

*Friday, 7 May 2021]*

No 57—2021] THIRD SESSION, SIXTH PARLIAMENT

**PARLIAMENT**

**OF THE**

**REPUBLIC OF SOUTH AFRICA**

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**ANNOUNCEMENTS,  
TABLINGS AND  
COMMITTEE REPORTS**

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FRIDAY, 7 MAY 2021

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**TABLE OF CONTENTS**

**ANNOUNCEMENTS**

**National Assembly**

1. Referral to Committees of papers tabled ..... 2

**National Council of Provinces**

1. Referral to Committees of papers tabled ..... 3

**TABLINGS**

**National Assembly and National Council of Provinces**

1. Minister of Justice and Correctional Services ..... 3

**COMMITTEE REPORTS**

## National Assembly

1. *Ad Hoc* Committee to Initiate and Introduce Legislation amending section 25 of the Constitution..... 4
- 

# ANNOUNCEMENTS

## National Assembly

### The Speaker

#### 1. Referral to Committees of papers tabled

- (1) The following papers are referred to the **Portfolio Committee on Employment and Labour** for consideration and report:
  - (a) Strategic Plan of Productivity SA for 2020-21 – 2024-25.
  - (b) Annual Performance Plan of Productivity SA for 2021-22.
- (2) The following papers are referred to the **Portfolio Committee on Higher Education, Science and Technology** for consideration and report:
  - (a) Strategic Plan of the Chemical Industries Education and Training Authority (CHIETA) for 2020 - 25.
  - (b) Updated Annual Performance Plan of the Chemical Industries Education and Training Authority (CHIETA) for 2020-21.
  - (c) Addendum to the Annual Performance Plan of the National Skills Fund (NSF) for 2020-21.
  - (d) Addendum to the Annual Performance Plan of the Quality Council for Trades & Occupations for 2020-21.
  - (e) Revised Strategic Plan of the South African Qualifications Authority (SAQA) for 2020-21 – 2024-25.
  - (f) Revised Annual Performance Plan of the South African Qualifications Authority (SAQA) for 2020-21.
- (3) The following papers are referred to the **Portfolio Committee on Human Settlements, Water and Sanitation** for consideration and report. Report of the Auditor-General on the Financial Statements and Performance Information is referred to the **Standing Committee on Public Accounts** for consideration:

- (a) Report and Financial Statements of Umgeni Water for 2019-20, including the Report of the Auditor-General on the Financial Statements and Performance Information for 2019-20.

## **National Council of Provinces**

### **The Chairperson**

#### **1. Referral to Committees of papers tabled**

- (1) The following paper is referred to the **Select Committee on Security and Justice** for consideration and report:
    - (a) Draft Amendment to Regulations, submitted in terms of section 94(3) of the Legal Practice Act, 2014 (Act No 28 of 2014).
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## **TABLINGS**

### **National Assembly and National Council of Provinces**

#### **1. The Minister of Justice and Correctional Services**

- (a) Proclamation No R. 16, published in Government Gazette No 44546, dated 07 May 2021: Referral of matters to existing Special Investigating Unit: In respect of the affairs of the KwaZulu-Natal Department of Transport, in terms of the Special Investigating Units and Special Tribunals Act, 1996 (Act No 74 of 1996).
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## **COMMITTEE REPORTS**

### **National Assembly**



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

**1. REPORT ON PUBLIC PARTICIPATION ON  
THE EIGHTEENTH CONSTITUTION  
AMENDMENT BILL**

**AD HOC COMMITTEE TO INITIATE AND INTRODUCE LEGISLATION  
AMENDING SECTION 25 OF THE CONSTITUTION**

**16 APRIL 2021**

## CONTENTS

<i>Contents</i>	<i>1</i>
<b>Chapter 1: Introduction and Overview of Public Participation</b>	
1. Introduction	3
2. Mandate of the Ad Hoc Committee to Initiate Legislation to Amend Section 25 of the Constitution	3
3. Constitutional Framework and Other Guidelines	4
4. Public Participation: The Approach	4
5. Layout of the Public Participation Report	5
6. Conclusion	6
<b>Chapter 2: Report on Written Submissions</b>	
1. Introduction	7
2. Public Participation: Advertisement of the Bill	7
3. Summary of Submissions	8
3.1 Views on the Preamble	8
3.2 Clauses of the Bill	10
3.2.1 Clause 1(a) of the Bill	10
3.2.2 Clause 1(b) of the Bill	11
3.2.3 Clause 1(c) of the Bill	11
4. Other Matters from Written Submissions	12
4.1 Rationale for Land Reform	12
4.2 Custodianship/Ownership of Land	13
4.3 Security of Tenure and Protection of Property Rights	14
4.4 Promotion of Peace and Security	14
4.5 Proposed Amendments Exceed the CRC Recommendations	15
4.6 Contravention of the Constitution and International Law	15
4.7 Unintended Consequences of the Bill	17
4.8 Expropriation of Property Without Compensation	18
5. Conclusion	19
<b>Chapter 3: Report on Public Hearings</b>	
1. Introduction	20
1.1 Delegation	20
1.2 Terms of Reference for the Ad Hoc Committee	21
1.3 Outline of this Chapter	21
2. Methods and Rules of Engagement for Public Hearings	22
2.1 Prior to Public Hearings Sessions	22
2.2 Facilitation of the Sessions and Rules of Engagement	22
3. Brief Outline of Attendance and Responses/Reactions of Members of the Public	23

4. Overview of Section 25 of the Constitution and the Proposed Amendments	27
5. Summary of Provincial Reports	27
5.1 Eastern Cape	28
5.2 Free State	32
5.3 Gauteng	37
5.4 KwaZulu-Natal	44
5.5 Limpopo	48
5.6 Mpumalanga	55
5.7 North West	60
5.8 Northern Cape	66
5.9 Western Cape	74
6. Conclusion	81

#### **Chapter 4: Oral Submissions**

1. Introduction	82
2. Oral Presentations: Organizations	83
2.1 SakeLiga	83
2.2 COSATU	84
2.3 SA Property Owners Association	84
2.4 Helen Suzman Foundation	85
2.5 AgriSA	85
2.6 Business Management Forum	86
2.7 Land and Accountability Research Centre	86
2.8 CASAC	89
2.9 The Catholic Church	92
2.10 AfriForum	93
2.11 Black Land First	94
2.12 Freedom of Religion South Africa	96
2.13 Banking Association of South Africa	96
2.14 National House of Traditional Leaders	97
2.15 Ndifuna Ukwazi	98
2.16 Legal Resources Centre	101
3. Oral Presentations: Relevant Departments	103
3.1 Department of Public Works and Infrastructure	103
3.2 Department of Minerals and Energy	105
3.3 Department of Justice and Constitutional Development	105
3.4 Department of Agriculture, Land and Rural Development	108
4. Conclusion	110

## CHAPTER 1

### INTRODUCTION AND OVERVIEW OF PUBLIC PARTICIPATION

#### 1. INTRODUCTION

Parliament is constitutionally obligated to involve the public in the activities of its Houses and committees. The involvement of the public also applies to the legislative processes undertaken by its committees. The Ad Hoc Committee to Initiate Legislation to Amend Section 25 of the Constitution is thus one other committee established by the National Assembly to initiate and process legislation to amend section 25 of the Constitution. Thus, it is expected of it to adhere to the constitutional prescripts with regards to public participation.

It is generally accepted and a norm for parliamentary committees to involve or encourage public participation in the legislative process. Failure to do so may render the process flawed and in breach of the Constitution and parliamentary rules with regards to public participation. The repercussions of not ensuring public participation, Parliament may be taken to court and consequently be found wanting in fulfilling its obligation to ensure public participation in its processes.

In accordance with its mandate and efforts to encourage public participation, the ad hoc committee on section 25 developed a bill (the Constitution Eighteenth Amendment Bill), which was in turn advertised in the newspapers and conducted public hearings on. This report on public participation is the culmination of all processes the ad hoc committee on section 25 embarked on as part of the legislative process.

Parliament did not only just elicit the views of the public on the Bill, it ensured that there is awareness on the Bill through radio adverts and media statements; members of the public are educated on the contents of the bill; and transported to public hearings to ensure both access and promote meaningful public participation.

In its processes, the ad hoc committee on section 25 was later guided by the regulations related to covid19 management in order to ensure the safety of everyone participating in the public hearings. Various sections and units collaborated to ensure these throughout public hearings held under the lockdown level 1 regulations.

#### 2. MANDATE OF THE AD HOC COMMITTEE TO INITIATE LEGISLATION TO AMEND SECTION 25 OF THE CONSTITUTION

The ad hoc committee derives its mandate from the resolution of the National Assembly taken on the 25th July 2019. The National Assembly resolved to establish an Ad Hoc Committee to Initiate Legislation to Amend Section 25 of the Constitution. As the name explicitly explains, the Ad Hoc Committee was mandated to initiate legislation to amend section 25 of the Constitution.

In doing so, the ad hoc committee to note the recommendations of the Constitutional Review Committee to amend section 25 of the Constitution to make explicit that which implicit in the Constitution, with regards to expropriation of land without compensation, as a legitimate option

of land reform, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs which was adopted in the 5th Parliament.

Furthermore, the House noted that the ad hoc committee was originally established to this effect but could not complete its task by the time of the dissolution of the 5th Parliament and that it recommended that the matter be concluded in the 6th Parliament (ATC, 15 March 2019, p92). The ad hoc committee was established in terms of Rule 253 to initiate and introduce legislation amending section 25 of the Constitution. The ad hoc committee has regard to the work done and recommendations as contained in the reports of the Constitutional Review Committee (CRC) and the previous ad hoc Committee on Amendment of Section 25 of the Constitution.

### **3. CONSTITUTIONAL FRAMEWORK AND OTHER GUIDELINES**

Section 44 vests the national legislative authority in Parliament by conferring the National Assembly the power to amend the Constitution. The Ad Hoc Committee to Initiate and Amend Section 25 of the Constitution was established precisely to amend the Constitution.

Section 59(1)(a) of the Constitution provides for the National Assembly to facilitate public involvement in the legislative and other processes of the Assembly and its committees; (b) conduct its business in an open manner, and hold its sittings, and those of its committees in public, but reasonable measures may be taken to (i) regulate public access, including access of the media to the Assembly and its committees; and (ii) provide for the searching of any person and where appropriate the refusal of the entry to, the removal of any person. The preceding constitutional framework guided the work of this committee in conducting its public participation processes.

In addition, the committee was guided by the Disaster Management Regulations related to Covid19 management in the latter part of the public hearings. In particular, the regulations applied to the public hearings held in the last three provinces viz. Northern Cape, Limpopo and the Western Cape. The concerned regulations put the country under lockdown which mainly regulated the movement of people, number of people who can gather at a venue, hygiene related matters among rules the committee had to adhere to in order to hold successful public hearings.

### **4. PUBLIC PARTICIPATION: THE APPROACH**

The Ad Hoc Committee to Initiate and Amend Section 25 of the Constitution utilized two modes/mechanisms of ensuring public participation in the legislative process, that is:

- Advertisement of the Bill in the government gazette and newspapers, and
- Conducting public hearings in all provinces.

#### **4.1 Advertisement of the Bill**

The advertisement of the bill was first done in the government gazette in December 2019 and an advertisement in the various newspapers in January 2020 with a closing date of 31 January



2020, which was further extended to end of February 2020. The two processes elicited 204 334 submissions to the committee. These written submissions culminated in a report found in chapter 2 of this report.

It must be noted here that the committee also tried to increase public participation through establishing a “whatsapp” line. However, it yielded no positive results as no comments/submissions were received via this mechanism.

## **4.2 Public Hearings**

The ad hoc committee on s25 took a decision to conduct public hearings in all provinces in order to provide the members of the public to address the Members of the committee in person. Thus, public hearings were held in nine provinces as agreed to. In the provinces, the ad hoc committee on s25 visited 33 towns across the country. Through this process, members of the public were given a further opportunity to give their views in person in the various towns in the provinces. The views of the public are duly captured in Section A of this report.

*In preparation for the public hearings,*

The public education unit of Parliament conducted educational sessions on the Bill in the towns/regions. The purpose of the educational sessions was to increase awareness and knowledge of the contents of the Bill in order to enable the members of the public to meaningfully participate in the public hearings.

Parliament also mobilized members of the public by increasing awareness about the public hearings. Thus, the parliamentary communications services issued statements about the public hearings across media platforms in advance. Furthermore, the public education contributed through the educational sessions mentioned above.

Parliament also transported the members of the public from their areas to the hall where public hearings were held and taken back home after the public hearings. The transportation of people from and to their areas was done in order to ensure that a diverse of people are able to access the public hearings and give their views on the Bill.

In accordance with the covid19 regulations, the SHE unit, protection services and the human resources units collaborated to ensure adherence to the regulations at the venues before, during and after the public hearings.

*During public hearings,*

During public hearings, interpreting services were provided in all public hearings in accordance with languages mainly spoken in the localities.

## **5. LAYOUT OF THE PUBLIC PARTICIPATION REPORT**

The layout of the report takes into consideration the processes followed by the ad hoc committee on section 25 in facilitating public participation. This chapter serves an introduction

and presents an overview of the public participation processes undertaken by the ad hoc committee on section 25.

As part of phase 1 of public participation, the ad hoc committee on section 25 prepared and advertised the bill calling for written submissions. This process took place from December 2019 to end of February 2020. Consequently, the ad hoc committee on section 25 received written submissions which are collated into a second chapter of this report.

The ad hoc committee on section 25 further conducted public hearings in provinces across the country. The third chapter thus captures information received by the committee during public hearings in provinces across the country. Furthermore, it presents the preparations before holding public hearings to enhance public participation and the public views as presented to it.

## **6. CONCLUSION**

The report thus presents all information on the public participation activities undertaken by the committee and consequently the views of the public on the bill. The report is intended to empower members of the committee with public views on the bill and to utilize its contents when deliberating on the clauses of the bill.

## CHAPTER 2

### REPORT ON WRITTEN SUBMISSIONS

#### 1. INTRODUCTION

The ad hoc committee in the 5<sup>th</sup> Parliament had drafted the Bill to give effect to its mandate to initiate and introduce legislation to amend section 25 of the Constitution. Upon revival of the ad hoc committee in the 6<sup>th</sup> Parliament, the draft Bill was introduced and brought into the current ad hoc committee for further processing. The aim of the Bill is to “amend the Constitution of the Republic of South Africa, 1996, so as to provide that where land and any improvements thereon are expropriated for the purposes of land reform, the amount of compensation payable may be nil; and to provide for matters connected therewith.”

The ad hoc committee on section 25 took a decision to embark on a public participation process as part of the legislative process. One of the mechanisms used was advertising the Bill in various newspapers for the broader members of the public to access it in their own languages where they are in the country. Thus, the Bill was advertised in all official languages in national, provincial and local newspapers. In addition, the Bill was advertised in the parliamentary website for everyone to access it. This report thus culminates from the submissions received following the advertisement of the Bill. Therefore, it is a report on written submissions.

#### 2. PUBLIC PARTICIPATION: THE ADVERTISEMENT OF THE BILL

Following its establishment and presentation of the proposed Constitution Eighteenth Amendment Bill by the legal services unit of Parliament on the 3<sup>rd</sup> December 2019, the committee resolved to advertise the bill in the newspapers and other platforms (parliamentary website, radio) to enable the members of the public to give inputs on the bill.

The advertised first published the Bill as a general notice calling for submissions on it in the Government Gazette on the 13<sup>th</sup> December 2019. In line with the requirements for publishing in the government gazette, the contact details of the committee secretary were provided to the members of the public. Very few submissions were received through this process and were incorporated in the overall number of public submissions received.

The bill was again advertised in the newspapers as from the 5<sup>th</sup> January 2020, and the closing date was the 31<sup>st</sup> January 2020. The advertisement clearly indicated who the submissions must be sent to and provided a dedicated email address for all submissions. Recognizing the fact that the bill was advertised during the summer holiday which may affect the submissions, the committee resolved to extend the closing date. Also, the committee requested that other means/mechanisms be used by Parliament to attract more submissions from the public. To this effect, a WhatsApp line was opened and advertised broadly to increase awareness of the existence of this line that could be utilized for sending submissions.

The committee received written requests for the extension of the closing date for submissions from civil society, the NHTL, some provinces and political parties represented in the Committee. The date was extended to the end of February 2020 to enable for more written submissions to be submitted to the committee. The extension also enabled Parliament to

establish a line to enable more members of the public to use the social media (WhatsApp line) to provide their inputs into the bill.

The committee also referred the bill to the National House of Traditional Leaders (NHTL) for comments.

Parliament had sufficiently advertised the bill by using various platforms/mechanisms to enable members of the public to make submissions on the bill to the committee. It gave sufficient time for the public through the first call and extension of the closing date for submissions.

Through the process of advertisement from the government gazette process through to the extended period in February 2020, the committee received 204 334 submissions from the public. A total of 198 570 submissions were resubmissions from the Constitutional Review Committee process as they were still addressed to then committee secretary but sent to the correct email address. Consequently, these submissions were about whether to amend section 25 of the Constitution or not. However, all the submissions received and views of the public are incorporated in the sections below.

### 3. SUMMARY OF SUBMISSIONS

What follows in the below section is the presentation of the views of the public on the bill and their views outside of the Bill but which relates to s25 in general. The report synthesizes their views and reflects their views as expressed in the submissions. Thus, no form of analysis of the views the public was done in this report. Instead, the extracts from the submissions are reflected in this report. Selected paragraphs are referenced as requested by the committee in the meeting of the 19<sup>th</sup> February 2021.

