholes repaired and living conditions improved but was disappointed to discover that when ownership of the land passed from the former wealthy landowners to a poor community, they had not taken on municipal functions in a nearby township and spread the benefits more widely. This raises difficult issues about how expensive restitution claims can be justified in the face of widespread poverty and begs the question about what should be prioritised and measured.

**B.4. Balance concern for the manner in which land is acquired with the manner in which it is used**

- B.4.1. The debate on expropriation without compensation reduces the land reform question to one of land acquisition, but the impact of what happens to the land once it is acquired and transferred is largely ignored.
- B.4.2. While acknowledging that land has a social and spiritual value that goes beyond its economic utility, both new landowners and public policy expect the land to be used productively to improve the lives of those who acquire it. Two questions arise:
- (i) whether the transferred land is used in any productive way at all; and
  - (ii) the extent to which land transferred is used to meet South Africa's transformation and poverty reduction objectives.
- B.4.3. Much of the land transferred under the land reform programme is not used productively. In 2010 the then Minister of Rural Development and Land Reform said "We have not talked about the revenue that the state has lost because farms totalling 5.9 million hectares, which were active and accruing revenue for the state, were

handed over to people. And more than 90% of those farms are now not functional.”<sup>19</sup>

This figure has been disputed by analysts who argue that it should be closer to 50% <sup>20</sup>

B.4.4. But no one would argue that the manner in which land transferred under the land reform programme is used is satisfactory. In the main<sup>21</sup>, the promise of land reform is that it can create assets for the poor, stabilise relationships and promote development. In reality, it often destroys assets, impoverishes communities and undermines local economies. The losers are the workers who lose their jobs when farming and other operations collapse and the intended land reform beneficiaries whose hopes for a better life are not met.

B.4.5. In order to overcome this problem, a clearer assessment is required of how land in the land reform programme will be used and better business models are required that respond to the different facets of land reform.

B.4.6. The different facets of land reform require it to:

- (i) Support the livelihood strategies of poor families who use the land for subsistence farming
- (ii) Support the development of small-scale farmers who supplement the livelihood strategies of the poor and produce a surplus for commercial purposes.
- (iii) Develop commercial agricultural, tourism and other enterprises that give those who were previously excluded from the economy the ability to use their land for commercial purposes.
- (iv) Provide access to land for housing in urban areas for a rapidly urbanising population

B.4.7. Different interest groups prioritise different land uses in the process of land reform. Those who see land and agrarian reform as an integrated process directed at changing the structure of the rural economy by changing the manner in which land, labour and capital are used see the primary function of land reform as “a restructuring of agriculture away from the large-farm model and towards a more mixed farming sector with a growing number of smallholders”<sup>22</sup>

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<sup>19</sup> [https://www.dailymaverick.co.za/article/2010-03-03-sas-land-problem-digs-itself-a-deeper-hole/#.WxD\\_AUifPIU](https://www.dailymaverick.co.za/article/2010-03-03-sas-land-problem-digs-itself-a-deeper-hole/#.WxD_AUifPIU)

<sup>20</sup> “empirical evidence suggests that about 50% of the projects have improved the livelihoods of beneficiaries to a degree. This is not to say that these projects have been highly productive...” Ben Cousins Data on Land Reform Unreliable <https://www.iol.co.za/pretoria-news/data-on-land-reform-unreliable-13856989>

<sup>21</sup> Accepting that there are cases where claimants seek restoration for a sense of attachment to a place.

<sup>22</sup> Hall R Land reform for what? Land use, production & livelihoods Chapter 2 in Another Countryside Policy Options for Land and Agrarian Reform in South Africa PLAAS 2009

- B.4.8. But in a rapidly urbanising society, land reform also has a role to play in the restructuring of the urban landscape and the provision of land for housing in towns and cities.
- B.4.9. As part of the broad thrust of black economic empowerment land reform also has the capacity to support the development of a class of black commercial landowners.
- B.4.10. To date there has been too little attention given to how land acquired as part of the land reform programme is used.
- B.4.11. Restitution projects often fail to conduct a thorough examination of the options available to claimants based on the current and likely future use of the land. Claimants can find themselves manoeuvred into acquiring land to which they have a right but over which they are unlikely to exercise effective control and which is unlikely to meet their needs. A full assessment of the potential future use of the land would find that in many cases alternative land or financial redress would better meet their needs.
- B.4.12. The redistribution programme also frequently acquires properties which carry risks that the intended beneficiaries are unable to bear.
- B.4.13. The focus on expropriation without compensation risks compounding the problem by focusing on rapid land acquisition rather than viable land use. By contrast, land reform would be enhanced if there was a clearer understanding of community needs, thorough assessment of land potential and a more open conversation with communities about how best the land reform programme can help them to meet those needs.

**Well-structured partnerships make effective use of the land**

**In our experience**, building viable partnerships for the use of land acquired by communities under the land reform programme is the most practical way of attracting investment and using the land effectively for the benefit of the community.

- In one such case, a Mpumalanga community was helped to establish a partnership with an established farmer for the development of some 200Ha of land acquired under the restitution programme. 45 jobs were created for workers who received training, over R3m was paid in salaries and the community received consistent annual income from rent.
- In another case, an agreement was established between a claimant

community for the development of a tourist lodge that will attract R65m investment, create 100 jobs and create a basis on which community enterprises can be established to provide supplies to the lodge.

- In a similar case in the North West, a community was assisted to find an investment partner and sign an agreement that will result in R120m investment and create 150 jobs
- In KZN a community with timber plantations was assisted to raise the finance to build a small sawmill to add value to their products and increase their revenue.

## **B.5. Streamline the restitution process**

B.5.1. Two parts of the restitution process require urgent attention if land reform is to be accelerated

- (i) Some 90% of claims were settled by financial compensation in the first round of land claims. A similar proportion is likely to require financial settlement when the opportunity for new claimants to make new claims is re-opened. If this process can be fairly and speedily completed a large portion of restitution claims can be addressed. This might include the development of settlement packages. In 2009 a draft policy<sup>23</sup> for the determination of such packages took into account:
  - the nature and extent of the rights lost,
  - The value of the right that was lost,
  - The compensation received at the time of dispossession
  - Development and sustainability needs
- (ii) At the other end of the scale, large complex claims have taken decades to resolve. The Department of Rural Development and Land reform needs to acquire access to the skills needed to ensure that these claims can be finalised and appropriate arrangements made to ensure the continued effective operation of the businesses often associated with these claims. The recent attempt by the Department of Rural Development and Land Reform to establish a panel of transaction advisors may provide some support for this process.

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<sup>23</sup> Policy Guidelines: Determining a restitution package: Policy Unit: Office of the Chief Land Claims Commissioner December 2009

- B.5.2. It is also necessary to increase the resources devoted to providing support to claimant communities. Two important areas in which this is required are the following:
- (i) The resources available to regulate Communal Property Institutions (Communal property Associations and Trusts) need to be increased. The overwhelming majority of these institutions are dysfunctional. A survey done by the Department of Rural Development and Land Reform in 2010 showed that only 59 of nearly 900 CPIs reviewed had financial statements. Less than a third held General Meetings to report to their members. If the land reform programme is accelerated and the number of Communal Property Institutions escalates without improved regulation, the consequence for the intended beneficiaries will be dire.
  - (ii) Resources are also required to develop mechanisms to cut through intra-community disputes. Many of the large complex claims are stalled because of unresolved intra-community disputes. A facility similar to the Land Rights Management Facility<sup>24</sup> but with a broader focus or an Ombudsman is required to facilitate the resolution of disputes. This would give ordinary community members the means to have disputes resolved which are driven by a complex of issues including community leaders jockeying for power and Government officials involved in community disputes.
- B.5.3. If the restitution process was streamlined by the development of clear settlement packages for the settlement of financial claims; the use of experienced transaction advisors to negotiate viable commercial transactions on large complex claims and the establishment of mechanisms to regulate communal property institutions and resolve intra community disputes then the process of land reform would be accelerated.