#### 3.1 Views on the Preamble of the Bill

This section deals with the arguments and/or views of the members of the public on the preamble Bill to amend section 25 of the Constitution. Below is the preamble of the Bill:

#### ***PREAMBLE***

***WHEREAS*** there is a need for urgent and accelerated land reform in order to address the injustices of the past that were inflicted on the majority of South Africans and especially as the hunger for land amongst the dispossessed is palpable and the dispossessed are of the view that very little is being done to redress the skewed land ownership pattern;

***AND WHEREAS*** section 25 of the Constitution of the Republic of South Africa, 1996, must be amended to make explicit that which is implicit therein, so that an amount of nil compensation is explicitly stated as a legitimate option for land reform;

***AND WHEREAS*** such an amendment will contribute to address the historic wrongs caused by the arbitrary dispossession of land;

***AND WHEREAS*** such an amendment will further ensure equitable access to land and will further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs,

***BE IT THEREFORE ENACTED*** by the Parliament of the Republic of South Africa

*Preamble from the Constitution Eighteenth Amendment Bill*

Some submitters believed that the preamble of the Bill is misleading in its formulation and the following reasons were advanced in support of this view:

- ***Land Restitution Claims:*** in recognition of the previous process undertaken by government with regards to land restitution and claims thereof, a view is advanced that 1.8million individuals had received compensation, either in a form of land or money. The claimants had choices between land and/or money as a preferred mode of compensation. The compensation to claimants was achieved without the need to expropriate land without compensation. The strong inference was that the remainder of land claims can also be resolved without interfering with the Constitution. In essence, the proposed Bill constitutes an interference to the Constitution and the values on which it is based or grounded.
- ***Farming is a technical job:*** Government spent over R1,4 billion buying farms in the Eastern Cape to redistribute to aspirant farmers. It was alleged that of the 265 farms purchased, only 26 remain viable. Furthermore, in 90% of those cases, once thriving farms that produced food and created employment for people in the surrounding areas are now in ruin. It was noted that this fact was acknowledged by the former Minister of Land Reform and Rural Development. Being a farmer is not easy. It's a technical job that requires an enormous amount of time, expertise, and money as well as a lot of support and training if one has no background in farming. Providing someone with the land to farm on is no guarantee that the farm will be successful. Thus, investment in many ways must be done in support of the farmers for farms to thrive and be sustainable.
- ***Damage to the economy:*** Life involves trade-offs and one cannot remove property rights and expect to have a flourishing economy. Foreign investors would not risk having their investments in a form of land confiscated in South Africa when they can pick any number of other nations that will protect their investments. South African was thus urged to protect foreign investments in order to minimize damage to the economy.

The submitters further noted that when Zimbabwe implemented a policy of expropriation of land without compensation, it led to the world's worst case of hyperinflation. It wasn't just the original landowners who were hurt but also the average person on the street was left destitute after the economy had been destroyed. Government must learn from the case and experiences of that country.

A floundering economy would have a negative impact on the amount of tax revenue that can be collected to assist the poor. If the state wants to acquire more land for the benefit of the poor and dispossessed, it can do so by utilising funds from the annual budget. The fact that R5,7 billion was budgeted for land reform and restitution in the last financial year which is only 0,3% of the total budgeted expenditure of R1,67 trillion is further evidence that government's land reform initiative is largely a political ploy. Meanwhile, the negative economic impact of the mere threat of expropriation without compensation is already visible.

- ***Lack of demand for land redistribution:*** this assertion is based on a survey conducted by the Institute for Race Relations polling South Africans to determine what they

perceive to be the country's most serious unresolved problems which concluded that less than 1% of the population were less concerned about land distribution.

Arguing against the preamble in the bill, it was noted that the point of departure in the RSA Constitution is that an expropriation should be "just and equitable". Compensation should reflect an equitable balance between the public interest and the interests of those affected, known as the principle of equivalence. Thus, it is implicit in the Constitution that nil compensation could in certain circumstances be just and equitable, to ensure an equitable balance between conflicting interests.

*Sources: South African Institute of Valuers*

### 3.2 Clauses of the Bill

This section of the report focuses on the comments or view of the members of the public with regards to the clauses of the Bill, the Constitution Eighteenth Amendment Bill.

#### 3.2.1 Clause 1(a) of the Bill

Clause 1(a) of the Bill to amend s25 of the Constitution reads as follows:

*(a) by the substitution in subsection (2) for paragraph (b) of the following paragraph:  
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.*

Clause 1(a): *Constitution Eighteenth Amendment Bill*

The amendment of this clause is objected to on the basis that section 25 of the Constitution already makes provision for courts to make a nil compensation where it is just and equitable to do so. Currently, the courts have the authority to determine in each circumstance before it whether the nil compensation should be granted. Thus, the courts should retain this authority to determine in each circumstance whether a nil compensation should be granted.

Also, it leaves section 25 of the Constitution under the protection and guidance of the judicial system which will allow for the due process in deciding on what is just and equitable. Thus, the courts should be a driving force behind the adjudication on what is just and equitable, and not the Executive. This argument is largely driven by a notion or perceived lack of trust in the exercise of the Executive authority.

Section 25 of the Constitution currently makes provision for development of national legislation to determine the circumstances under which expropriation can take place at nil compensation.

While other submitters were opposed to the amendments to section 25 of the Constitution as proposed in the current Bill before the Ad Hoc Committee on Section 25, some submitters were of the view that expropriation of land without compensation was necessary as a redress for injustices committed in the past for forceful land grab from the legitimate and rightful owners of land. Thus, the submitters felt strongly that the history of injustices with regards to land must be recognized and rectified by the current government.

The land grabs that took place in the past subjected the rightful owners to indignity, landlessness and consequently abject poverty. Moreover, the rightful owners experienced continued abuse on farms leading to insecurity of tenure especially for vulnerable women and children living and working on the farms. Government is thus obligated to ensure the dignity of people whose land was taken illegally and forcefully without compensation, ensure security of tenure especially for the vulnerable women and children of this country.

In order to ensure fairness, the submitters also advocated a view that there must be a limitation clause inserted on number of hectares a person can own, with the exception of land that is productive and/or serves the public purpose. The limitation clause would then apply to land identified for human settlements rather than productive land for subsistence and commercial farming.

The proposed provision at s25(2) also be made subject to s25(3) and not only be made subject to the proposed s25(3)(a). Otherwise, it will undermine the court's jurisdiction constitutionally to determine nil compensation, instead of only by means of national legislation. The suggested change will mitigate litigation over national legislation which have to comply with the Constitution.

The s25(2) contains no definition of "land reform". For the purposes of s25(8) the term land reform is restricted to reform which addresses the consequences of past racial discrimination. A court may however, in the absence of definition of the term "land reform", where it appears in s25(2), attach and wider meaning to it.

*Sources: South African Institute of Valuers; O'Kennedy Pepler Attorneys and Notaries on behalf of Ruvimbo (Pty) Ltd; IRR- supported by many people; Palmer Estate (PTY) LTD;*

### 3.2.2 Clause 1(b) of the Bill

Clause 1(b) of the Bill to amend s25 of the Constitution reads as follows:

*(b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:*

*"(3) The amount of the compensation as contemplated in subsection (2)(b), and the time and manner of any payment, must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—";*

Clause 1(b): *Constitution Eighteenth Amendment Bill*

The submitters did not comment on this part of clause 1 of the Bill.

### 3.2.3 Clause 1(c) of the Bill

Clause 1(c) of the Bill to amend s25 of the Constitution reads as follows:

*(c) by the insertion after subsection (3) of the following subsection:*

*"(3A) National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil."*

Clause 1(c): *Constitution Eighteenth Amendment Bill*

Section 25(3) to be added and should read as follows:

- Where property was acquired without payment, through donations, gifts or through favourable low sale purchases prior to 1994 by the apartheid State and its subsidiaries, be expropriated without compensation by the relevant Government Minister.
- Where property rights and title deeds are held by entities who obtained these rights at no costs, through donations, gifts or at low favourable sales purchases from the apartheid government and its subsidiaries, that these rights and title deeds be expropriated without compensation to the property beneficiaries occupying these premises.
- Where land was acquired from the apartheid state at no cost, through donations, gifts or ceded at low favourable rates that the land by expropriated without compensation to be used for social housing.

#### **4. OTHER MATTERS FROM THE WRITTEN SUBMISSIONS**

The advertisement of the bill gave members of the public an opportunity to make submissions on the clauses of the bill. However, members of the public went beyond commenting on the clauses to looking at section 25 of the Constitution in totally and expressed their views for and against the proposed amendments as articulated in the advertised bill. The members of the public broadly reflected on the proposed bill without commenting on each clause. This section thus presents the views of the public on the bill in relation to section 25 as a whole.

This section of the report directly reflects the views of the public as expressed in their submissions. As requested by the committee on the 19<sup>th</sup> February 2021, a few references are inserted as it is untenable to have the names of all submitters on a point in this report because that will affect the length and readability of the report. Thus, the Members are referred to the submissions on a folder on submissions which is made available to all for perusal. Furthermore, the subheadings reflected in the report are either developed from reading the submissions or extracted directly from the submissions.

##### **4.1 Rationale for Land Reform**

Submitters provided differing views on the rationale for land reform as advocated for in the amendment of section 25 of the Constitution. These views include the following:

Amending section 25 is significant because it aims to address the historic wrongs caused by the arbitrary dispossession of land and thus ensure equitable access to land and further empower the majority of struggling South Africans to have access to productive participants in land ownership, food security and agricultural reform programs.

Amending section 25 and implementing land reform programs effectively is likely to give dignity back to indigenous people whose land was wrongfully, illegally and forcefully taken away from them. It will enable this group of people to participate effectively in agricultural production and the efforts in developing and strengthening the economy of the country. Thus, economic development will not be reserved for a minority group in the country but all.



There are those submitters who noted that the amendment to section 25 of the Constitution at this stage of our country is misguided and unwise. Government must look at the impact of land expropriation without compensation as it is against the Constitution and in breach of the International Laws.

Furthermore, the amendment is a political plan and agenda to dispossess the current owners of land who are mainly White. Government must find other ways to reach equilibrium in terms of land ownership in the country.

Also, it will not address the failure to implement land reform program and the needs of the people of the country. Government must strengthen the administration of the land reform programs to effect real change properly.

*Sources: International Race Relations supported by many submitters; Jannie Strydom of Agri Western Cape; and many others.*

#### **4.2 Custodianship/Ownership of Land**

Differing views and opinions emerged with regards to ownership/custodianship of land in South Africa henceforth.

One view relates to the State being the custodian of all land in South Africa. Once custodianship is placed with the State, the State should in turn distribute land equitably for human settlement, commercial and subsistence farming, and industrial development. However, the national legislation and regulations should put a cap on a number of hectares that individuals should have or own at any given time. However, differentiation should be made for the size of land ownership between residential and subsistence/commercial farming.

There is a belief that the State land ownership will boost the economy, create jobs for people and deter private food producers from monopolizing of the agricultural sector. More and more people will be exposed to food production thus promoting food security whether it is for subsistence or commercial purposes.

It is argued that beneficial to the economy as a developmental agenda for the country points to land. The current land ownership continues to disadvantage the previously marginalised citizens and prohibits government from fast tracking developmental issues where necessary. Furthermore, the ill-gotten wealth cannot be perpetuated at the expense of the majority by the minority group. Thus, the amendment of section 25 will ease racial tensions, as there had been no good gestures to correct past transgressions of land dispossession.

However, other submitters are of the view that the need to provide land and opportunities flowing there from to people should be funded from government land. The people who currently own commercial property should not carry the burden of the government, and the willing buyer, willing seller system should apply and/or continue.

The enabling national legislation to give effect to this constitutional amendment will necessitate further public hearings and will thus leave the market with negative connotations related to property market and related sectors. This view is premised on the view that the continuous debate on the land matter is likely to bring jitters to both investors and the markets.

The target of ‘nil compensation’ as a default position for the value of land taken for purposes of reform is all encompassing category of land redistribution, restitution and land tenure security. However, some commentators have added land development as a fourth pillar of land for reform purposes. Reference was made to the South African rating agency and that the consequences of passing this bill will be a failed State.

It is argued that the principal of expropriation of land without compensation is unacceptable as no person possessing property for which a titled deed had been issued should not be taken without compensation but according to market oriented price.

*Sources: Albert Edeling of Edeling & Immelman Prokureurs; Tshepho Mosella; Siyabulela Twala; Musa Mabasa; and many others.*

### **4.3 Security of Tenure and Protection of Property Rights**

Farm dwellers and farm labour tenants were identified as the most vulnerable groups as a result of continued evictions from farms by farm owners without giving them a security of tenure following years of working on the farms. State ownership and ability to disburse land will provide security of tenure for these category of people.

The amendment of s25 of the Constitution will enable those who still live in congested informal settlements or squatter camps will finally have the opportunity to own property in a form of land where they will be able to build their own houses.

The State must protect property rights. If property rights are not protected, the consequences are dire as the country will lose and discourage international investments, experience stagnant economy thus leading to worsening inequality among the people of this country.

Government is urged to find a balance between the security of tenure for identified groups (farm dwellers and farm labour tents, including women and children) and the protection of property rights of people already own property like home and farm owners. The security of tenure and protection of property is possible when decisions and administration of land reform rests with the Executive instead of courts.

*Sources: Kenneth Sutherland; Arno Celliers; Murry Macgregor; Charles Robertson Video Bible Trust; Lawrence van der Berg; and many others.*

### **4.4 Promotion of Peace and Security**

In order to ensure there is everlasting peace and prosperity not only in South Africa but Africa as a whole, the amendment to s25 is vital. Therefore, this Bill must be extended to include not only land taken from 1913, but back in 1652. It is believed that the recognition of invasion of this land by settlers in 1652 led effectively to dispossession of land that originally belonged to indigenous groups of people who occupied this land.

*Sources: Mark Taylor; Nomali Ngobese; and many others.*

#### 4.5 Proposed Amendments Exceed the CRC Recommendations

The CRC recommended that Section 25 of the Constitution must be amended to make explicit that which is implicit in the Constitution, with regards to Expropriation of Land without Compensation as a legitimate option for Land Reform, to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs. It is thus argued that the proposed amendments as stated in the bill currently exceeds the recommendation of the CRC in that the recommendations limit the scope of the constitutional amendment in two fundamental ways:

- First, only a change that makes explicit that which is already implicit is provided for. This means that the amendment can clarify the existing powers that the state already has to expropriate land without compensation. It cannot provide the state with any new powers that it does not currently have.

The amendment goes beyond mere clarification. Its effect is to bypass the relevant circumstances that currently determine compensation (set out in Section 25(3) of the Constitution) and replace these with circumstances that have yet to be determined by national legislation. This grants Parliament a blank cheque to pass a law (at the lower voting threshold of 50% plus 1), setting out when nil compensation is payable.

- Second, the recommendations only use the term “land”. The amendment goes beyond this by referring not only to land, but also any improvements on the land. This would include structures built on the land like houses, factories and dams. It also includes the products of cultivating the land, like crops and vineyards. Therefore, the amendment is unlawful because it exceeds the scope of the recommendations made by the committee.

*Sources: O’Kennedy Pepler Attorneys and Notaries on behalf of Ruvimbo (Pty) Ltd; Schoeman Farms; Mark Taylor and various individuals.*

#### 4.6 Contravention of the Constitution and International Law

**Section 39(1)(b) of the Constitution** requires that “when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.”

The Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) of 1962 (of the United Nations, of which South Africa is a founding member and has been since 1945) states that (own emphasis) that “Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon

agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.”

Article 2(2)(c) of The Charter of Economic Rights and Duties of States Resolution 3281 (XXIX) of 1974 states that (own emphasis) “Each State has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.” It is maintained that the current standards of international human rights law extend the duty of the state to pay market-related compensation to a state’s own nationals whose property is expropriated, not just to foreign nationals.

Essentially, in terms of international law, a State has the power to expropriate, but this power is accompanied by a duty to pay appropriate compensation. There may be circumstances where it is appropriate to pay no compensation, but each case will have to be determined on its own merits. Therefore, the proposed amendment would be a breach of international law.

**Section 2 of the Constitution** states that the “Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” Thus, the current text of Section 25 of the Constitution sets out the circumstances to be considered when determining how much compensation will be paid when land is expropriated.

The amendment bypasses these factors and refers to national legislation to determine when no compensation will be payable. Instead of the Constitution reigning supreme, it is made subservient to national legislation. This approach is unconstitutional and vastly different to other references to the promulgation of national legislation in the Constitution.

**Section 36 (1) & (2) of the Constitution** reads as follows:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

The amendment is a limitation of the existing right to receive compensation for land that has been expropriated. Furthermore, the authors of The Bill of Rights Handbook state that Section 25 requires compensation for an expropriation to be fair and equitable in amount, timing and

manner of payment. Compensation not meeting this requirement will be unfair and inequitable and can hardly be considered reasonable and justifiable. Therefore, the amendment is a breach of Section 36 of the Constitution.

Constitution cannot be perceived as a barrier because Section 8 expressly says that the provisions of the section cannot impede land, water and related reform. Furthermore, in the 1990s when the land reform was conceptualized, the targets set in or articulated in the Reconstruction and Development Plan were premised on and/or section 25 used as a toolkit to do so.

*Sources: South African Agri Initiative (SAAI); Institute for Race Relations (IRR) supported by many individuals.*

#### **4.7 Unintended Consequences of the Bill**

The amendment to section 25 of the Constitution through this Bill will give additional powers to the State, if the bill is passed as it is. The Bill gives additional powers to the State to expropriate land without compensation. This power was not provided for in the Constitution or any other legislation before.

The State power must be limited so that it does not abuse this power. At the centre of democracy is the balancing the rights of the majority with the protection for minority groups. Therefore, the State must seek to find this balance even with the land matter in this country.

The Bill in its current form is intended to focus on land. However, section 25 of the Constitution is about property which includes moveable objects; intellectual property; any registered rights such as mortgage and notarial bonds, and servitudes; and any unregistered and informal rights such as collecting wood or water by local communities. Thus, the definition of land must be provided to provide clarity even when the courts deal with and/or required to adjudicate on land matter.

The Bill introduces the systematic risks to the financial sector. The concept “economic suicide” is used in reference to the impact this bill will have on the economy of the country if approved as it is. It is argued that it will be an attack on the people without jobs who will in turn engage in criminal activities for a living.

The farmer whose agricultural land is expropriated with become a squatter and depend on government for a living as agricultural land constitute a pension for the land owner. Thus, the ownership of land serves as a financial security for farmers on retirement.