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<sup>24</sup> The Land Rights Management Facility was established by the Department of Rural Development and Land Reform in 2012 to provide specialised legal and mediation services to indigent farm dwellers, labour tenants and communities who faced the violation of their land rights.

**Courts are used to resolve disputes and compel administrative action.**

**In our experience**, there is a need to streamline the restitution process and increase the resources available to resolve disputes and structure projects for the effective use of land transferred.

- In a project in the forestry sector, a claim that was made 20 years ago has been dogged by intra-community disputes where, in the absence of more efficient means of resolving the disputes the matter has been driven through the courts all the way to the Constitutional court delaying the finalisation of claims and provision of benefits for claimants.

**B.6. Make the Redistribution Programme more transparent**

- B.6.1. The redistribution programme was established to provide access to land for those who had been denied access under apartheid. The programme has gone through a number of phases with shifting objectives given expression through the nature of the grants that have been available at different times: The Settlement/ Land Acquisition Grant (SLAG) modelled on the housing subsidy (originally R16 000 per household); the Land Redistribution for Agricultural Development (LRAD) programme based on a sliding scale from R20 000 to R100 000 per individual; The Proactive Land Acquisition Strategy (PLAS) based on the state buying farms and leasing them to beneficiaries.
- B.6.2. From 2013 onward the Recapitalization and Development Policy Programme (RECAP) replaced the previous forms of grant funding for land reform.
- B.6.3. RECAP was designed to focus on land reform farms acquired since 1994 that were considered to be in distress but had the potential to be sustainable. The programme seemed to be based on the assumption that land reform projects would fail and need to be recapitalised.
- B.6.4. It was not clear how communities could get access to funding for redistribution projects. In a review of RECAP, it was found that “Various methods were used to launch RECAP in the provinces. This ranged from an advertisement in national and local newspapers, inviting land reform beneficiaries and potential strategic partners to participate in workshops. In addition, DRDLR staff conducted a number of workshops and briefing sessions with strategic partners and beneficiaries at the provincial and district levels to publicise RECAP. In some instances, DRDLR staff visited farmers or

made direct contact with them. The Minister of Rural Development and Land Reform also held imbizos/meetings with farmers in the provinces to launch RECAP. In addition, some land reform beneficiaries and strategic partners were invited by the Minister to meetings in Pretoria.” It concluded that “There is no clarity on the selection criteria for beneficiaries and farmers to participate in RECAP”<sup>25</sup>

- B.6.5. While an application form for “PLAS” land or a farm has now been posted on the Department of Rural Development and Land Reform web site the entire redistribution process needs to be clarified and applied in a transparent manner if the process of land reform is to be accelerated.
- B.6.6. Much of the responsibility for this may lie with the District Land Reform Committees. In 2012 the NDP proposed that District Land Committees (DLCs) should be established in each district municipality containing commercial farming land to resolve the slow pace of land redistribution in South Africa.
- B.6.7. According to the NDP, the DLCs should be charged with identifying a minimum of 20% of farming land in the area in which they are established that is easily acquirable and which does not cause distortions in the land market.
- B.6.8. By May 2015, forty DLRCs (91% of the target) had been established and launched across the Country<sup>26</sup>
- B.6.9. It was intended that the DLRCs would process recapitalization and development applications within the framework of the Department of Rural Development and Land Reforms existing programmes.
- B.6.10. It is not clear whether such applications have been processed. There is only one reference to DLRC in the Departments Annual Performance plan 2018/2019 which says “The District Land Reform Committees (DLRCs) are important structures to further implement land reform programmes at a district level” The annual report of the Department published in August 2017 reported that the Department had “launched the District Land Reform Committees and the District Agri-Park Management Councils and these are now functioning across the country. Although there are some challenges emerging, these structures are beginning to create the platform for participatory development and enhanced delivery”.
- B.6.11. If the redistribution programme was structured to make it clear how potential beneficiaries could apply for land and current landowners could make land available

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<sup>25</sup> Implementation evaluation of the Recapitalisation and Development Programme (from its inception in June 2010 to June 2012 Business Enterprises University of Pretoria

<sup>26</sup> Presentation to Economic Cluster Technical Committee 20th MAY 2015

and if clear criteria for selection and transparent procedures for allocation of land and grants were established then the rate of redistribution could be accelerated and the prospects for success enhanced.

**Unclear procedure and poor project selection delays land reform**

**In our experience**, the absence of clear project selection criteria and limited resources to assess the properties acquired through the Proactive Land Acquisition Strategy results in the acquisition of properties that absorb resources but turn out to be commercially unviable.

- In one case in which we were involved the Government had acquired the assets of a loss-making business in a distressed industry under the PLAS programme and leased them to local people who had approached the government for assistance to become owners of the property. Vumelana was asked to assist the parties to regularise governance and secure the commercial viability of the business. This turned out to be impractical and the project did not proceed.
- In another case, an ambitious plan to provide PLAS beneficiaries with a stake in an entire agricultural value chain was supported but it could not be concluded because of a lack of consensus on how to deal with projects of this nature.

**B.7. Improve the post-settlement conditions for land reform beneficiaries**

B.7.1. When people are dispossessed of land they lose much more than the land. In addition to the loss of dignity, they lose access to the networks, capital and skills that are required to make land useful.

B.7.2. The return of the land without access to the other factors of production prevents the land from being used productively. This is the main reason for the failure of land reform projects. The point was underscored by the Settlement and Implementation Support Strategy produced in 2007. It concluded that “Giving land to a poor community may allow its members to produce food or cash crops, but only if they have the required skills or expertise, are healthy enough and have access to sufficient labour power and if input supply and transport systems work and markets are predictable”<sup>27</sup>

B.7.3. As a rights-based programme, land reform has correctly emphasised the rights to restoration through the restitution, redistribution and tenure reform programmes. But

<sup>27</sup> Settlement an implementation support for land and agrarian reform in South Africa DLA 2007

too little attention has been given to the post-settlement impact of land reform. In 2007 the Government commissioned the analysis of settlement and implementation support referred to above. When launching the report the then Minister said that Government had come to realise that “the majority of beneficiaries require comprehensive support in order to ensure the sustainability of projects.” She went on to say that people acquiring land must be enabled to produce for themselves and the market and require access to finance, equipment, technical and business support” The report found that “the failure of post-transfer support to materialise....presents an overwhelming obstacle to production and marketing at whatever level of production”<sup>28</sup>

- B.7.4. Progress, since the report was produced, has been limited. In 2016 the diagnostic report on land reform prepared for the High-Level Panel noted that a “Lack of effective post-settlement support is widely seen as a key problem. This includes access to finance, infrastructure, inputs, markets, extension and training, and water for irrigation”<sup>29</sup>.
- B.7.5. More recently the Government has moved to withhold the transfer of title deeds (apparently to retain the ability to intervene if projects fail), investment in recapitalisation and development has increased and the Agri-Parks programme has been prioritised.
- B.7.6. There is clearly a need for improved post-settlement conditions for land reform beneficiaries. However, the experience of the last ten years shows that it is unlikely that this can succeed if it is conceptualised as a large-scale, publicly financed and managed intensive care programme for projects in distress.
- B.7.7. Improving post settlement conditions requires a clearer assessment of community needs and aspiration and of the potential post-settlement use of the land prior to the finalisation of settlement agreements in order to limit the chance of failure and job losses. Enhancing the prospects of success requires more than “support”. The conditions into which many land reform projects are launched pose extraordinary challenges for the intended beneficiaries. In particular, without access to finance and having to negotiate the often widely different interests of an artificially constructed “community” while working through poorly regulated and resourced

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<sup>28</sup> Ibid

<sup>29</sup> Diagnostic Report on Land and Agrarian Reform Plaas 2016

common property institutions would be daunting for the most experienced managers.