Expropriation of land without compensation will lower the value of farm land. Thus, banks will not be in a position to borrow money to those who want to develop the land as a direct result of expropriation without compensation. Banks will thus be affected negatively by the act of expropriating land without compensation.

***Tampering*** with section 25 will have unintended consequences and directly degrade chapter 2 of the Constitution which contains the Bill of Rights:

- The current formulation of section 25, properly applied, could result in the court determining that, in a particular circumstance, taking into account all relevant factors,

it would be just and equitable to award compensation, which is substantially low market value, or even in very rare circumstances, nil compensation. Therefore, it is not necessary to amend the Constitution in the manner that is currently proposed.

- Amendment to the Constitution is viewed as unnecessary as it undermines the foundational values of the Constitution. It is irrational and has the effect that the Constitution will be treated by the State as it would with any other legislation. Given that the apex court had recognized that the real problem with land reform is not with the courts or the laws of the country, an unnecessary amendment undermines the rule of law since it ignores the findings of that court.

No distinction is made between compensation for land and other forms of property that could conceivably be needed by the State.

*Sources: Schoeman Farms; Mpumalanga Landbou/Agriculture; Agri- Gauteng, Limpopo, Agri Limpopo Farmers Association; Agri Loskop; various individuals; Agric-Letaba; Agri Bosveld; Adriana Engelbrecht, Justin and Karen Strik and others.*

#### **4.8 Expropriation of Property Without Compensation**

With expropriation without compensation, some submitters made proposals about the type of land that must be expropriated without compensation. One of the proposals included the expropriation without compensation of land currently in possession of Communicare because that it was dispossessed and hijacked from South African Housing Beneficiaries. The submitter proposed the following:

- That all property and land stocks in the portfolio of Communicare be expropriated without compensation.
- That social housing beneficiaries who are residing in Communicare's housing stocks be issued with title deeds.
- That the land hijacked by Communicare be expropriated without compensation to the State for Social Housing.

The submitters also noted that the following land must be expropriated without compensation:

- Land owned by Communicare (as noted above);
- Land currently not in use through abandonment and neglect by absent landlords;
- Land owned by foreigners; and
- Land whose market value was not paid to the rightful owners by then and current owners. Reference made to the land taken during the colonial and apartheid eras.

*Sources: Communicare Social Housing Beneficiaries - Mr Alan Mkunqwana, Ms Bonang Kenosi, Ms Karabo Makgoene, Mr Neville Petersen; Nonhlanhla Mohlaba and Tebele Luthuli of Business Leadership South Africa submitted*

## 5. CONCLUSION

The report is a culmination of the public participation processes the Ad Hoc Committee on Section 25 embarked on in processing the Constitution Eighteenth Amendment Bill. In particular, the written submissions in response to the advertisement of the Bill as part of the public participation process.

The members of the public were given sufficient time to make submissions on the Bill to the committee evidenced by the advertisement in December 2019, January 2020 and a further extension of the submission date to end of February 2020.

The whole process elicited 204 334 submissions given the public's views on the Bill thus giving Parliament and members of the committee rich information to use in deliberating on the clauses of the Bill. The report therefore fairly presents the views of submitters who participated in enriching the legislative process with regards to the Constitution Eighteenth Amendment Bill.

## CHAPTER 3

### REPORT ON PUBLIC HEARINGS

#### 1. INTRODUCTION

This report accounts for public hearings conducted by the Parliamentary Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution (henceforth, the Ad Hoc Committee). The public hearings took place between 28 February and 7 November 2020 across all the nine provinces of South Africa following an approval of the draft Constitution Eighteenth Amendment Bill by the Ad Hoc Committee and a resolution to consult widely in line with section 59(1) of the Constitution of the Republic of South Africa. Section 59(1) places an obligation on the National Assembly and its Committees to facilitate public involvement in the legislative and other processes. The public involvement, as agreed by the Committee entailed, in addition to written submissions discussed in chapter 1, public consultations through public hearings. During this process, members of the public were afforded opportunities to express their views about the content and form of the Constitution Eighteenth Amendment Bill.

#### 1.1 Delegation

In terms of the National Assembly resolution establishing the Ad Hoc Committee, membership of consists of 11 voting members of the Assembly; African National Congress 6, Democratic Alliance 2, Economic Freedom Fighters 1 and other parties 2. It also consists of 14 non-voting members of the Assembly; African National Congress 2, Democratic Alliance 1, Economic Freedom Fighters 1 and other parties 10. Given the limited time available to the Ad Hoc Committee, the Committee decided to split the delegation into two teams (see Table 1 below), one focusing on the inland provinces (Limpopo, Mpumalanga, Gauteng and North West) and the other focusing on coastal provinces (Free State, KwaZulu-Natal, Northern Cape and Eastern Cape). Both the teams were to jointly host public meetings in different parts of the Western Cape. Dr Motshekga and Adv. Bongo led delegation A and delegation B respectively, except for Mpumalanga and Free State where they swapped places.

**Table 1: List of Members of Parliament (Delegation)**

Delegation A		Delegation B	
Name	Political Party	Name	Political Party
<b>Dr MS Motshega (leader)</b>	African National Congress (ANC)	Adv. B Bongo (Leader)	African National Congress (ANC)
<b>Ms N Ntobongwana</b>		Ms R Lesoma	
<b>Ms KD Mahlatsi</b>		Mr SN Gumede	
<b>Inkosi ZMD Mandela</b>		Mr P Moroatshehla	
<b>Dr MM Gondwe</b>	Democratic Alliance	Ms T Mbabama Mr N Masipa	Democratic Alliance
<b>Mr F Mokoena</b>	Economic Freedom Fighters (EFF)	Mr Shivambo	Economic Freedom Fighters
<b>Ms LF Tito</b>		Mr WM Thring	
<b>Ms O Maotwe</b>		Mr E Buthelezi	
<b>Ms NF Mashabela</b>			
<b>Dr S Thembekwayo</b>			



<b>Mr K Ceza</b>			
<b>Ms N Tafeni</b>			
<b>Mr D Mthenjane</b>			
<b>Ms R Mohlala</b>			
<b>Mr S Zandemela</b>			

## 1.2 Terms of Reference for the Ad Hoc Committee

On 25 July 2019, the National Assembly noted that the Fifth Parliament adopted a Report of Constitutional Review Committee on Review of section 25 of the Constitution, 1996 on 4 December 2018 (*ATC, 15 November 2018, p.4*). It further noted that the same report was adopted by the National Council of Provinces on 5 December 2018. The report recommends amendment of section 25 of the Constitution to make explicit that which is implicit in the Constitution with regards to expropriation of land without compensation as a legitimate option for land reform. The purpose is to address the historic wrongs caused by the arbitrary dispossession of land and to ensure equitable access to land and empowerment of the majority of South Africans to be productive participants in land ownership, food security and agricultural reform programs. It further recommended establishment of a mechanism to effect the necessary amendment to the relevant part of section 25 of the Constitution.

Given the fact that “an *Ad Hoc* Committee was established to this effect but could not complete its task by the time of dissolution of the Fifth Parliament and that it recommended that the matter be concluded in the Sixth Parliament (*ATC, 15 March 2019, p 92*); the National Assembly established an Ad Hoc Committee in terms of Rule 253 to initiate and introduce legislation amending section 25 of the Constitution. The Committee must have regard to the work done and recommendations as contained in the reports of the Constitutional Review Committee and the previous *Ad Hoc* Committee on Amendment of section 25 of the Constitution. The purpose of the public hearings is to create opportunities and platforms for citizens to make inputs into the Bill so that the amendment reflects the will of the People of South Africa.

## 1.3 Outline of This Chapter

Following introductory section, the chapter proceeds as follows:

- It briefly presents an overview of the methods and rules of engagement agreed to by the Ad Hoc Committee and members of the public in order to ensure smooth running of the proceedings.
- It outlines participation of members of the public in the different sessions, showing number of people who registered and those who addressed the Ad Hoc Committee.
- It summarises responses of members of the public from the different sites of public hearings in the six provinces referred to in this report. It further highlights key arguments in support of, or against, the Amendment Bill. It highlights in brief specific proposals made to the Ad Hoc Committee by the members of the public.
- It weaves together thoughts, perspectives and lived experiences of members of the public into themes in order to develop emerging insights from the inputs received.

- It concludes with a summary of proposals and a highlight area of agreement and disagreement about the Bill.

## **2. METHODS AND RULES OF ENGAGEMENT FOR THE PUBLIC HEARINGS**

On 4 February 2020, as discussed above, the Ad Hoc Committee resolved to solicit inputs of members of the public through an extensive public participation process that entails, amongst other mechanisms, oral submissions at selected sites across all the nine (9) provinces of South Africa. The Ad Hoc Committee, organised in two teams, facilitated public hearings in two provinces at the same time. Each delegation spent at least 3 to 4 days per province visiting about 3 to 4 areas/towns. The approach adopted by the Ad Hoc Committee was to was that the delegation must share information about the proposed amendments to section 25 of the Constitution and to receive inputs from members of the public, i.e. their views and perspectives in so far as the Bill advances, or does not advance, expropriation of land without compensation.

### **2.1 Prior to the Public Hearings Sessions**

Public Education Office (PEO) of Parliament, together with the Parliamentary Democracy Offices (PDOs), sent out teams of educators to selected districts across all the nine provinces to conduct public education on the Constitution 18<sup>th</sup> Amendment Bill. The main aim of the exercise was to raise awareness about the Amendment Bill as it relates to making explicit that land may be expropriated without compensation to expedite land redistribution in South Africa. The teams further conducted workshops on how to make oral submission on a complex matter such as the Constitution and land redistribution within a limited allocated time during public hearings. The process assisted member of the public to be straight to the point and address key issues of concern to them with regard to this process.

In addition to the promotional materials distributed by PEO, Parliamentary Communication Services (PCS) supported the Ad Hoc Committee by sending out media statements about the public hearings to be held in different areas of the provinces. Further, the Chairperson or persons designated by him gave interviews at various media houses about the mandate of the Ad Hoc Committee and purpose of the public hearings. Parliament also took reasonable steps to ensure that as many people as possible attended the public hearings. It organised transport for members of the public to be transported from various districts to the selected venues where the public hearings were held.

### **2.2 Facilitation of the Sessions and Rules of Engagements**

The public hearings sessions started at 14:00 and concluded at 17:00 during the week and from 11:00am to 15:00 on weekends. In each of the sessions, the chairperson remarked about the delegation's agreement with regard to facilitation of the sessions as follows:

- The difference of the Ad Hoc Committee mandate and the CRC which completed its work in 2018 lies in the fact that the Ad Hoc Committee focused on the desirability of amendment of section 25 and the Ad Hoc Committee was focusing on the actual amendment and proposed texts of the Constitutional Amendment;

- The rules of the National Assembly apply to the meeting, given that it is a meeting of the Ad Hoc Committee (an extension of the House); therefore, the Ad Hoc Committee appreciated the importance of tolerance, listening to each other irrespective of the views expressed, not drowning the speakers. All mobile phones were to be switched off or put in silent mode in order to minimise disturbances to the recording of proceedings;
- All speakers were given equal opportunity to address the Ad Hoc Committee. Those recognised to speak were allocated three (3) minutes each to make their points in relation to the Bill before them, especially how expropriation of land without compensation is catered for in the Constitution; and
- The Ad Hoc Committee had support of language interpreters. Members of the public were therefore requested to use languages that they were comfortable with, and their inputs were translated either into English or the dominant local language.

Given repeated reference to the work done by the CRC, the Chairpersons and members of the Ad Hoc Committee that presented the concluding remarks on behalf of the delegation clarified the different mandates of the CRC and the Ad Hoc Committee. They also emphasised the significance of engagement with the constitutional amendment processes. The speakers were encouraged to transcend the usual and the easy ‘yes’ or ‘no’ responses because the CRC had responded to that question. They were also encouraged to provide reasons why they thought it was, or was not, necessary to frame the amendments in the manner they appeared in the Bill and to advance their own proposals. Where members of the public thought that the current framing was adequate, equally so, they were encouraged to articulate the arguments in support of the current framing of Section 25. However, it was emphasised that the debate about the necessity of the constitutional amendment was thoroughly dealt with and concluded by the CRC in 2018.

### **3. BRIEF OUTLINE OF ATTENDANCE AND RESPONSES/REACTIONS OF MEMBERS OF THE PUBLIC**

The Ad Hoc Committee hosted a total of 33 public hearings meetings in different locations across the nine provinces of South Africa (see Table 2 below). The meetings drew an overall attendance of 12475 individuals (on attendance register), some representing communities and organisations. Of the total 1666 individuals that were given opportunities to address the Ad Hoc Committee, 1424 speakers supported the Amendment Bill and amendment of the Constitution with variations in how they would like to see the framing of the texts of the amendments as will be discussed in the concluding section of this report. A total of 148 speakers rejected the Amendment Bill and any attempt to amend the Constitution for a range of reasons which will also be discussed in this chapter. A further 94 submissions did not articulate any objection or support of the Amendment Bill. As can be expected in public hearings, speakers tended to use the opportunity to articulate challenges of service delivery to their public representatives. Speakers also highlighted service delivery inefficiencies in their municipal areas and called for intervention from Parliament. Some submitted specific complaints which they requested Parliament to attend to without delay. Most of the complaints submitted related to government’s programme for restitution, land redistribution and tenure reform. Particular concerns were about lack of information with regard to the status of land claims lodged before 31<sup>st</sup> December 1998 and the ‘new order’ land claims lodged in 2014, lack of access to

agricultural land and inadequate post-settlement and farmer support. In some cases, landlessness and a need for redistribution of well-located land for human settlement, provision of houses and basic services was also a dominant issue. Equally important were the allegations of corruption in municipalities and government departments.

With regard to the oral submissions received, the following observations are noteworthy:

- Conflation of the process conducted by the Fifth Parliament's CRC in 2018 and the current Ad Hoc Committee Public Hearings process. The delegation, at all times, clarified the distinction between the two committees and their mandates.
- Fair representation of youth and women in the public hearings; and the Ad Hoc Committee was also intentional to create space for all people across race, gender and age variations to speak.
- Submissions were mainly received from individuals who represented political parties, organisations and traditional communities. In some cases, traditional and community leaders themselves were in attendance and presented their views on behalf of communities they led. There were also submissions from farmers' associations and student leaders from local universities.
- A majority of the submissions came from members or supporters of various political parties. The majority of those that presented specific proposals to the Bill read from the prepared written submissions articulating their preferred formulation of the text. However, there were also those that articulated issues that the amendments should cater with and advanced reasons for their particular stance.
- As stated above, speakers with specific complaints about land reform were allowed to present their cases to their public representatives. The Ad Hoc Committee, through the Secretariat, recorded their details and made undertaking to refer their issues to the Minister of Agriculture, Land Reform and Rural Development and the Commission on Restitution of Land Rights or any other relevant member of the Executive.

**Table 2: Total Number of participants and submissions**

Province	Date	Municipality	Locality	No. of Attendees	No. of Submissions	No. supporting the Bill	No. against the Bill	Not clear	
<b>Eastern Cape</b>	12/03/2020	Mhlontlo	Tsolo	421	44	40	4	0	
	13/03/ 2020	Engcobo	Engcobo	499	40	38	2	0	
	14/03/2020	Buffalo City Metro	King William's Town	499	47	42	5	0	
	15/03/2020	Nelson Mandela Metro	Motherwell	623	45	42	3	0	
			<b>Sub-total</b>	<b>2042</b>	<b>176</b>	<b>162</b>	<b>14</b>	<b>0</b>	
<b>Free State</b>	28/02/2020	Matjhabeng	Welkom	398	58	54	3	1	
	29/02/ 2020	Dihlabeng	Bethlehem	727	53	48	2	3	
	01/03/2020	Mangaung	Bloemfontein	360	72	67	4	1	
			<b>Sub-total</b>	<b>1485</b>	<b>183</b>	<b>169</b>	<b>9</b>	<b>4</b>	
<b>Gauteng</b>	12/03/2020	City of Tshwane	Soshanguve	697	41	33	2	6	
	13/03/ 2020	Westonaria	Westonaria	724	40	31	5	4	
	14/03/2020	Sedibeng District	Vereeniging	364	53	44	1	8	
	15/03/2020	City of Ekurhuleni	Ekurhuleni	734	56	49	5	2	
			<b>Sub-total</b>	<b>2519</b>	<b>190</b>	<b>157</b>	<b>13</b>	<b>20</b>	
<b>KwaZulu-Natal</b>	05/03/2020	Umkhanyakude	Mtubatuba	334	40	38	2	0	
	06/03/ 2020	AbaQulusi	Vryheid	441	48	42	6	0	
	07/03/2020	Okhahlamba	Winterton	451	41	28	13	0	
	08/03/2020	Greater Kokstad	Kokstad	436	41	32	9	0	
			<b>Sub-total</b>	<b>1662</b>	<b>170</b>	<b>140</b>	<b>30</b>	<b>0</b>	
<b>Mpumalanga</b>	28/02/2020	Mbombela	Mbombela	694	60	51	4	5	
	29/02/ 2020	Steve Tshwete	Middleburg	488	61	55	2	4	
	01/03/2020	Gert Sibanda	Ermelo	578	51	46	2	3	
			<b>Sub-total</b>	<b>1760</b>	<b>172</b>	<b>152</b>	<b>8</b>	<b>12</b>	
<b>North-West</b>	06/03/2020	Mamusa	Shweizer-Reneke	382	79	69	4	6	
	07/03/2020	Mahikeng	Mahikeng	382	51	42	3	6	
	08/03/2020	JB Marks	Potchefstroom	231	66	45	13	8	
			<b>Sub-total</b>	<b>995</b>	<b>196</b>	<b>156</b>	<b>20</b>	<b>20</b>	
<b>Limpopo</b>	22/10/2020	Vhembe	Makwarela	146	39	36	2	1	
	23/10/2020	Mopani	Thomo	193	61	56	4	1	
	24/10/2020	Sekhukhune	Jane Furse	139	50	50	0	0	
	07/11/2020	Capricorn	Polokwane	258	65	65	0	0	
			<b>Sub-total</b>	<b>736</b>	<b>215</b>	<b>207</b>	<b>6</b>	<b>2</b>	
<b>Northern Cape</b>	22/10/2020	Pixley ka Seme	De Aar	104	38	28	9	1	
	23/10/2020	Frances Baard	Kimberly	213	51	44	5	2	
	24/10/2020	ZF Ngcawu	Upington	198	52	38	14	0	
	25/10/2020	Namakwa	Springbok	139	32	25	7	0	
			<b>Sub- total</b>	<b>654</b>	<b>173</b>	<b>135</b>	<b>35</b>	<b>3</b>	
<b>Western Cape</b>	30/11/2020	George	Mosselbay	189	54	32	6	16	
		West Coast	Saldanah Bay	186	48	44	0	4	
	31/10/2020	Breede Valley	Worcester	114	45	32	4	9	
		City of Cape Town	Khayelitsha	133	44	38	3	3	
			<b>Sub-total</b>	<b>622</b>	<b>191</b>	<b>146</b>	<b>13</b>	<b>12</b>	
<b>TOTAL</b>				<b>33</b>	<b>12475</b>	<b>1666</b>	<b>1424</b>	<b>148</b>	<b>94</b>

**Box 1: Section 25 of the Constitution**

25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

25(2) 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, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

25(3) The amount of the compensation and the manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

25(4) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and property is not limited to land.

25(5) must take reasonable and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

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

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

25 (8) No provision of this section may impede the State from taking legislative and other measures to achieve land, water, and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

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

*Source: RSA (1996) Constitution of the Republic of South Africa*

#### **4. OVERVIEW OF SECTION 25 OF THE CONSTITUTION AND THE PROPOSED AMENDMENTS**

The Chairpersons of the sessions, having outlined the process and an order of proceedings, explained the proposed amendments that the Ad Hoc Committee brought for discussion. To sum up, the Bill sought to amend section 25 of the Constitution of the Republic of South Africa. This section is commonly referred to as the Property Clause because it lays a framework for protection of property rights whilst balancing it with imperatives for transformation of property relations in South Africa. Section 25 of the Constitution, outlined in Box 1 above, provides for the following:

- It prohibits arbitrary deprivation of property. In the event that land is to be taken, it should be under a law of general application which does not promote any arbitrary deprivation;
- Expropriation of property is permissible under a law of general application and it serves to advance public purpose or public interest. Land reform is included as a public interest issue;
- Where there is expropriation, there is a requirement of payment of compensation which is just and equitable; and
- It lays foundation for land reform: redistribution 25(5), tenure reform (25(6); and restitution 25(7).

The Chairpersons outlined the purpose of the Constitution 18<sup>th</sup> Amendment Bill. It seeks to amend the Constitution of the Republic of South Africa, 1996 in order to clarify that the right to property is not absolute in such a way that where land is expropriated for land reform, the amount of compensation payable may be Nil. Further, to consult on expropriation of land without compensation as a legitimate option for land reform, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land. In summary, the Ad Hoc Committee sought public input on Amendment Bill which sought to provide for expropriation of land without compensation.

#### **5. SUMMARY OF PROVINCIAL REPORTS**

This section summarises inputs of the members of the public according to provinces. Given the manner in which some of inputs were coordinated, i.e. according to organisations and/or communities, this report attempts ensuring that the report reflects the views as presented by individuals and/or representatives of organisations/communities. In some cases, the report might appear repetitious because of the way organisations mobilised their representatives.

## **5.1 Eastern Cape**

Public hearings were held from 12 to 15 March 2020 in three localities of different district municipalities; namely, Mhlontlo, Engcobo, King Williams Town and Motherwell. Of the total of 176 oral submissions made, 162 supported the Bill whereas 14 did not support it.

### **5.1.1 A Case for the Amendment Bill to Enable Expropriation of Land Without Compensation**

Arguments advanced in support of the Bill and the amendment of section 25 of the Constitution to expropriate land without compensation can be summarised as follows:

- To fast track redistribution of land in order to address the historical landownership imbalance caused by a racially-based system of land allocation. The system dates back from the period of colonial and apartheid regimes which used policy and legislative measures to legitimise their dispossession of land from Africans.
- The slow pace of land redistribution result from a requirement of compensation entrenched in the Constitution. Amendment of the Constitution to allow for expropriation of land without compensation will address a pressing need for acceleration of the government's programme of land reform and agrarian transformation without any constitutional or legal impediment.
- The 'willing buyer, willing seller' principle, adopted in the policies for land acquisition is perceived to frustrate all efforts to redistribute land at scale and pace anticipated.
- Dealing with landlessness and removing barriers to entry into the agricultural economy in order to improve food security is vitally important if South Africa was to address the triple challenge of poverty, inequality and unemployment.

### **5.1.2 A Case Against the Amendment Bill to Enable Expropriation Without Compensation**

Most of the few oral submissions that made a case against expropriation of land without compensation stated upfront their support of the land redistribution in order to address the wrongs of the past. However, they were against any Constitutional amendment intended to make expropriation of land without compensation lawful for reasons that can be summarised as follows:

- The entrenched protection of private property rights in the Bill of Rights should be upheld, and any suggested amendment to expropriate without compensation will threaten the existing constitutional architecture and should therefore be avoided.
- Expropriation of land without compensation is used for political purposes to hide government inefficiencies in dealing with the failures of land reform. Some speakers made references to the High Level Panel recommendations on land reform, which indicates the causes of the failure of land reform.
- The proposed changes in the Constitution will have a negative impact on the economy and food security in South Africa.



- Consequences of expropriation of land without compensation on existing agricultural and other private properties, bank bonds and other forms of debt that still need to be paid by debtors will be devastating to the economy and the people of South Africa.

### 5.1.3 Proposed changes to the Amendment Bill

Majority of them made oral submissions on the basis of written proposals expressing their political parties' positions with regard to the Bill, choosing to comment on the Property Clause in its entirety, highlighting strengths and weaknesses of each clause and what needs to be retained and excluded. In doing so, they addressed the proposed amendments and located the clauses in the entirety of the property clause.

A number of speakers whose inputs appeared aligned, and reading from prepared documents, proposed that Section 25 should read as follows:

- (1) The State, including Parliament, Executive and Judiciary carry an obligation to redress imbalances of the past through enactment of laws that will achieve redress and equitably redistributive all resources.
- (2) Property may be expropriated without compensation
  - (a) only in terms of law of general application, or
  - (b) a public purpose or in the public interest

Remove Subsection 3 and replace with:

- (3) The State should be the custodian of all South Africa's natural resources, inclusive of land, mineral resources and water, and relevant legislation should be passed to clearly define and contextualise State custodianship of natural resources.
- (4) For the purpose of this section,
  - (a) the public interest includes the nation's commitment to land reform to bring about equitable access to all South Africa's natural resources,
  - (b) property is not limited to land
- (5) The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) Remove sub section 7.

- (8) No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of Section 36(1).
- (9) Parliament must enact the legislation referred to in subsection 6.

Other speakers, whose submissions were closely aligned, proposed that the Amendment Bill should take the following shape:

- Subsection 1 should remain as is because protections to property rights against arbitrary deprivation are vitally important.
- In Sub-section 2, they proposed that there should be an addition of a new (c) which should read as follows:

(2)(c)(i) “subject to without compensation or nil compensation under conditions laid out in a law of general application”.

- Expropriation of land without compensation must remain in the domain of the Executive rather than the Courts. They argued that the Executive would be able to accelerate delivery of land and avoid long winded legal processes. They Courts remain the final arbiter in the event of disputes arising from Executive decisions in relation to land expropriation. They therefore suggested that Sub-section 3 must be amended as follows:
- At the start of the sub-section, add the following “*Where compensation is payable...*”. The proposed amended clause should read as follows:

Where compensation is payable, the amount of the compensation and the time and manner of payment must be just and equitable, reflecting and equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including ...

In other sections, proposals were submitted as follows:

- Section 25 (4) must remain as is because property is not limited to land. They also agreed that include natural resources such as water and other natural resource rights which may be necessary of productive use of land.
- Section 25(5) must remain as is because it is the basis for land redistribution.
- Section 25(6) must remain as is; however, it requires the relevant policies and legislation to give effect to this clause.
- Section 25(7) must, for the time being, be left as it is and to be revised later to include restitution in the broader land redistribution.

- Section 25(8) must include a provision that states that no provision of this section, including the requirement for payment of compensation, may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination...

#### **5.1.4 Issues that transcended the ambit of the purpose of the public hearings**

As discussed above, the public hearings were specifically called for members of the public to make comments and suggestions into the proposed amendments to section 25 of the Constitution. However, there were many people who had come to raise concerns about the slow progress in the settlement of land claims, difficulties with land reform and post-settlement support and other service delivery issues. The Ad Hoc Committee undertook to refer all specific complaints regarding land reform to the relevant Portfolio Committee. Members of the Public were also encouraged to address their issues with their public representatives at local constituency offices and ward councillors.

Some of the issues for consideration include the following:

- *Farmworkers and illegal evictions:* Farm evictions and abuse of farmworkers continue unabated despite legal protections. Some speakers reported that farm dwellers suffer physical assaults which South African Police Services (SAPS) does not follow up. Other violations of human rights include denial of access to water, electricity, and access to graves of families.
- *Land claim challenges:* Queries about progress with settlement of land claims featured strongly in all the public hearings in the Eastern Cape. In addition, many people complained about lack of post-settlement support to land reform beneficiaries.
- *Failure of the programme of land redistribution to meet the local land needs:* A couple of concerns were raised in Motherwell by urban livestock farmers about alleged arbitrary allocation of grazing land by the Department of Land Reform and Rural Development (DRDLR). They accused the DRDLR of corruption and nepotism in allocation of grazing land. Further, they raised concerns about the arbitrary deprivation of property (livestock) by charging steep pound fees when livestock is impounded. When farmers cannot pay the pound fees, their livestock is sold on auction to farmers for cheap prices. The heavy handed approach of government has threatened, and put at risk, their livelihoods.
- *Revocation of agreements:* Some members of communities alleged that municipalities were revoking agreements that granted land for communal gardening to communities.

## 5.2 Free State

Public hearings were held from 28 February to 01 March 2020 in three localities in different district municipalities; namely, Welkom, Bethlehem and Bloemfontein. Of the total of 183 oral submissions received, the 169 supported the Bill whereas 9 did not support it. The remaining 4 people did not indicate whether they supported or not supported the Bill. Instead, they raised service delivery concerns which are later discussed in this section.

### 5.2.1 A case for the Amendment Bill

Arguments that members of the public advanced in support of the Amendment Bill can be summarised as follows:

- A need to redress the persisting legacy of colonial and apartheid racially-based patterns of land ownership and access in South Africa.
- Expropriation of land in the public interest is a matter of restorative justice. It is not meant, and should not be perceived, to be a mechanism to drive white farmers off the land. It is a just course that seeks to remedy the wrongs of the past, especially the skewed land ownership patterns.
- Emphatic rejection of the need to compensate those who are accused of having secured, through Constitutional property rights protections, stolen the land. Further, some stated that there can never be a true and meaningful reconciliation without resolving the land question in South Africa. South Africa has to confront this issue.
- There was broad consensus that the current land reform programme has failed to meet the public expectation, and need to accelerate it through expropriation. Equally, the collapse of land reform projects where land was allocated was attributed to inadequate post-settlement support (which in some areas it is almost non-existent). Therefore, there was a strong case presented for a need for government to accelerate land redistribution without any constitutional or legal impediment.
- The current constitutional regime, though not dictating the ‘willing buyer, willing seller’ principle for land acquisition, it makes it difficult to implement expropriation without compensation and is thus perceived to be frustrating efforts to redistribute land at scale which meets the public need and demand for land.
- Landlessness is a contributing factor to poverty and food insecurity among the poor. Expropriation of land without compensation, and accelerated land redistribution should be matched with post-settlement support which includes removal of all barriers to entry into the agricultural economy in order to improve food security. Such barriers are, amongst others, allocation of secure land rights, enable market access, access to capital and extension support with implements and equipment for farming.

- South Africa should never accept the use an argument of protection of food security to protect private property rights which were unjustly acquired and to maintain the status quo in property relations. In actual fact, constitutional amendment and accelerated redistribution of land should be to ensure that the majority of people in South Africa have access to productive land in order to produce food for themselves. Status quo means that the majority remain landless and food insecure.

### **5.2.2 A case against the Amendment Bill**

It is important to note upfront that, amongst those that rejected the Amendment Bill, there was consensus about the imperatives for land reform as provided for in section 25 of the Constitution. They rejected the Amendment Bill and any attempt to expropriate land without compensation for the reasons summarised below:

- Private property rights are entrenched in the Bill of Rights and any suggested amendment to of the Bill of Rights expropriate land without compensation would threaten the existing Constitutional architecture.
- There is a concern that there is a using expropriation of land without compensation for political purposes in order to hide government inefficiencies and land reform failures.
- The slow pace of land reform in the last 25 years is not a reason why the Constitution should be amended. There is nothing in the Constitution that obstruct government to expropriate land for land reform. However, the failure of land reform is a result of wastage of resources through corruption and maladministration. The funds lost could have been put to good use to accelerate land redistribution. Some speakers cited examples such as Estina Dairy Farm and others to demonstrate failed land redistribution projects that could have made a difference in people's lives.
- Expropriation of land without compensation will have a negative impact on the South African economy and food security. With regard to the economy, some speakers highlighted that the agricultural sector relies, in the main, on capital funding from financiers, banks and a range of debtors. Expropriation of land will, by extension, have disastrous effect to the economy. The Ad Hoc Committee was requested to consider how the entire banking industry could be impacted by the amendment.
- Some people referred to the findings and recommendations of the High Level Panel that was led by former President Motlanthe which highlighted that the failures of land reform policy was a matter of implementation inefficiencies rather than the constitutional impediments.

### **5.2.3 Proposed changes to the Amendment Bill**

Proposals for changes to the current text of the Amendment Bill can be categorised into two on the basis that there was clear alignment emerging as they read out their prepared inputs.

A number of speakers whose inputs appeared aligned, and reading from prepared documents, proposed that Section 25 should read as follows:

- (1) The State, include Parliament, Executive and Judiciary carry an obligation to redress imbalances of the past through enactment of laws that will achieve redress and equitably redistributive all resources.
- (2) Property may be expropriated without compensation
  - (a) only in terms of law of general application, or
  - (b) a public purpose or in the public interest

Remove Subsection 3 and replace with:

- (3) The State should be the custodian of all South Africa's natural resources, inclusive of land, mineral resources and water, and relevant legislation should be passed to clearly define and contextualise State custodianship of natural resources.
- (4) For the purpose of this section:
  - (a) the public interest includes the nation's commitment to land reform to bring about equitable access to all South Africa's natural resources.
  - (b) property is not limited to land
- (5) The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) Remove sub section 7
- (8) No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
- (9) Parliament must enact the legislation referred to in subsection 6.

Other speakers, whose submissions were closely aligned, proposed that the Amendment Bill should take the following shape:

- In Subsection (2), the Ad Hoc Committee must add a new (c) that reads as follows:

(2)(c)(i) subject to without compensation or nil compensation under conditions laid out in a law of general application.

- Expropriation of land without compensation must remain with the Executive to avoid long court processes which might derail land reform. In this way, the process will allow for an individual to exercise a right to approach Courts to review Executive decision regarding expropriation.
  - Section 25(3) add at the start of the sub section “Where compensation is payable”. So it should read as follows:
- (3) Where compensation is payable, the amount of the compensation and the time and manner ...
- Section 25 (4) should remain because property is not limited to land. It includes other resources such as water.
  - Section 25 (5) to remain as it is
  - Section 25 (6) to remain as it is.

The Executive must take decisions about expropriation of land and not the Court because expropriation is an Executive function, Court processes takes time and are expensive.

- Section 25(7) should be left as it is but should be reviewed as part of broader review land reform policy.
- Section 25(8) should include a provision that says that the requirement for payment of compensation may not impede the State’s commitment to redistribute land.

#### **5.2.4 Issues that transcend the ambit of the purpose of the Public Hearings**

Whilst the Ad Hoc Committee public hearings related to a specific mandate, some land reform and other related issues that are relevant to the exercise of the oversight by Parliament, especially Portfolio and Select Committees, were considered. Some of the issues for consideration to be referred to relevant Portfolio Committee are as follows:

- *Human settlements and housing needs:* speakers made allegations of corruption and other forms of malfeasance in the process of allocation of low-cost houses against municipal officials. The complaints include the removal of people from waiting lists for houses and payment of bribes in order to receive houses.
- *Farm long-term occupiers/farm dwellers evictions:* Farm evictions and abuse of farm workers continue on a daily basis unattended by government officials. For example, SAPS never follow up or investigate criminal cases of assault of farmworkers by farmers or illegal evictions. Some suggested that an increase in constructive eviction,

for example, denial of access to water, electricity, burials and limitations to visitors are some of the strategies farmers use to force farm dwellers to leave farms. The Chairperson recommended that the Office of the Executive Mayor should consider availing office space that could be occupied by volunteer unemployed law and social work graduates to assist victims of evictions and human rights violations on farms.

- *Land claims challenges:* Challenges with regard to processing of land claims featured strongly in all the public hearings in the Free State. In addition, there were concerns about poor farmer support to beneficiaries of the land reform programme. The complaints about land claims, mainly lack of information about the status of their land claims, has implications for the exercise of oversight by the relevant Parliamentary Committees.
- *Traditional healers:* Concerns were raised by traditional healers about regulations and permits required by government before anyone is recognised as a healer. Of great concern is that landlessness affects them and their practice. The herbs that they use have been fenced off on farms which they cannot access for harvesting medicinal plants and/or growing their own herbs. Many of them complained that they were turned criminals because of charges of trespass and allegations for violation of environmental legislation and relevant by-laws. They argued that legislation fails to take into consideration the relevance and significance of traditional healers in the society.