- B.7.8. While increased support is required, the conditions that are designed into projects that prevent access to capital and often make intra community disputes unresolvable must be also be changed.
- B.7.9. Continuing to build a system that is increasingly dependent on government resources is unaffordable and makes the participant's life-long beneficiaries of Government largesse rather than independent landowners in their own right.
- B.7.10. If restrictions on access to capital were addressed, dysfunctional property institutions regulated to protect the rights of their members and post-settlement support increased, the rate of failure of land reform projects would decline, resources would be used more efficiently and land reform would be accelerated.

<b>Good governance enhances the benefits of land reform</b>
<p><b>In our experience,</b> most land-owning institutions under the land reform programme (Communal Property Institutions and Trusts) are unable to discharge their responsibilities to their members once the land claims have been settled. They need support to establish sound governance practices and to use their land for the benefit of their members.</p> <ul style="list-style-type: none"><li>• In one of the cases on which Vumelana provided such support, it was necessary to assist the CPA to develop policies for asset management, risk management, benefit distribution, procurement and remuneration. It was also necessary to establish a code of conduct, set up management accounts, procure auditors and convene an AGM to report to members. Without such post-settlement support, the risks of failure are high often requiring “recapitalisation” thus absorbing resources and slowing progress.</li></ul>



## **B.8. Resolve the conflicts associated with tenure reform**

- B.8.1. The third primary component of land reform which was designed to secure the rights of people with insecure tenure has been the least effective part of the land reform programme. Cousins notes that “In post-apartheid South Africa a key goal of land policy has been the reform of ‘communal’ or ‘customary’ land tenure, in order to

address its chronic legal insecurity and thus meet constitutional imperatives for tenure security for those whose tenure was rendered insecure through past racially discriminatory law or practice. Twenty-one years after the first democratic elections in 1994, however, no such reforms have been implemented to date, and government's proposals continue to be mired in controversy. Less remarked, but also highly significant, is a widespread failure to extend formal property rights to the urban poor"<sup>30</sup>

- B.8.2. As indicated above this affects farm labourers and their families living on privately owned land; people living on former mission stations; people in backyard dwellings and informal settlements in urban areas; and people living under customary tenure systems in former homelands.
- B.8.3. There are complex political, technical, social, economic and legal dimensions to the problem of tenure reform.
- B.8.4. For the 17m people living in former homelands, their fate is most directly affected by the political dynamics in the relationship between traditional leaders and the ruling party. Claasens argues that "Traditional leaders are in alliance with the ruling party, and constitute the key beneficiaries of 'empowerment' deals with mining and other companies investing in these areas"<sup>31</sup>
- B.8.5. Technically tenure reform presents difficult issues to be resolved with respect to the manner in which tenure is to be secured for large numbers of people excluded from the formal land titling system. Some analysts argue that this may constitute more than half of the population.
- B.8.6. The economics of tenure reform also pose questions about how the improvement of tenure is to be financed and how those who fall outside the titling system can be linked to the financial system.
- B.8.7. While formal progress has been limited, independent initiatives have piloted innovative ways of responding to the challenge of tenure reform. The Khaya Lam project reports that it has reduced the cost of land transfer of former council-owned houses to full freehold rights from its average cost of between R6 000 and R8 000 to

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<sup>30</sup> Cousins: Beyond private ownership: alternative paradigms for rural and urban tenure reform in post-apartheid South Africa Draft chapter for book of essays in honour of H.W.O. Okoth-Ogendo

<sup>31</sup> Claasens 2015 in Cousins: Beyond private ownership: alternative paradigms for rural and urban tenure reform in post-apartheid South Africa

R2100.<sup>32</sup> The Free market Foundation claims that the 7 – 10million occupants of homes in former townships could become landowners with full title if the Khaya Lam programme was taken up nationally.