### 5.3 Gauteng

Public hearings were held from 12 to 15 March 2020 in four localities (different district municipalities); namely, Soshanguve, Westonaria, Vereeniging, and Ekurhuleni. Of the total of 190 oral submissions received, the 157 supported the Bill whereas 13 did not support it. The remaining 20 people did not indicate whether they supported or did not support the Bill. Instead, they raised issues that were not directly relevant to the Bill. Their inputs, as will be discussed in this section.

#### 5.3.1 Arguments for the Amendment Bill

The main reasons provided by the majority of speakers who were in favour of the Bill to amend Section 25 of the Constitution to allow for expropriation of land without compensation can be summarised as follows:

- The Bill is important for the decolonisation project of the South African society, as well as to address the injustice of the past. Speakers argued for a need to address the historical imbalance caused by the colonial and apartheid land dispossession and allocation of land along racial lines.
- The logic for inclusion of the 1913 cut-off date for land claims in the Constitution was questioned, suggesting that it should be removed because it impedes lodgement of land claims for land dispossessed prior to 1913. They argue that, by 1913, majority of the land was already taken from black people. What the 1913 Land Act did was to legalise and consolidate the project of dispossession and removals of black people from white-owned land. Lodgement of land claims should start in 1652, some argued.
- The Bill is crucial for ensuring the equitable distribution of land in South Africa. Some drew on the Freedom Charter to support the argument, being paraphrased as: “Land belongs to all who works it” and that South Africa belongs to all. Others highlighted the importance of working the land redistributed to people.
- Expropriation without compensation was not a new phenomenon in South Africa. Land was expropriated from Black people from 1913 without compensation; therefore, there is no need to hesitate implementing it to acquire land that was unjustly taken from Black people. They argued that land should be returned to its rightful owners. Throughout the sessions, a popular phrase used was “we want our land back”.
- Government must accelerate implementation of land reform and agrarian transformation project without any constitutional or legal impediments, hence the proposed constitutional amendment.
- The adoption of the ‘willing-buyer, willing-seller’ principle when acquiring land, although not prescribed in the Constitution, is seen as an impediment to redistribution of land at scale.

- There was noticeable number of speakers that reported about an increased demand for land for housing. They attributed the failure of government to meet the demand of housing to landlessness because most of the available land in towns and cities was already privately owned, in some cases for speculation purposes. This included state-owned and public land. Government was urged that it should expropriate well located land and allocate to those who need land. This include the abandoned high rise buildings.
- Having secure land rights is important for the dignity of any person, especially black people who suffered apartheid dispossession and removals. In addition to restoration of dignity and belonging, land is vitally important for food security and public amenities.
- The ‘willing-buyer willing-seller’ provision of the existing Expropriation Act (No. 63 of 1975), did not yield the desired results in terms of the land reform and restitution processes. Therefore, it was argued that expropriation of land without compensation will fast-track the process of land reform.
- If the Government continues to compensate landowners during acquisition of land, it would be using funds that could have been used for building infrastructure and for economic development.
- The current Constitution is a hindrance to expropriation without compensation. Therefore, it has to be amended to facilitate people taking their land back.

### **5.3.2 Arguments against the Amendment Bill**

Few oral submissions received spoke against the proposed expropriation of land without compensation. What was notable, however, was that none of the speakers said that they were against land reform. They expressed their support for land reform within the existing Constitutional parameters. Their argument against a constitutional amendment can be summarised as follows:

- The protection of private property rights is entrenched in the Bill of Rights, and any suggested amendment to expropriate land without compensation would undermine property rights and could be detrimental to the economy of the country.
- Expropriation without compensation is being used for political purposes to hide Government inefficiencies and incompetence in dealing with land reform.
- The slow pace of land reform in the last 25 years is no reason why the Constitution should be amended. They argued that it was poor capacity and under-spending in the former Department of Rural Development and Land Reform that has caused the slow pace of land reform.

- The Constitution, section 25 in its current form, provides mechanisms for restitution and redistribution to address the historical injustice. It also provides for expropriation of property in a just and equitable manner.
- The State owns about 40% of the agricultural land that could have been used for land reform. This land must be redistributed without delay.
- The notion that acquiring land will automatically lead to wealth is not true. There are many farmers who are struggling financially. In support of this argument, reference was made to the statement made by the former Minister of Rural Development and Land Reform, Mr Nkwinti, that 90% of land reform projects have collapsed or are on the verge of collapse.
- Expropriation of land without compensation is unfair to those who bought the land and have invested in major developments. The representative of AfriForum said “taking people’s land without payment is tantamount to theft”. It favours one group against the other and would lead to civil war. Land grabbing, as witnessed in Zimbabwe, destroys land productivity and therefore undermines food security.
- There is no clarity on what Government is going to do with the expropriated land, how is it going to happen and who is going to benefit. This creates a concern that it would be another land-grab, as was the case in Zimbabwe.

### 5.3.3 Proposed changes to the Amendment Bill

Majority of them made oral submissions on the basis of written proposals expressing their positions and preferences with regard to the Bill, choosing to comment on the Property Clause in its entirety, highlighting strengths and weaknesses of each clause and what needs to be retained and excluded. In doing so, they addressed the proposed amendments and located the clauses in the entirety of the property clause.

A number of speakers whose inputs appeared aligned, and reading from prepared documents, proposed that Section 25 should read as follows:

- Section 25(1) “The State, include Parliament, Executive and Judiciary carry an obligation to redress imbalances of the past through enactment of laws that will achieve redress and equitably redistributive all resources”.
- Section 25(2): “Property may be expropriated without compensation
  - (a) Only in terms of law of general application, or
  - (b) a public purpose or in the public interest”.
- Section 25(3) should be deleted and replaced with the following:
 

“The State should be the custodian of all South Africa’s natural resources, inclusive of land, mineral resources and water, and relevant legislation should be passed to clearly define and contextualise State ownership of natural resources”.

- Section 25(4) “For the purpose of this section:
  - (a) The public interest includes the nation’s commitment to land reform to bring about equitable access to all South Africa’s natural resources.
  - (b) property is not limited to land”.
- Section 25(5) “The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”.
- Section 25(6) “A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress”.
- Section 25(7) should be deleted in its entirety.
- Section 25(8) “No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of Section 36(1)”.
- Section 25(9) “Parliament must enact the legislation referred to in subsection 6”.

Other speakers, whose submissions were closely aligned, proposed that the Amendment Bill should take the following shape:

- In Subsection (2), the Ad Hoc Committee must add a new (c) that reads as follows:
  - (2)(c)(i) subject to without compensation or nil compensation under conditions laid out in a law of general application.
- Expropriation of land without compensation must remain with the Executive to avoid long court processes which might derail land reform. In this way, the process will allow for an individual to exercise a right to approach Courts to review Executive decision regarding expropriation.
- Section 25(3) add at the start of the sub section “Where compensation is payable”. So it should read as follows:
  - (3) Where compensation is payable, the amount of the compensation and the time and manner ...
- Section 25 (4) should remain because property is not limited to land. It includes other resources such as water.
- Section 25 (5) to remain as it is

- Section 25 (6) to remain as it is.
- Executive to take decision on expropriation and not the Court as court takes time and is expensive as one needs to hire a lawyer.
- Section 25(7) should be left as it is but should be reviewed as part of broader review land reform policy.
- Section 25(8) should include a provision that says that the requirement for payment of compensation may not impede the State's commitment to redistribute land.

Other specific comments and proposals for amendments can be summarised as follows:

- The language of Nil compensation must be completely removed in the Bill. Section 25(3) must be discarded completely. It should state that land must be expropriated without compensation.
- Section 25(7) 7 must be amended to delete 1913 and be replaced by 1652.
- Delete section 25 of the Constitution and allow people to occupy land they want and give them tools and equipment to work the land.
- As it stands, section 25 ascribes to colonial tendencies and it must be changed to foster transformation.
- The Bill must explicitly state expropriate land for housing.
- Introduce a clause that prevents politically connected or elite people from benefiting from land unduly.
- The Bill must specify that when land is expropriated, people must also inherit the structures built on the land. Simply put, expropriation of land must include all the developments.

#### **5.3.4 Issues that transcend the ambit of the purpose of the public hearings**

While the Ad Hoc Committee public hearings related to a specific mandate, some land reform and other related issues, all of which are relevant to the oversight role of Parliament, were raised during the hearings. The Chairperson indicated that all disputes relating to land claims or conflicts could be submitted to Parliament, addressed to the Chairperson of the Portfolio Committee on Agriculture, Land Reform and Rural Development.

Issues raised by the members of the public can be summarised as follows:

- *Access to Housing:* Some of the speakers indicated a need for land to enable them to gain access to adequate housing. They complained about corruption within municipalities, especially allocation of houses to foreign nationals whilst South Africans who have been on waiting lists for many years are not. For example, Residents of Emfuleni municipality alleged that people pay bribes of about R6 000 for a site. In another area, in Dikothole Extension, government built flats for residents but they were occupied by foreign nationals.

- *Lack of school facilities:* In some municipal areas, there are a number of dilapidated schools; community members wanted to know who the responsible Departments were so that they can follow up. Some speakers expressed interest in the conversion of facilities for human settlements because they were not being used and have become a haven of criminals.
- *Land Claims:* A great majority of speakers complained about slow implementation of the current section 25(7), restitution of land rights. Family representatives who access to their ancestors' land and houses have suggested that the process to settle their land claims was inefficient, and many people have died before they could be compensated for the loss. For example, an organisation known as WEPA, reported that a claim was lodged in 1998 and claimants have been waiting ever since. The second issue on land claims related to the new lodgement process reopened 2014. Most of the speakers suggested that there was no information given to them about the status of their land claims. They were not aware of the interdict of processing the new claims until all the pre-1998 claims were settled and finalised. The submissions on land claims implied that there was poor communication from the Restitution of Land Rights Commission to claimants.
- *Security of tenure:* There were concerns of tenure insecurity expressed by people who live in urban and peri-urban areas. Equally important were farmers on PLAS farms. They reported that they did not have Title Deeds and were, as a result, vulnerable to evictions or threats thereof. For example, a female farmer who was working on a PLAS farm belonging to the Department of Rural Development and Land Reform since 2008. She reported that she identified the farm in 2006 and approached the Department for assistance. This programme leases out land to farmers instead of giving land ownership. Irrespective of harassment by officials she continued to use the land. The Department did not renew the lease, and she was under threat of being evicted. She alleged that there were corrupt tendencies and she feared that the State officials would take the land from her. She pleaded for assistance from Parliament.
- *Poor service delivery:* Some speakers alleged that Emfuleni Municipality was collapsed by corruption. It rendered it useless because it could not provide services to the people. It could not adequately provide access to electricity and water; including in cases where people have paid for those services. The situation was reportedly worse in private property where landowners may cut off electricity anytime and the municipality had refused to intervene.
- *Mining:* Gold was being mined and exported from the area and mine owners made billions while the people who stay in those areas were not benefitting. Most of the mines were being owned by white people own mines and black people were workers who do not have shareholding. It was alluded that some of the mining areas have become ghost towns with no infrastructure but sink holes. There was also no government plan to convert the facilities into something useful for the community.

- *High unemployment:* A significant number of speakers highlighted the challenge of high unemployment, especially among the youth. The Ad Hoc Committee was informed about a high number of young people who passed matric but were without jobs. As with housing challenged, there were also allegations about the poor being made to bribe officials of government to get a job in the area.
- *Illegal farm evictions and human rights violations on farms:* Farm evictions and abuse of farm workers was reportedly continuing unabated. In some cases, farm workers were being physical assaulted and criminal cases involving abuse of farm workers and illegal eviction of farm dwellers were not being followed up by the South African Police Service (SAPS). Farm workers and farm dwellers were also being denied access to water and electricity, as well as access to the graves of their families. These were constructive eviction practices which owners were using to get farm dwellers off the farms.
- *Vulnerable groups:* People with disabilities were not being given opportunities to provide for themselves. They were depending on the Social Grants. The experiences of women and youth were also highlighted in terms of lack of jobs, access to land and secure access to housing.
- *Taxi Rank:* Some speakers complained that a lot of money was spent on the renovation of the Taxi Rank in Vereeniging but no progress has been made.
- *Crime and drug abuse* in the area was viewed as a serious challenge undermining the stability of the communities. Some presenters alleged that their children were promised jobs by foreign nationals, but were instead given drugs.

## 5.4 KwaZulu-Natal

Public hearings were held from 05 to 08 March 2020 in four localities (different district municipalities); namely, Mtubatuba, Vryheid, Winterton, and Kokstad. Of the total of 170 oral submissions received, the 140 supported the Bill whereas 30 did not support it.

### 5.4.1 Arguments for the Amendment Bill

The Bill, which provides for amendment of section 25 of the Constitution, was supported by the majority of speaker. They submitted that -

- After 25 years of democracy, South Africans are faced with a pressing need for Government to accelerate land reform and agrarian transformation without any constitutional or legal impediments.
- The amendment of section 25 is about a need to address the historical imbalance caused by the racially-based system of allocation of land. During the colonial and apartheid years, government passed legislation and policy measures to prohibit ownership of land by black people. The Constitution, as many argued, has not enabled the State to move at a pace anticipated by the majority.
- The ‘willing buyer, willing seller’ principle, that has been applied by government since 1994, is perceived to be a stumbling block to faster pace of land redistribution and has frustrated efforts to redistribute land at scale anticipated by the black majority.
- Given the apartheid destruction of black commercial farmers, there is a need to remove all barriers to entry into the agricultural economy, including access to land in order to improve food security.

### 5.4.2 Arguments against the Amendment Bill

Despite their opposition to expropriation of land without compensation, majority of speakers who rejected the Bill expressed their support for redistribution of land to redress the past injustices. They did not believe the current framing of the Constitutional provision for land redistribution and expropriation are a problem.

Their key arguments can be summarised as follows:

- Protection of private property rights is a fundamental right entrenched in the Bill of Rights, and expropriation of property without compensation could threaten the existing constitutional architecture. Further, it would negatively impact the economy and food security.
- Given that agriculture is highly dependent on lending, consequences of expropriation of land without compensation on existing agricultural financiers and bank bonds could collapse their entire banking industry in South Africa.



- References to the High Level Panel recommendations on land reform, which speak to land reform policy failures, amongst others.
- Expropriation without compensation is being used for political purposes to hide government inefficiencies in the implementation of the programme of land reform.

#### 5.4.3 Proposed changes to the Amendment Bill

Some suggested that legalistic tone of the language used in drafting the Bill was confusing, therefore it needs to be simplified. For example, the use of the phrase Nil compensation was not properly understood. In addition, concerns were raised about the use of permissive language on expropriation without compensation, instead of mandatory language regarding expropriation without compensation (using the word ‘may’ instead of ‘must’).

One organisation proposed that –

- It was sceptical about the current proposed amendment process.
- The scope of the consultation is very limited and the reformist approach that was used during CODESA should not be repeated.
- There seems to be a problem with methodology on how section 25 should be drafted.
- They do not support any amendment, they rejected the amendment Bill, suggesting that the entire section 25 must be scrapped and redrafted afresh.

A number of speakers whose inputs appeared aligned, and reading from prepared documents, proposed that Section 25 should read as follows:

- (1) The State, include Parliament, Executive and Judiciary carry an obligation to redress imbalances of the past through enactment of laws that will achieve redress and equitably redistributive all resources.
- (2) Property may be expropriated without compensation
  - (a) only in terms of law of general application, or
  - (b) a public purpose or in the public interest

Remove Subsection 3 and replace with:

- (3) The State should be the custodian of all South Africa’s natural resources, inclusive of land, mineral resources and water, and relevant legislation should be passed to clearly define and contextualise State custodianship of natural resources.
- (4) For the purpose of this section:
  - (a). the public interest includes the nation’s commitment to land reform to bring about equitable access to all South Africa’s natural resources.
  - (b). property is not limited to land

- (5) The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) Remove sub section 7
- (8) No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of Section 36(1).
- (9) Parliament must enact the legislation referred to in subsection 6.

Other speakers, whose submissions were closely aligned, proposed that the Amendment Bill should take the following shape:

In Subsection (2) add new (c)

(c)(i) subject to without compensation or nil compensation under conditions laid out in a law of general application.

- Expropriation without compensation must remain with the Executive to avoid long process of going to court. In anyway, an individual has a right to go to court review of Executive decision.
- Sub section (3) add at the start of the sub section “Where compensation is payable”. So it will be as follows:  
  
Where compensation is payable, the amount of the compensation and the time and manner.
- Section 25 (4) to remain as it is because property is not limited to land. It can include other things such as water.
- Section 25 (5), (6) and 7 to remain as they are. However, Section 25 (7) to be revised later for broader land reform process
- Executive to take decision on expropriation and not the Court as court takes time and is expensive as one needs to hire a lawyer.
- Section 25 (8) include that the payment of compensation may not impede efforts to expropriate land for land reform purposes.

#### 5.4.4 Issues that transcends the purpose of the public hearings

While the Ad Hoc Committee public hearings related to a specific mandate, speakers often raised issues on land reform and service delivery that are mainly relevant to the exercise of the oversight mandate by other Parliamentary Committees. The Chairperson suggested that those problems can also be raised in their parliamentary constituency offices.

Some of the issues for consideration include the following:

- *Farmworkers evictions and human rights violations:* There were reports farm evictions and abuse of farm workers. Some reported physical assaults that were not followed up by SAPS. They were denied access to water, electricity and to graves.
- *Slow pace of settlement of land claims:* Many claimants were not informed about progress of their land claims. Where there was land restoration, beneficiaries complained about lack of post-settlement support.
- *Access to land:* A couple of concerns were also raised in Motherwell by urban livestock farmers alleging that there was arbitrary allocation of grazing land by the Department of Land Reform and Rural Development. They alleged nepotism and favouritism. In addition, concerns were raised about the arbitrary deprivation of property (livestock) by charging steep pound fees when livestock is impounded, and having their cattle sold on auction to farmers for cheap prices when they could not pay the pound fees.
- *Revocation of agreements:* Challenges were raised about the alleged revocation of agreements by the municipality on granting land to communities for communal gardening.

## 5.5 Limpopo

Public hearings in Limpopo were held from 22 to 25 October and 7 November 2020. The localities of the public hearings were in Makwarela (Vhembe District), Thomo (Mopane District), Jane Furs (Sekhukhune District) and Polokwane (Capricorn District). Given the Covid-19 Level 1 Lockdown regulations, limited number of people were allowed into the halls. Despite the restrictions, a total of 736 people were registered for attendance and 215 were able to address the Ad Hoc Committee. Of the 215 oral submissions made in Limpopo Province, the 207 speakers supported the Amendment Bill whereas 6 speakers did not support the Amendment Bill. Additional 2 speakers who addressed the Committee were neither in support nor in opposition to the Amendment Bill.

### 5.5.1 Arguments for the Amendment Bill

The amendment of Section 25 of the Constitution was long overdue according to speakers that addressed the Ad Hoc Committee. Some of them expressed frustration with the processes to the extent that they reported that they do not want further consultation. The next steps should be about implementation. However, there were those who expressed confidence in the process and the fact that Parliament was facilitating an inclusive process where South Africans are central to decision-making in terms of how the amendments should look like. The Chairpersons emphasised the key principles of participatory democracy and said there would still further consultation on the proposed law of general application which members of the public have requested for.

Arguments advanced in support of the propose 18<sup>th</sup> Constitutional Amendment Bill, presented by a majority of speakers across Limpopo, can be summarised as follows:

- The formation of political parties in South Africa and the struggle against colonialism and apartheid was founded on the need to resolve land question. The fact that 26 years after attainment of democracy, most part of South Africa's land is still in the hands of a white minority demonstrates the failure of legal framework for land reform; and therefore a need for reconsideration of the Constitutional framework to remove the impediments to the redistribution of land. Among key interventions, it is vitally important to make it explicit that expropriation without compensation is permissible in order to bring about socio-economic transformation for the majority of South Africans.
- Landlessness is a result of violent dispossession and displacement of black people without compensation. Equally, therefore should not be a need for the State to pay compensation for land that was taken without any agreement, hence speakers argued that government cannot pay compensation for 'stolen property'. There is a pressing need for Government to accelerate land reform and agrarian transformation project without any constitutional or legal impediments in order to respond to the increasing need for land for housing and agricultural purposes.
- Expropriation of land without compensation is seen as a tool that must be used to restore dignity for black people because land is part of the culture and identity of the Black

people. As many people have said; “without land we are nothing, “without land there is no dignity for Black people”. The Bill is seen as an intervention to address the historical imbalance and injustice of the past caused by land dispossession, dating back to colonial times.

- The ‘willing buyer-willing seller’ principle, which the democratic Government adopted for acquisition of land under the land reform programme, has failed to assist the State to redistribute land at pace and scale anticipated. Almost 26 years after attainment of democracy, skewed patterns of land ownership still exist. The Land Audit conducted by government attest to this assertion, a majority of South Africans remain landless. It reveals that Whites own 26 663 144 ha or 72% of the total 37 031 283 ha farms and agricultural holdings by individual landowners; followed by Coloured at 5 371 383 ha or 15%, Indians at 2 031 790 ha or 5%, Africans at 1 314 873 ha or 4%, other at 1 271 562 ha or 3%, and co-owners at 425 537 ha or 1%. The abandonment of market-based system of land acquisition and use of expropriation of land without compensation will accelerate the pace and reduce the cost of land acquisition.
- While the value of land in creating opportunities, especially for the young people that are faced with high unemployment is recognised, the high cost of land makes it an expensive commodity that the poor are unable to access in the open market. Speakers believed that expropriation of land without compensation will make land accessible to the poor, especially the unemployed youth and will therefore facilitate entry into the agricultural economy.
- Some speakers supported the amendment with the caution that expropriation of land without compensation should not undermine food security (no land should lie fallow) and guard against corruption that might lead to the process benefitting only the elite, i.e. politicians or politically connected people. One of the suggestions made was for Government to prioritise unused land or those with large tracts of land. An example was made of ZZ2 which owns large tracts of land in Mopani.
- Expropriation of land must be matched with necessary post-expropriation support in order to increase production on those farms. If government was not investing in skills development preparing people for takeover of the farms, then it was already setting people up for failure. Proper care must be taken in order to avoid the experiences of Zimbabwe after white-owned land was expropriated. Agricultural land must be given to people who want to farm.
- Lack of implementation of government land reform programmes is a key weakness. The current Section 25(7) was not being fully implemented. People around Giyani lodged claims for land restoration in the Kruger Park. Since 1998, their land claims have not been settled. Those that were settled in financial compensation were few. In addition, despite section 25(6) and relevant legislation such as Extension of Security of Tenure Act, farm dwellers continue to live under precarious conditions with continuous threats of eviction and human rights abuses. Therefore, to ameliorate the challenge,

farm dwellers and farmworkers must be a priority for allocation of land after expropriation because they were already farming/working the land.

- Equitable allocation of land will contribute to increase in food production as the country will not be reliant on a few commercial farmers. It is a process which must be inclusive, creating avenues for smallholders and emerging commercial farmers to participate in the value-chains which in some cases are exclusive.
- Implementation of the Constitution, especially Section 25(6) means that government must protect tenure rights of the people. In Sekhukhune, the Ad Hoc Committee heard about the plight of rural people who accused traditional leaders of infringing on people's customary rights to land. For example, land rights holders were being deprived of their land, and in one instance land allocated a college was taken by a traditional leader. In addition, women who bear the brunt of raising children were discriminated against because they could not own land in their own right. According to speakers, these are matters that government must address rather than a narrow focus on constitutional amendment which might not be implemented.
- The Chairperson of the Congress of Traditional Leadership in South Africa (CONTRALESA) in Vhembe argued that colonialists did not just take land but took also chieftaincy and therefore, they would like to provide further input in writing on how Government can resolve the matter.

### **5.5.2 Arguments against the Amendment Bill**

Arguments advanced to reject the Amendment Bill and oppose any attempt to expropriate land without compensation be summarised as follows:

- Land redistribution, according to the speakers, was a necessary programme for South Africa whose history is characterised by racially-based system of land ownership. Representatives of white commercial farmers argued that farmers were willing to contribute to the resolution of the challenge confronting land reform and a greater majority of South Africa. They supported sustainable land reform. However, constitutional amendments were unnecessary and were not a solution to slow process of land redistribution. Section 25 forms part of The Bill of Rights which should not be tampered with because they are a cornerstone of South Africa's democracy. The process that the Committee was engaging in, if it weakness private property rights, it is then counterproductive and would have unintended consequences. It undermines the Constitution. Participants emphasised that land ownership should be protected.
- Expropriation without compensation will compromise the economy, as it will drive away investors and impact negatively on food security. It will cause distress to the agricultural sector and end up in a situation where the majority of land will lie fallow and lead to job losses and food insecurity. It was suggested that instead of expropriation of land without compensation, Government should use available State land for redistribution.

- It is believed that expropriation of land without compensation is used for political purposes to hide Government inefficiencies in dealing with land reform. In particular, corruption, poor government support and inadequate budget for land reform were cited as reasons for the failure of land reform.
- There is no need to amend the Constitution because Section 25 as it stands provides for expropriation of land without compensation under certain circumstances. What Parliament should do is to focus on the Expropriation Act (i.e. the law of general application).
- It is unfair to expropriate land and any improvements made without compensation, as landowners have private property bank bonds and other forms of debt that still need to be paid.
- The State was in possession of vast tracts of land. Before expropriating private property, the State must release its own land and reallocate to emerging farmers and smallholders. In addition, the state must give farmers title deeds rather than making farmers tenants on state-owned land. In this way, farmers can be able to access capital from financiers using the land as a collateral.
- Commercial farmers have started making contributions to build skills among black farmers. They are involved in partnership and mentorship programmes. So, upskilling programmes are necessary. This, according to some of the speakers, was the process that government should be encouraging rather than the Constitutional Amendments.
- Other organisations, including supporters/members of political parties, cautioned against constitutional amendment. One speaker suggested that expropriation can and should only be done after due consideration by a Court and only after the interests of all parties have been weighed against each other, and where prevailing circumstances warrant it. Further, the executive and/or national legislation should determine to conditions under which expropriation can be done without compensation, as this would allow amendments to be done, and rights to be diminished by a simple majority in the National Assembly. However, if no compensation the court must have declared that it is just and equitable to pay Nil value.

#### **5.5.4 Proposed changes to the Amendment Bill**

Majority of speakers made oral submissions on the basis of written proposals expressing their positions and preferences with regard to the Bill, choosing to comment on the Property Clause in its entirety, highlighting strengths and weaknesses of each clause and what needs to be retained and excluded. In doing so, they addressed the proposed amendments and located the clauses in the entirety of the property clause.

A number of speakers whose inputs appeared aligned, and reading from prepared documents, proposed that Section 25 should read as follows:

Some have suggested that the Preamble must be amended to read as follows:

- **AND WHEREAS** section 25 of the Constitution of the Republic of South Africa, 1996, must be amended to remove any ambiguities, so that expropriation without compensation is the only legitimate mechanism for land reform;
- **AND WHEREAS** such an amendment will contribute to address the colonial and apartheid historic wrongs caused by the arbitrary dispossession of land;
- **AND WHEREAS** such amendments will further ensure equitable access to all land and will further empower the majority of South Africans to be productive participants in ownership of all categories of land including residential, industrial, commercial and agricultural.

Further amendments to the entire Section 25, proposed are as follows:

1. The State, including Parliament, Executive and Judiciary carry an obligation to redress imbalances of the past through enactment of laws that will achieve redress and equitably redistribute all resources.
2. Property may be expropriated without compensation
  - (a) only in terms of law of general application.
  - (b) for a public purpose or in the public interest
3. Remove sub-section 3 and replace with:
  - (a) The State should be the custodian of all South Africa's natural resources, inclusive of land, mineral resources and water, and relevant legislation should be passed to clearly define and contextualise State custodianship of natural resources.
4. For the purpose of this section:
  - (a) The public interest includes the nation's commitment to land reform to bring about equitable access to all South Africa's natural resources.
  - (b) property is not limited to land
5. The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
7. Remove sub section 7
8. No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of Section 36(1).



9. Parliament must enact the legislation referred to in sub-section 6.

Others suggested that it should be recognised that willing buyer willing seller has failed and that expropriation of land without compensation is a just and equitable process to bring about socio-economic transformation in South Africa. They suggested that Sections 1,4,5,6 and 7 of the Constitution must not be changed. They proposed that the Amendment Bill should take the following shape:

In sub-section (2), the Committee must add a new (c) to read as follows:

- 2(c) (i) subject to without compensation or nil compensation under conditions laid out in a law of general application.
- Expropriation without compensation must remain with the Executive to avoid long process of going to court. In anyway, an individual has a right to go to court for review of the Executive decision around expropriation if necessary.
- Sub-section (3) add at the start of the sub section “Where compensation is payable”. So it will be as follows:
  - (3) Where compensation is payable, the amount of the compensation and the time and manner of payment must be just and equitable...
- Section 25(4) to remain as it is because property is not limited to land. It can include other things such as water. Similarly, Section 25 (5) and (6) must remain unchanged. Section 26(7) must not be changed however, there is a need to look at policy in relation to broader land redistribution.
- Section 25 (8) must be amended to insert, after “this section”, including the payment of compensation”

#### **5.5.6 Issues that transcends the ambit of the purpose of the public hearings**

Whilst the Ad Hoc Committee’s public hearings related to a specific mandate, some land reform and other related issues were raised that are relevant to the exercise of the oversight mandate of Parliament and relate to the work of other Portfolio Committees.

Some of the issues for consideration include the following:

- *Tenure Security*: There were calls, especially from those that did not support the Bill, for title deeds to be given to land reform beneficiaries to enable them to use such title deeds as collateral to borrow from financial institutions for any improvement they need to do to their farms, and therefore, thereby becoming economically empowered. There were also calls to provide tenure security for farm dwellers and farm workers by prioritising them to get land as owners.

- *Land Reform:* Some speakers raised frustration with the slow process and demanded that Government fast-track the process and that priority be given to young people as beneficiaries. It is believed this will open up opportunities for young people, as many are unemployed. With regard to restitution, some speakers raised concern that claimants were compensated financially instead of getting their land back and therefore requested Government to give back land to land claimants and not pay money.
- *Role of Traditional Leaders:* Some participants alleged that traditional leaders were selling land. It was mentioned that traditional leaders sold land or stands at the cost of R1 500. An example was given of land that was set aside for a college but was taken by a traditional leader. An appeal was made for Government to ensure that traditional leaders did not sell land. Whilst these allegations were levelled against traditional leaders, the representatives of traditional leaders complained that their role in land management was being undermined. In particular, they indicated that there was no cooperation between Parliament and Traditional leadership on land.
- *Service delivery challenges:* Some speakers raised issues of poor service delivery in some areas in different municipalities. For example, the issue of water shortages was raised in Giyani and Makhuduthamaga. It was indicated by some speakers from Makhuduthamaga that there was no water in schools and in the hospital. The situation is so bad that people drink water with livestock. It was alleged that the Municipality has been ignoring calls to address water shortage in the area and therefore they implored Parliament to intervene. In addition to water challenges, speakers complained about the poor condition of the hospital and roads in the area.
- *Land for human settlements:* A noticeable number of participants indicated an increase in the demand for land for housing. People from Sekhukhune mentioned that they have to build houses on the mountainous areas because of landlessness.
- *Women's access to land:* One of the representatives of the Alliance of Rural Democracy indicated that although women are the ones who care for the children they do not have access to land. Traditional leaders undermine their rights to land.
- *Mineral resources:* Some participants indicated that although mines and agricultural towns surround Sekhukhune, the people in the area are not benefiting from these resources. Instead, the majority are living under poor conditions.

## 5.6 Mpumalanga

Public hearings were held from 28 February to 01 March 2020 in three localities (different district municipalities); namely, Mbombela, Middleburg and Ermelo. Of the total of 172 oral submissions received, the 152 supported the Bill whereas eight did not support it. The remaining 12 people did not indicate whether they supported or did not support the Bill. Instead, they raised issues that were not directly relevant to the Bill. Their inputs, as will be discussed later in this section, were complaints about poor service delivery, corruption, unresolved land claims, farm evictions and human rights violations for people living on farms.

### 5.6.1 Summary of case for the Amendment Bill

Key reasons provided by the speakers in favour of the Bill can be summarised as follows:

- The Bill is an important intervention for accelerating the process of the decolonisation of society as well as addressing the land ownership injustices of the past. This Bill is a recognition of the pressing need to redress colonial and Apartheid land dispossessions. Despite a variety of land reform programmes, which are perceived not to have resulted in any fundamental transformation of land ownership patterns, the Bill is seen as a crucial and a correct step for ensuring equitable land distribution in South Africa.
- Some argued that land should not only be seen as a commodity. In Africa, land has a social meaning too. For many communities it is a form of identity and for households, it is important for the dignity of the Black person. Land dispossession and displacement of many black families from their homes has stripped them of their dignity and sense of belonging. Therefore, discussion about fast-tracking land should also consider a need to redress this huge injustice that no amount of money can compensate for the loss suffered during removals. Equally important, those whose land-based livelihoods were destroyed also argued that equitable land distribution would enhance food security as more people are given access to land.
- Many speakers implored Parliament to be decisive about expropriation of land without compensation. They argued that it would not be the first time that the South African government took land from the owners. They cited that the Colonial government, through the 1913 Land Act, expropriated land from Black people without compensation. Subsequently, the Apartheid government also, through many pieces of legislation, forced black people off their land and homes. Therefore, they argued, the democratic government should not be hesitant to expropriate land through legal means without any payment of compensation.
- The increasing demand of land for housing coupled with the high land value and cost of acquisition, sprawling informal settlements, failure of land reform to meet the urban land needs have made people to look for mechanism that could make them access land in a faster manner and without lots of bureaucratic impediments, hence some have said that “give us land, don’t ask us what were are going to do with the land”. Further, high

levels of unemployment meant that many people were unable to access land in an open market and were looking up to government to meet their land needs.

- The ‘willing-buyer willing-seller provision of the existing Expropriation Act did not yield the desired results in terms of the land reform and restitution processes. Therefore, expropriation of land without compensation was seen to be an intervention that could accelerate processes for land redistribution and restitution.

### **5.6.2 Summary of case against the against the Amendment Bill**

Key reasons provided by those who did not support the Bill can be summarised as follows:

- The Bill, amending section 25 of the Constitution, should it be passed into law will cripple the economy of the country and impoverish everyone. Such trends were already being observed in the property market. Immediately after Parliament passed the motion to amend section 25 of the Constitution there was a decline in property sales. It is indicative of what could come after the Bill is signed into law.
- Land cannot be taken without compensation, especially from people who have bought their land either using own investments or bank loans which they still owe commercial banks.
- The argument that expropriation of land without compensation could unlock the impediments to faster pace of land redistribution is misplaced. Lack of delivery of land is a result of government inefficiency in land reform administration and corruption. These have led to the slow pace of land transfer. Amending section 25 will not address the challenges of corruption and government inefficiencies.
- There is no need to amend the Constitution because section 25, as it currently stands, allows for land to be expropriated without compensation. There has not been willingness of the State to test the provisions of the Constitution with regard to expropriation.
- About 60% of land belongs to the State, such land could therefore be transferred to the people for agricultural and industrial purposes.
- The country needs to guarantee property rights to enable it to attract investment, ensure development, job creation, collaterals and economic progress. Guarantee of property rights will mean more jobs and could improve the economy of the country. If there is no guarantee of property rights it could discourage investment, thus leading to a decrease of revenue generation through property investment. Government will lose millions it collects from tax such as Capital Gains tax, transfer duty, Bond duty, Estate duty, Value Added Tax (VAT) and Property tax.
- Instead of expropriation, government should reallocate property/land, which has no registered title to people and give them proper support to develop the land.