- B.8.8. The financial industry has developed products that provide housing loans for properties without a formal title by using pension savings as security. While these arrangements are not beyond criticism the pension-backed loans market was estimated at R17bn in 2009<sup>33</sup> and provides an example of how innovative attempts have been made to respond to the lack of formal title
- B.8.9. The different social dynamics of tenure in different communities with some emphasising group based and others prioritising individual title requires the acknowledgement of customary law while avoiding the creation of second-class rights.
- B.8.10. Legally, the status of land in the former homelands, in particular, is complex, with the development of land requiring agreement from the affected communities, sanction by traditional authorities and approval by the State as title holder. In this complex of relationships, it is difficult to attract investment that is needed for development.
- B.8.11. Overall, land reform could be accelerated if the rights of families living in former homelands and in informal urban housing were secured and if the status of land in former homelands and the authority and approval mechanisms for the development of that land was clarified.

**Unclear tenure and complex procedures discourage investment**

**In our experience**, it is extremely difficult to attract investment and promote development in communal areas with uncertain tenure, unclear procedures and contested authority.

- In one instance following a protracted attempt to develop a project in the Lusikisiki area the project was terminated “in the absence of a clear process for setting land aside for development in communal areas”
- In another, it was not possible to secure the necessary assurances that the development benefits would accrue to the local community rather the Chief and the project was terminated.

<sup>32</sup> Free Market Foundation Engineering News 11 August 2017

<sup>33</sup> Business day 25 July 2016 Pension-backed loans under scrutiny

## **B.9. Increase the capacity of the State and prioritise spending**

- B.9.1. The diagnostic report prepared for the High-Level Panel showed that 76.5 billion was spent by government on land reform programmes between 1994 and 2015, at an average of 0.77% of the national budget. It suggested that “either it has not been a political priority, or Treasury has been reluctant to expand the budget in the light of weak evidence of impact, or perhaps both factors are relevant”<sup>34</sup>.
- B.9.2. It is widely believed that the level of funding applied to land reform is insufficient to achieve the targets set for the programme. This is seen to be a key factor in the slow pace of land reform and a spur to the suggestion that land should be acquired without compensation or at below market value.
- B.9.3. However, it should be remembered that finance alone is unlikely to address the problem. Good leadership, sound institutional arrangements, clear policies and priorities, skilled personnel and effective systems and procedures are required to put the finances to effective use.
- B.9.4. It was reported in February 2018 that staff vacancies in the Land Reform and Restitution programmes of the Department of Rural Development and Land Reform were 26.03% and 21.16% respectively.<sup>35</sup> It is sometimes assumed that if the money was available these other matters could be addressed. But in practice, these things progress in a step-wise manner. Clear leadership is required to trigger the process of institutional improvement to justify resource increases.
- B.9.5. In addition to the level of resource available, the pace of land reform is determined by the budget priorities and the efficiency and effectiveness with which budgets are used.
- B.9.6. In 2016 it was reported that R2bn had been committed to the Agri Parks programme for the 2015/16 financial year<sup>36</sup>. This seemed to indicate a shift in priority from land acquisition to development support. The establishment of priorities is clearly important and development support is needed. Whether Agri-Parks provide an effective means of providing that support is not pertinent to this submission. What is pertinent is that while the political debate appears to prioritise land acquisition and thus contemplates acquiring land without compensation, the budgeting process places the priorities elsewhere.

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<sup>34</sup> Op cit

<sup>35</sup> <http://www.plaas.org.za/blog/why-government-failing-achieve-land-reform>

<sup>36</sup> Report to the portfolio committee on rural development and land reform 16 March 2016.

B.9.7. The Estimates of National Expenditure show the 2018/19 budget for Rural Development and Land Reform In Rand millions as follows:

1	Administration	1 825.4
2	National Geomatics Management Services	690.4
3	Rural Development	1 814.5
4	Restitution	3 371.0
5	Land Reform	2 723.9
	<b>Total</b>	<b>10 452.2</b>

B.9.8. Land acquisition budgets are contained in programmes 4 and 5.