- Expropriation of land without compensation, which the Bill seeks to legislate for, will undermine food security because farmers need finances for production. When the Bill is passed, farmers will not be able to get loans for production from banks and cooperatives because of the possibility of expropriation of land without compensation threatens the security of tenure for the owner and will thus not be able to use the land as a collateral.
- It is an unnecessary punitive measure that will transfer deep emotions from one group to the other, which will become a huge burden for the new generation to carry.

### 5.6.3 Proposed changes to the Amendment Bill

Majority of speakers made oral submissions on the basis of written proposals expressing their positions and preferences with regard to the Bill, choosing to comment on the Property Clause in its entirety. They highlighted strengths and weaknesses of each clause and what needed to be retained or excluded.

A number of speakers whose inputs appeared aligned, and reading from prepared documents, proposed that Section 25 should read as follows:

- (1) The State, include Parliament, Executive and Judiciary carry an obligation to redress imbalances of the past through enactment of laws that will achieve redress and equitably redistributive all resources.
- (2) Property may be expropriated without compensation
  - (a) only in terms of law of general application, or
  - (b) a public purpose or in the public interest

Remove Subsection 3 and replace with:

- (3) The State should be the custodian of all South Africa's natural resources, inclusive of land, mineral resources and water, and relevant legislation should be passed to clearly define and contextualise State custodianship of natural resources.
- (4) For the purpose of this section:
  - (a) the public interest includes the nation's commitment to land reform to bring about equitable access to all South Africa's natural resources.
  - (b) property is not limited to land
- (5) The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

- (7) Remove sub section 7
- (8) No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
- (9) Parliament must enact the legislation referred to in subsection 6.

Others suggested that the failure of the willing buyer willing seller approach to redistribute land to bring about socio-economic transformation should be acknowledged. They suggested that Sections 1,4,5,6 and 7 of the Constitution must not be changed. They proposed that the Amendment Bill should take the following shape:

In Subsection (2) add new (c) which reads thus:

- 2(c)(i) Subject to without compensation or nil compensation under conditions laid out in a law of general application.
- Execution of expropriation of land without compensation must remain the domain of the Executive rather than the judiciary in order to avoid lengthy legal processes which might derail the objective of acceleration of land redistribution. An individual affected by expropriation has a right to approach the Courts to review of Executive decision.

Sub-section (3) add, at the start of the sub-section, “Where compensation is payable”. It will thus read as follows:

- Where compensation is payable, the amount of the compensation and the time and manner ...
- Section 25(4) to remain as it is because property is not limited to land. It can include other things such as water.
- Section 25 (5) to remain as it is
- Section 25 (6) to remain as it is.
- Section 25(7) must be left as is but must be reviewed later as part of broader land reform policy.

Section 25(8) must include that –

- “the payment of compensation may not impede the state from taking legislative and other measures to achieve land reform...”

The following comments were made by individuals who did not align with majority of speakers who read from written notes or statements; i.e. -

- Amendment must make it explicit that expropriation without compensation is permissible.
- Consideration should also be given to just administrative action in terms of Clause 33 (1): “Everyone has a right to administrative action that is lawful, reasonable and procedurally fair.”

#### **5.6.4 Other comments that did not directly relate to the Bill**

Some of the comments raised by speakers did not directly relate to proposed amendments (the Bill) but is relevant to the oversight work of Parliament and could be referred to other Committees. The following thematic issues emerged from the Mpumalanga hearings:

- *Poor service and alleged corruption:* Issues were raised about poor services in some areas in the different municipalities. For example, some decried lack clinics and secondary schools. As a result, children have to travel long distances to Mbombela High School.
- *Land claims and other land issues:* Few of the speakers wanted assistance on the claims they lodged in 1998, to which they have not received any response from the Commission on Restitution of Land Rights. For example, one speaker mentioned that as a group they claimed 19 farms in 1998 but only one has been returned. Traditional leaders of Amendebele wanted their land back and the Commission was not providing feedback to claimants. A number of people also raised concern about the poor or lack of post-settlement support for land reform beneficiaries.
- *Consultation of traditional leaders:* Traditional leaders expressed a general concern that Government does not consult them properly on issues of land. They view themselves as equal partners with Government and, as such, are of the opinion that when the Executive takes decisions about land, they should involve traditional leaders and decisions should be taken together on an equal footing.
- *Women’s access to land:* It was mentioned that gender-bias is entrenched in land reform, as most women do not get access to land. Therefore, there is a need for land ownership to express the demographics of the country. Since women constitute 56% of the population, they should have access to 56% of land.
- *Farm evictions and human rights violations:* Cases of eviction and abuse of farm dwellers by farmers were highlighted. A particular case is of a farmer who refuses a school bus to enter the farm because he claims it is private property. The same farmer has allegedly demolished houses of farm dwellers and killing their livestock. In response to the statements, the Chairperson of the Portfolio Committee on Agriculture, Land Reform and Rural Development requested that the affected people provide details to the Portfolio Committee Secretary. He undertook to follow-up on these matters.

## 5.7 North-West

Of the total 196 oral submissions made in the North West, 156 supported the Bill; 20 did not support the Bill; while the remaining 20 did not indicate whether they supported or not supported the Bill. There were also people who raised issues that were not directly to the Bill. Their inputs, however, related service delivery challenges, prevalence of corruption in municipalities, unresolved land claims, farm evictions and poor treatment of people on farms.

### 5.7.1 A Case for the Amendment Bill

Arguments advanced in support of the amendment of section 25 of the Constitution to enable expropriation of land without compensation, advanced by the majority of oral submissions, can be summarised as follows:

- There is a need to address the historical imbalance in land ownership and access caused by racially-based land policies of the colonial and apartheid governments. The legacy of such policies, laws and practices manifest in landlessness, poverty, unemployment among black people which was attributed to deprivation of land ownership and destruction of African farmers.
- Land expropriation without compensation, whose intention is not meant to drive white farmers out of the farms/land, is a way in which the State will accelerate the process to redress unequal land ownership in South Africa. Unfortunately, as many speakers complained, the process of restitution and redistribution has progressed very slowly due to Constitutional perceived protection property against faster redistribution of land. As a result, the skewed land ownership patterns have not changed 25 years into democracy. Some argued that the delay in the redistribution of land is by design of the compromises at CODESA.
- The speakers rejected any requirement for compensation, especially given the violent and forceful dispossession of land that took place. Some have described the colonial and apartheid displacement of black people from their land as land theft, therefore argued for restorative justice in manner that does not compensate for stolen property.
- The Constitutional amendments required should place the State in position where it can accelerate land and agrarian reform without any constitutional or legal impediments. For this reason, some argued that the process must remove any ambiguity in the current text of the Constitution to explicitly articulate that expropriation of land without compensation to advance land and agrarian reform is permissible under South African law.
- The ‘willing-buyer, willing-seller’ principle is perceived to frustrate all efforts to redistribute land at a faster pace.



- Lack of access to land has impeded many African farmers to participate in the agricultural economy. Therefore, speeding up land redistribution process through the expropriation of land without compensation should be about removing on of the barriers to entry into the agricultural economy. Further, the state must also assist the farmers to use the land productively in order to improve food security.
- Expropriation of land should follow the Mineral and Petroleum Resources Development Act model. Land and mineral resources are a common heritage and therefore should be equally shared by the people of South Africa.

### **5.7.2 A case against the Amendment Bill**

This section summarises discussion and arguments by those that reject the Bill, the proposed constitutional amendment to allow for expropriation of land without compensation. However, it is important to note that despite their rejection of the Bill, the speakers articulated their commitment to land redistribution as provided for in the current text of Section 25, including expropriation in the public interest with compensation calculated as provided for in the Constitution.

Those that argued that the Bill must be scrapped in its totality submitted key arguments that can be summarised as follows:

- The failure of land reform programme to redistribute land at scale is not a constitutional problem. It is the inefficiency and incompetence of government as was documented in the Report of the High Level Panel to assess the impact of legislation and fundamental change. The panel found that there was a huge problem with failure to implement land reform policy.
- To substantiate the argument, some suggested that government owns about 21.7 per cent of agricultural land which can be easily redistributed without cost to anyone. However, in the last 25 years, government has failed to release state land for redistribution. State-owned land should first be redistributed and piloted for different projects (i.e. Human settlement and agriculture) instead of populist slogans of taking privately owned land from one person and giving it to another for political reasons. the redistribution of land should therefore begin with state owned land.
- The move to amend the Constitution in order to execute expropriation of land without compensation is a political ploy to divert the public attention from the failure of government to redistribute land as promised. Expropriation of land without compensation will be tantamount to land theft.
- Government resources that could be put to good use to accelerate redistribution of land were wasted through corruption and maladministration. For example, a number of failed land redistribution projects, including the local Estina Dairy Farm, are an example of government wastage and use of resources to enrich a few.

- Speakers rejected any constitutional amendment that is seen to infringe property rights. Protection of private property rights is entrenched in the Bill of Rights, and any suggested amendment to expropriate land without compensation would threaten the existing constitutional architecture and therefore must be rejected.
- South Africa is faced with a serious challenge for failing economy, joblessness, crime and sub-standard education for the majority. Increasing access to land for majority can help curb the current challenges. However, short-cuts such as wholesale expropriation of land will have disastrous effect on the economy of South Africa to an extent that it would exacerbate the existing socio-economic challenges. It could further have negative impact on food security as there is decline in production and reluctance in investment in the agricultural sector.
- Consequences of expropriation without compensation on existing agricultural/farming sector and other private property will result in farmers who have a mortgage with the banks being unable to service their debt, and could lose the productive land. The impact on the food security of the country could be devastating, as have been seen in Zimbabwe.
- The notion that acquiring land will automatically lead to wealth is not true. There are many commercial farmers who are struggling financially.

### **5.7.3 Proposed changes to the Amendment Bill**

A majority of speakers made specific proposals in relation to the text of the Amendment Bill. Dominant suggestions can be categorised into two as shown below.

A number of submissions by members of the public whose inputs appear to align read out the proposals as follows:

- (1) The State, include Parliament, Executive and Judiciary carry an obligation to redress imbalances of the past through enactment of laws that will achieve redress and equitably redistributive all resources.
- (2) Property may be expropriated without compensation
  - (a) only in terms of law of general application, or
  - (b) a public purpose or in the public interest

Remove Subsection 3 and replace with:

- (3) The State should be the custodian of all South Africa's natural resources, inclusive of land, mineral resources and water, and relevant legislation should be passed to clearly define and contextualise State custodianship of natural resources.
- (4) For the purpose of this section:

- (a) the public interest includes the nation's commitment to land reform to bring about equitable access to all South Africa's natural resources.
  - (b) property is not limited to land
- (5) The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
  - (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
  - (7) Remove sub-section 7
  - (8) No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
  - (9) Parliament must enact the legislation referred to in subsection 6.

Another groups whose inputs can be closely linked suggested that -

In Subsection (2) add new (c) which reads thus:

- 2(c)(i) Subject to without compensation or nil compensation under conditions laid out in a law of general application.
- Execution of expropriation of land without compensation must remain the domain of the Executive rather than the judiciary in order to avoid lengthy legal processes which might derail the objective of acceleration of land redistribution. An individual affected by expropriation has a right to approach the Courts to review of Executive decision.

Sub-section (3) add, at the start of the sub-section, "Where compensation is payable". It will thus read as follows:

- Where compensation is payable, the amount of the compensation and the time and manner ...
- Section 25(4) to remain as it is because property is not limited to land. It can include other things such as water.
- Section 25 (5) to remain as it is
- Section 25 (6) to remain as it is.

- Section 25(7) must be left as is but must be reviewed later as part of broader land reform policy.

Section 25(8) must include that -

- “the payment of compensation may not impede the state from taking legislative and other measures to achieve land reform...”

#### **5.7.4 Issues that transcend the ambit of the purpose of the public hearings**

The Committee also noted issues that did not relate to the Bill in question but complaints about implementation of land reform in general and other service delivery issues. The issues can be summarised as follows:

- *Housing and tenure security:* A significant amount of submissions related to allegations of corruption and other forms of malfeasance in the process of allocation of Reconstruction and Development Programme (RDP) houses by municipalities. These include the removal of people from lists, payment of bribes, and allocation of houses to illegal immigrants. In addition to need of land for housing, some reported that the townships were overcrowded and more land was needed. The increasing number of informal settlements is a result of landlessness and housing problems. Instead of providing people with land, government resorted to evictions. People continue to live under threat of eviction on land that they occupied.
- The reality is that land is a developmental asset and provides a means not only for restoring the dignity of those who were previously dispossessed, but also for accessing economic opportunities, shelter and other forms of human advancement. There was an outcry for land for grazing.
- *Farmworkers and illegal evictions:* Farm evictions and abuse of farm workers are alleged to continue on a daily basis. The abuse includes human rights violations such as physical assaults that never get followed up by SAPS, denial of access to water and electricity, and denial of access to graves of families which can be seen as constrictive evictions. Farm dwellers in some cases continue to live under threat of eviction.
- *Land claim challenges:* Serious challenges with the land claims process featured strongly during the public hearings in the North-West Province. People also complained about lack of post-settlement support to beneficiaries of the land reform. Many claimants reported that they were not informed about the status of their land claims.
- *Traditional healers:* Concerns were raised by traditional healers about regulations and permits required for them to carry out their calling. They also raised concern about environmental and land-related challenges impacting their ability to access land to harvest or grow traditional herbs without being charged with trespassing or violating environmental legislation and by-laws. According to them, current land reform

initiatives fail to meet their land needs for the wellbeing of the communities they support.

- *Vulnerable groups:* Allegations were made of systematic exclusion of women by denying them equal opportunities to own or access land. Also, it was raised that the youth are invisible in the land reform discussions and processes. Furthermore, there is a lack of access to land and barriers to entry into the agricultural economy space for skilled young people. Women in attendance who are under the chieftaincy claimed that local chiefs are denying them access to land as single women. The chiefs provide land for men who are married. Most of the older generation indicated that at their age they cannot do anything with the land, as they do not have the strength to work the land and would rather opt for monetary compensation by the State.
- *Ownership and custodianship:* The majority of submissions touched on the custodianship over land and the role and powers of the State and traditional leaders in that regard. Some of the speakers indicated that land under the custodianship of traditional leaders provided them with excessive power to dispossess the land (just as the white settlers did) from the local community and/or use the land to for their own private interests instead of using it to serve the community. Serious concerns were also raised about vast tracts of land owned by foreigners while locals are scrambling for land.

## 5.8 Northern Cape

Public hearings in the Northern Cape were held from 22 to 25 October 2020. The localities of the public hearings were in De Aar (Pixley ka Seme District), Kimberly (Frances Baard District), Upington (ZF Ngcawu District) and Springbok (Namakwa District). Given the Covid-19 Level 1 Lockdown regulations, limited number of people were allowed into the halls. Despite the restrictions, a total of 654 people were registered for attendance and 173 were able to address the delegation of the Ad Hoc Committee. Of the 135 oral submissions made in the Northern Cape. A total of 135 speakers supported the Amendment Bill whereas 35 speakers did not support the Amendment Bill. Additional 3 speakers who addressed the Committee were neither in support nor in opposition to the Amendment Bill.

### 5.8.1 Case for the Amendment Bill

Amendment of Section 25 of the Constitution to allow for expropriation of land without compensation was long overdue according to majority of speakers that addressed a delegation of the Ad Hoc Committee in the Northern Cape. They expressed frustration with the processes to the extent that they reported that they did not want further consultation but implementation. However, there were those that appreciated the fact that Parliament was running an inclusive process which places the people at the centre of decision-making with regard to the proposed amendments.

Arguments advanced in support of the proposed 18<sup>th</sup> Constitutional Amendment Bill can be summarised as follows:

- Amendment of Section 25 needs to be put in context. Almost 26 years since transition to democracy, land injustices still persist. People do not have land. The economy and the land cannot remain in the hands of the minority. The proposed amendment must be seen in the context of furthering transformation envisaged in 1994. There must be equitable distribution of the wealth and resources of South Africa. Everybody must benefit from the land and have access to it, not a minority. Land is wealth and there cannot be a focus on self-interests when people are impoverished beggars.
- Speakers demonstrated frustration with the process by saying that they expected the Ad Hoc Committee to bring solutions (informing them when expropriation was going to take place) instead of hearing all the complaints and submissions which Parliament was already aware of. Parliament must speed up the process because a minority can't continue to hold large tracts of land while the majority are landless. Arable land must be shared not only unproductive land.
- Expropriation must take place to advance redress of colonial and apartheid dispossession. However, it must start with addressing the land question for Khoi and San communities as a First Nation. They must be consulted before the implementation of the amendments. Exclusion of Khoisan in the resolution of the land question for South Africa was an unjust process. To date, the redistribution programme has not

attempted to deal with the land issues pertaining to the Indigenous people of South Africa.

- A traditional leader of the Khoisan, a members of the National Steering Committee on land matters in Upington, submitted that the land must return to the first indigenous people of the land, emphasising that land cannot belong to the government. Access to land goes hand in hand with the right to life and all must have it. To start with, the people of must be provided with land for formal housing because in some parts of the provinces there were too many informal settlements, especially in the Upington area.
- Land was forcefully taken away from South Africans and there is a need to return to their land. The programme of land reform underpinned by Section 25 of the Constitution and the market-based system of land has not resolved the land question. Therefore, it is necessary that the Amendment Bill under discussion be passed to allow expropriation of land without compensation in order to fast-track equitable distribution of land among South Africans. People must be allocated productive land and for the process to be accelerated, laws must allow the government to intervene by expropriation.
- Returning the land to the people of South Africa will restore their dignity and identity which was eroded when they were dispossessed of their birth right and ultimately displaced. The dispossession, as seen in the Northern Cape, can be equated to land theft because there was not consultation nor prior warning. White farmers just took the land and communities became tenants on the newly demarcated farms. The proposed expropriation is a remedy to the delayed redistribution of land. After restoration of their land, people would be able to build houses rather than be cramped in shacks.
- In support of expropriation of land without compensation, there were questions about how the State will determine NIL compensation. Therefore, this question must be addressed in the Constitution, especially providing for a framework on how the State could determine that compensation is NIL.
- Foreign nationals own large tracts of land in the Northern Cape. This should not be permitted under the proposed amendments. There must be equitable access to land by South Africans so that all citizens can enjoy the natural resources and wealth of South Africa, not only the white minority. Black people waited for 26 years and were no longer going to wait. The State must correct past mistakes by speeding up the process of amendments, the youth of South Africa have become impatient with the process.
- Emphasizing that Section 25 must not provide for compensation when the government is expropriating land for land reform purposes, some of the farm dwellers informed the Committee that they grew up on farms and farming is the only life they know. Expropriation must give them access to land and municipal services, it must give them opportunities own houses. Currently, farm dwellers are kept as labourers and displaced when they can no longer work. In similar vein, people of Rhythm City also spoke of the effects of displacement and poverty in informal settlements.