- In programme 4 these are made up of Restitution Grants which account for R2 762.9m (R2,7bn) of the R3.37bn restitution budget
- In programme 5 land acquisition is mainly funded through the Agricultural Land Holdings Account which is responsible for buying and holding land until suitable beneficiaries are identified. R1 326.5 (R1.3bn) was allocated for this purpose. Land redistribution and land reform grants add a further R841.4m to this figure.

B.9.9. On these figures, it can be seen that just under R5bn (R4 930.7m) is available for land acquisition out of a budget of over R10bn

B.9.10. The most direct impact on the efficiency with which the available funds are used arises from the Department having to “recapitalise” projects on which capital costs have already been incurred. The Recapitalisation and Development programme (RECAP) was motivated by this concern. The RECAP policy document says that the Department identified that “many land reform projects were not successful and thus in distress or lying fallow”<sup>37</sup> ... in order to correct this, the policy targeted projects originally acquired through the Restitution and Redistribution programmes. The resources required for recapitalisation thus have a significant impact on the resources available for the acquisition of land.

B.9.11. We conclude that if there was consensus on priorities supported by a budget set at a level commensurate with the objectives of the land reform programme; and if administrative delays could be reduced and the new owners allowed access to the banking system then budgets would be more efficiently used and the land reform programme would be accelerated.

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<sup>37</sup> Policy for the Recapitalisation and Development Programme of the Department of Rural Development and Land Reform 23 July 2013

### **Limited State capacity slows land reform**

**In our experience**, the costs of land reform projects exceed land acquisition costs and the nature of these costs and the manner in which they are to be met is often unclear at the point of acquisition. It is also our experience that the pace at which land reform projects are implemented is directly affected by the capacity of the State to apply sometimes confusing policies and complex time-consuming procedures.

- In a project on which support was provided, the land was acquired for some R230m for restitution purposes. It also became necessary to provide recapitalisation funding, primarily for the acquisition of moveable assets, this increased the costs by a further R120m. It subsequently transpired that an injection of working capital would be required of some R50m to R100m. A project that appeared to cost R230m might end up costing twice that amount.
- In another case where a community had land restored and was assisted to enter into an agreement with a commercial investor for an R120m investment in the development of a tourist lodge, the development was delayed for over a year by the need for approval under the Subdivision of Agricultural Land Act, notwithstanding the fact that the land cannot be used for agricultural purposes.
- In a further example of delays that arise from low capacity a project requiring zoning approval was delayed for 36 months before any development could take place

#### **B.10. Develop innovative mechanisms for financing land reform**

B.10.1. There are two important areas where financing for land reform needs innovative responses

B.10.2. First, the scale of demand on public resources exceeds the available funds. As already indicated, the capacity of the State must be increased if land reform objectives are to be met. That includes an increase in the financial capacity of the State. But even if the budget for land reform is increased from 1% of the National Budget to 2% or 3% as suggested by the High-Level Panel, this alone will not address the demand for funding. When the Land Restitution Amendment Bill was introduced in 2013 to reopen the restitution process to people who missed the cut-off date of December 31, 1998, a regulatory impact assessment on the reopening of claims found that 379,000 claimants were likely to apply for restitution. It was

forecast that this would cost the State between R129bn and R179bn<sup>38</sup>. Those figures should be compared with the less than R5bn per annum spent on restitution and redistribution to date. However this is addressed, restitution claims are likely to swamp the budget and leave little funding for redistribution and other forms of land reform. If the State was to incentivise, regulate and record private land transfers as part of the land reform programme that might ameliorate the public funding crunch to some extent.

B.10.3. Secondly, restrictions on access to capital must be addressed. One of the most problematic features of the land reform programme is that it requires beneficiaries to agree not use the land restored to them as collateral to raise the capital to work the land. This is driven by a concern that if the land is used as collateral financiers may call up the collateral and the land restored to the claimants will move out of their control into the hands of 3rd parties who are not land reform beneficiaries. The unintended consequence of this is that communities find themselves as owners of land without the capital needed to use the land. This often results in the collapse of the farming or other operations on the land and the community reverting to the Government to “recapitalise” the project to restore infrastructure and provide working capital. Having prevented the community from gaining access to the banking sector the Government ends up as a financier and the project can cost two or three times the acquisition price of the land. A guarantee or similar mechanism is needed to link land reform projects to the financial system.

<b>Limiting access to capital drives land reform projects to failure</b>
<p>In our experience, land reform projects cannot be sustained without access to working capital.</p> <ul style="list-style-type: none"><li>• In one example, a successful claim on one of South Africa’s largest agricultural businesses has resulted in the business being placed into business rescue partly as a result of lack of access to working capital. The lives of 1 700 workers and their families are at risk. The Government is under pressure to “recapitalise” the project to avoid the loss of jobs. In this state of crisis, an attempt is being made to find commercial investors. This may require a special dispensation from the Minister to use the land as collateral.</li></ul>

<sup>38</sup> Business Day Live 2 November 2013

## C. Conclusion

- C.1. This report to the Joint Constitutional Review Committee submits that an amendment to the Constitution is not required to allow expropriation without compensation. The Constitution allows for a wide range of factors beyond market value to be taken into account when calculating compensation and opens the possibility for expropriation without compensation where that is shown to be just and equitable.
- C.2. We believe that the principles of justice and equity, clear property rights and the rule of law are prerequisites for systematic land reform and these should be upheld in whatever decisions are made.
- C.3. Based on our practical experience we conclude that to focus on expropriation without compensation as the means of accelerating land reform is to misdiagnose the problem because the impediments to more rapid, radical and successful land reform are to be found in:
- (i) A lack of consensus on the impact of historical dispossession and the need for reform
  - (ii) Uncertainty about what land reform should achieve and how results should be measured
  - (iii) Insufficient attention to the manner in which land is used while assuming that land reform is about land acquisition
  - (iv) Inefficient restitution processes which could be improved for both those seeking financial compensation and for the finalisation of large, complex claims
  - (v) Opaque redistribution procedures which slow progress
  - (vi) Policies that inhibit access to finance for land reform beneficiaries and other unhelpful post settlement conditions that sink many projects and require the diversion of resources from undertaking new projects to rescuing old ones.
  - (vii) Inactivity on tenure reform which has failed to confront the political and technical matters that have to be addressed
  - (viii) Limited institutional capacity and insufficient resources to meet the multiple objectives and heavy reliance on government funding assumed by the land reform programme.
- C.4. In the light of these conclusions it is submitted that the Committee should determine that an amendment of the constitution is not required to accelerate land reform but rather that land reform will be accelerated if:

- (i) A broader national consensus is built on the need for reform
- (ii) Property rights are protected, the rule of law is upheld and where land is acquired just and equitable compensation is paid
- (iii) The priorities of land reform are clarified and the means of measuring progress are agreed
- (iv) Greater attention is paid to the manner in which land is used, in addition to how it is acquired
- (v) The restitution process is streamlined
- (vi) The redistribution process is made more transparent
- (vii) Post-settlement conditions and support are improved
- (viii) The practical and conceptual conflicts about tenure reform are resolved;
- (ix) Innovative mechanisms are developed for financing land reform, and
- (x) The capacity of the State is enhanced.

C.5. In making this submission we:

- (i) Acknowledge that land reform has proceeded too slowly to meet post-liberation expectations.
- (ii) Understand that “land dispossession” stands as a proxy for dispossession in its many forms and that the slow pace of land reform symbolises what many South Africans feel to be an unsatisfactory outcome of liberation in which the heirs of colonialism and the beneficiaries of apartheid continue to enjoy the fruits of the land while large numbers of their compatriots remain poor in an increasingly unequal society.
- (iii) Submit that while acknowledging the frustration arising from the slow pace at which lives have improved for many South Africans, misdiagnosing the cause of the slow pace of land reform as being the Constitution will not result in a cure but will compound the problem. As argued in this submission the causes lie in binding financial, institutional, legislative and human constraints which must be addressed if land reform is to be accelerated.

Vumelana Advisory Fund

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