- Black female farmers in the NC, especially De Aar, started engaging with the resolution of the land needs in to 1993. Regrettably, to date there is no solution. The Amendment Bill must address both residential and farmland.
- Restitution and requirement of title deeds has been problematic for them because no one has proof of title to the land that has been in their generations for years. Some white farmers in the Northern Cape also do not have evidence of title deeds. Therefore, expropriation will solve landlessness in South Africa.
- Fast-track settlement of land claims. Some speakers alleged that government was in cahoots with the De Beers mine owners to ensure that land claims were not resolved by restoring land to claimants. Therefore, expropriation of land without compensation will resolve this matter. Parliament must run an enquiry of land claims involving mining companies on settled claims in order to unearth corruption in those settlement deals.
- There were allegations of corruption in municipalities especially in allocation of land. Speakers submitted that Parliament must intervene to end corruption involved in the administration of land and allocation of houses to the people needs serious intervention.
- Government issue permits to private multi-national companies such as De Beers to mine and leave the mining communities without services. There were also concerns raised by the artisan miners and requested government intervention. These mines must be expropriated and be transferred to communities. Government must support mineworkers because miners are contributing to the economy and they would like the government to come back to attend to some of their challenges on the mines in the area. The devastation that closed mines have caused must be looked at because they left communities in very bad socio-economic conditions of immense poverty.
- The Northern Cape House of Traditional Leaders submitted that communal land must be protected regardless of the changes to section 25 of the Constitution. In support of expropriation, any communal land owned by government ought to be transferred to Traditional Leaders. They further submitted that Chapter 12 must be amended to clearly define the roles and functions of traditional leaders.
- If expropriation of land without compensation is a crime, so is keeping the disadvantaged people landless, resulting in all sorts of social ills and an impediment to social cohesion. Black people cannot be denied land ownership opportunities for the rest of their lives.
- The South African Land Restitution Forum supports the amendment bill. The challenge is that government gives land but not support for development. Agri-SETAs were not active in the area. If expropriation of land and accelerated redistribution was to be successful, there must be support of beneficiaries.
- There high rate of youth unemployment whereas land in white hands is lying fallow. Landlessness and social disorder in townships, drug abuse are a major problem because



people are unemployed and lack space. There is a need to give land to the people to ensure employment for the young people. The speaker said that the land matter must be sorted and the law should not permit one person to own more than two pieces of land. There needs to be limitation of hectares per owner.

### **5.8.2 A case to reject the Amendment Bill**

Land redistribution, according to the speakers who opposed the Bill, was a necessary programme for South Africa whose history is characterised by racially-based system of land dispossession. However, constitutional amendments were unnecessary and was not a solution to the challenges facing South Africa. Arguments advanced to reject the Amendment Bill and oppose any attempt to expropriate land without compensation be summarised as follows:

- The process the Ad Hoc Committee was facilitating provided an opportunity to address the challenges of land reform which could be addressed by the amendment of section 25. There was no room for failure in the process of amending Section 25 which is an extremely emotive matter because it deals with property. The process creates uncertainty in the value of land and investment on the land.
- There is a need for protection property rights under Section 25, if not protected nobody can invest in South Africa and create wealth that boosts economy and employment. All South Africans must be given access to property rights as currently provided for in the Constitution. The uncertainty of the process is quite astounding and the effects will be felt for generations.
- Whilst there is a need to redress the discrimination that occurred in the past, expropriation of land without compensation was not the solution to the problem. People must be given opportunities to transform and let those who work the land gain the experience needed. A process of transformation, as is currently provided is something that will broaden our horizons. There must be correction of the wrongs of the past by addressing corruption but not taking away people's hard earned property investments for nil compensation as this would not be a fair and just practice.
- Expropriation does not equate to sustainable land reform. The proposed draft bill is regrettable and not the best way to address land reform. It would destroy the South African economy if passed into law. Land that is already available to the government needs to be developed in order to make south Africa work. The Amendment Bill will not achieve the desired result.
- South Africa is member of the United Nations and needs to observe international laws as we are bound to abide by international statutes to which we are signatories. The expropriation cannot mean that people's homes can be taken without compensation. The Executive cannot be trusted to decide on expropriation and ownership of property.
- Land reform must be accelerated. People need title deeds to their property when allocated. The focus of this amendment takes the law away from the courts and gives it

to the Executive and this not right. If the Constitution is changed, now then the next government can change it again. The law must give citizens certainty, this is not the case, and therefore she does not support the amendment.

- A male member of the community, Ori Sons, spoke on section 25(4) on the financial implications this amendment for the state, saying that the state is going to take the land for free, but what is this section in relation to.
- Amendment to the Bill of Rights, the cornerstone of South Africa's democracy will possibly make South Africa a failed state. What South Africa needs is a corruption-free programme of land reform. Amendment of section will lead to economic instability.
- Parliament must, in the process of the amendment of section 25, ensure that it protects the country's economy. Weakening property rights will negatively impact the international rates for imports and exports. Further, the Banks will not grant loans to those wanting to start up farming if the price of land is nil when this law is passed.
- Organised farmers submitted that amendment of section 25 will affect the value of land, economic growth, job creation and will destroy farming communities. However, sustainable land reform must take place in order to not to destroy the economy of the rural areas and submitted that amendment bill, if passed into law, will destroy food security. Instead of amendment of section 25, Parliament, organised agriculture and other stakeholders must find a solution to the land question.
- The amendment of section 25 and state ownership of land will lead to more corruption, if one was to consider all the corruption exposed during the Zondo Commission of Inquiry. The State cannot be trusted with custodianship of all the land. People should have their full property rights held in existing title deeds protected.
- Section 25 does not only speak of land but also speaks of property and that people's houses will be affected. The speaker expressed the view that people need to be aware that they will not get land but the government will be custodian of all land.
- People bought their houses and farms, and paid for them. It is unfair for the government to just pass a law that allows people's property to be expropriated without compensation. There is enough of the state land and land in the open market to allocate to emerging farmers.
- Amending the Section 25 was not going to fix the wrongs of the past as there is enough land to be shared among the people. Farmers are not against land reform, government ought to communicate and negotiate ownership of the farm rather than just taking it without compensation. There needs to be a distinction between the need for housing and need for food security.

### 5.8.3 Proposed changes to the Amendments Bill

Specific suggestions to the Amendment Bill received by the Ad Hoc Committee are as follows:

The entire Section 25 must be overhauled to decolonise land ownership by introducing these clauses:

1. The State, including Parliament, Executive and Judiciary, carry an obligation to redress imbalances of the past through enactment of laws that will achieve redress and equitably redistributive all resources.
2. Property may be expropriated without compensation only
  - (a) in terms of law of general application, or
  - (b) a public purpose or in the public interest.

Remove sub-section 3 and replace with:

3. The State should be the custodian of all South Africa's natural resources, inclusive of land, mineral resources and water, and relevant legislation should be passed to clearly define and contextualise State custodianship of natural resources.
4. For the purpose of this section,
  - (a) the public interest includes the nation's commitment to land reform to bring about equitable access to all South Africa's natural resources.
  - (b) property is not limited to land
5. The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
7. Remove sub-section 7
8. No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of Section 36(1).
9. Parliament must enact the legislation referred to in subsection 6.

The other dominant views expressed by many members recognised that willing buyer willing seller has failed and that expropriation of land without compensation is a just and equitable

process to bring about socio-economic transformation in South Africa. They suggested that Sections 1,4,5,6 and 7 of the Constitution must not be changed.

They suggested the following changes to Section 25.

- In sub-section (2), the Committee must add a new (c) to read as follows:  
  
(2)(c) (i) subject to without compensation or nil compensation under conditions laid out in a law of general application.
- Expropriation without compensation must remain with the Executive to avoid long process of going to court. In anyway, an individual has a right to go to court for review of the Executive decision around expropriation if necessary.

Sub-section (3) add at the start of the sub section “Where compensation is payable”. So it will be as follows:

(3) Where compensation is payable, the amount of the compensation and the time and manner of payment must be just and equitable...

- Section 25(4) to remain as it is because property is not limited to land. It can include other things such as water. Similarly, Section 25 (5) and (6) must remain unchanged. Section 26(7) must not be changed however, there is a need to look at policy in relation to broader land redistribution.
- Section 25 (8) must be amended to insert, after “this section”, including the payment of compensation”

#### **5.8.4 Issues that transcends the ambit of the of the purpose of the Public Hearings**

While the Ad Hoc Committee’s public hearings related to a specific mandate, some land reform and other related issues were raised that are relevant to the exercise of the oversight mandate of Parliament and relate to the work of other Portfolio Committees. Some of the issues for consideration by other Portfolio Committees include:

- *Recognition of Khoisan as the First Nation and their historical ownership of land:* Representatives of the Khoi and San communities raised concern that as the First Nation, they have been undermined in the process of land reform and their rights to land as indigenous people have been deprived, contravening the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, participation of indigenous people in this discussion before any changes or implementations of amendments that affect their historical ownership of land.
- *Service delivery:* Complaints of poor service delivery featured strongly during the public hearings. They indicated that they live in informal settlements where there are

no toilets, water, electricity or crèche facilities. These were most pronounced in De Aar and Upington areas.

- *High unemployment rate:* A significant number of participants highlighted the challenge of high unemployment among the youth. As a result, many unemployed young people have turned to drugs. There must agricultural support programmes to empower youth to produce food and support themselves.
- *Land for human settlements:* The increasing need for land for housing featured strongly in the public hearings. There were complaints that Black people are living in informal settlements or small RDP houses with big families. Informal settlements are overcrowded because of landlessness. There were allegations of corruption by municipal officials allocating low cost houses and land for human settlement.
- *Ill-treatment of farmworkers/dwellers:* It was highlighted by some participants that farm dwellers live under poor conditions on farms. Farmworkers are displaced, after working for their entire life on farms. They find themselves landless. There is a challenge of evictions on farms.
- *Land claim challenges and farmer Support:* Some speakers raised challenges with the land claim process and some indicated that there is a need for Government to support land reform beneficiaries.
- *Mining and mining communities:* The effect of closed mines on communities on communities is negative. Further, there were requests for support of female miners and artisanal miners.

## 5.9 Western Cape

Of the 191 oral submissions made in the Western Cape, the majority of submissions supported the Amendment Bill, i.e. 146, while 13 did not support it. A total of 32 people, whilst indicating the necessity of the redressing the unequal property relations in South Africa did not indicate whether they supported or did not support the Bill.

### 5.9.1 A case for the Amendment Bill

The question of amendment of Section 25 of the Constitution is long overdue according to speakers that addressed the Ad Hoc Committee. Most of them has anticipated that the hearings would be talking about implementation of the amendments. They never expected that Parliament would be coming back. However, there were those who expressed confidence in the process and the fact that Parliament is running an inclusive process where the people are central to decision-making in terms of how the amendments should look like.

Arguments advanced in support of the Amendment Bill can be summarised as follows:

- There is an urgent need to address the colonial and apartheid legacy of skewed patterns of land ownership that resulted in racially-based land policies and centuries of dispossession and deprivation of black people. Land was forcefully taken from black people without compensation and consultation. As one of the speakers put it: “There is no need to pay or compensate people for a stolen property. There is no need for consultation. Government must give us back the land of our forefathers and not ask us to explain ourselves”.
- Land redistribution, envisaged in Section 25, was meant to disrupt this land injustice that continues to-date. However, the willing-buyer willing seller approach in the acquisition of land, a purely market based system that failed to recognise the ‘just and equitable’ approach required in the Constitution failed to redistribute land at the pace and scale that the majority of the people of South Africa anticipated.
- Lack of expropriation of land in the public interest meant that the perpetrators of land injustices who had already forcefully taken 72% of the entire land of South Africa for themselves stayed securely protected on land that was acquired through an unjust process and generating wealth for their descendants. Some speakers have regarded that process as “colonial and apartheid land theft” which requires redress without delay.
- The idea that the Constitution starts by saying “No one may be deprived of property is problematic in the sense that it treats the oppressor and the oppressed equally. It should not have been the case because the playing field had not been levelled yet. The dispossessor and the dispossessed could not be treated equally if South Africa was to achieve redress. Expropriation without compensation can be the only solution to the slow process of redress of land injustices of the past.

- A minority, including foreign nationals, continue to hold on to vast tracts of land, some even owing multiple properties, whilst a majority of South Africans live in inhumane conditions and poverty because of racially based system of deprivation of property, hence persistent landlessness. So, there is evidence that the market-based system has not worked to accelerate the pace of land redistribution. The state must decolonise land relations in South Africa.
- Acceleration of redistribution of land through expropriation without compensation is necessary for the restoration of dignity of black persons and promotion of socio-economic transformation. The need to address the historical imbalance caused by the allocation of land along racial lines, through legislation and other policy measures, dating back to colonial times. Government must accelerate land reform and agrarian transformation without any constitutional or legal impediment. Expropriation of land is a just and equitable process to restore land to its rightful owners, thus restoring their dignity too.
- Some speakers, in advancing why land should be expropriated and how the Amendment bill should look like, emphasised a need for land to be equitably distributed among South Africans. For that reason, they suggested the State should take custodianship of all land so that it can allocate it equitably among South Africans. Equitable allocation must consider the needs and aspirations of South African citizens. For example, people in informal settlements, farmworkers and farm dwellers and the poor need to be prioritised. In the Western Cape, people from Breede Valley and Cape Winelands Districts highlighted the plight of farmworkers and those living in informal settlements. Allocation of land was seen as one of the solutions that could unlock opportunities to address their current challenges (e.g. joblessness, hunger, lack of housing, tenure insecurity, better living conditions, and access to basic services).
- Some argued that government cannot be trusted to own farms because of corruption and nepotism. For example, some emerging farmers who addressed the delegation in Mossel Bay relayed how government officials were denying them opportunities to farm, even after training them. The land they occupy was earmarked to be taken away from them. As a result, they did not trust the State could administer land in a fair and transparent manner.
- There is high demand for land for different purposes (ploughing, grazing, housing and business) for Black people, which makes it necessary for Government to accelerate its land reform and transformation project without any constitutional or legal impediments.
- Expropriation of land without compensation must be accompanied by secure forms of tenure to new land owners. Further, government must remove barriers to entry into the agricultural economy, specifically the established value-chains, in order to improve food production and security.
- Representatives of diverse groups of Khoi and San and other indigenous people, referring to themselves as First Nation of South Africa, supported expropriation of land

without compensation to address their plight as a distinct group. They argued that land policies and laws, including the proposed amendment marginalises them. They requested that expropriation must be implemented with recognition that South Africa is their land. They argued for recognition of their language and a need for representation in Parliament and higher structures of South African state. Their land claims, predating 1913, have not been dealt with. Therefore, any constitutional amendment that fails to recognise their dispossession since 1652 will not bring justice to their issues.

### 5.9.2 A case against the Amendment Bill

Few oral submissions made against expropriation of land without compensation highlighted the significance of redressing the colonial and apartheid land injustices. Land redistribution, according to the speakers, was a necessary programme for South Africa whose history is characterised by racially-based system of land dispossession. However, constitutional amendments were unnecessary and was not a solution to the challenges facing South Africa. Arguments advanced to reject the Amendment Bill and oppose any attempt to expropriate land without compensation be summarised as follows:

- Expropriation is a phenomenon that is practiced by governments across the world. Where it takes place, governments provide market-related compensation for the loss incurred. However, the proposed amendments to the Constitution to allow for the State to expropriate land without compensation is problematic in many ways. Firstly, it is an outright theft of property from people that worked hard and invested in their own properties; secondly, it appears that the programme excludes minorities, it is perceived to be biased against Indians, Coloureds, Whites; and it can lead to destruction of an economy that is already battling the effects of ‘COVID-19 lockdown regulations’.
- The protection of private property rights is entrenched in the Bill of Rights, and expropriation of property undermines the Bill of rights and is immoral. The entrenched protection of private property rights in the Bill of Rights, and any suggested amendment to expropriate without compensation would threaten the existing constitutional architecture.
- One of the critical areas that the Ad Hoc Committee, as it relates to this Bill, must critically engage with the unintended consequences of this Bill to the economy, trade and investment, and on food security. Its effects on the banking sector, where over a R1 billion has been lent in the open market could be devastating, as some have argued. When government expropriate bonded properties, how is it going to address this matter and how will the banks continue to function under these circumstances. If the banking sector collapses, the effect on the poor who are reliant on industries that survive through bank loans, including the agricultural sector, will be devastating and could lead to poverty.
- Apart from equating expropriation of land without compensation to theft, some speakers emphasised the moral question of depriving someone of his or her own property on expropriated land as a fundamentally flawed position, and it is unthinkable



in modern democracies. A speaker in Mosselbay told the Ad Hoc Committee that “This amendment is theft, it is like a virus, it leads to distress, worry and fear”.

- Expropriation of land without compensation is not a solution to challenges confronting land reform. The diagnosis of the problem is found in the HLP report which shows that South African programme of land reform is riddled with corruption and incompetence in the state agencies responsible for the redistribution of land. For example, with the land restitution claims settled to date, it is reported that 90% of claimants opted for cash compensation rather than land restoration. Further, more than R50 billions of taxpayers’ money have been spent with negligible impact on the socio-economic conditions of beneficiaries. Furthermore, the claims were in respect of urban as opposed to rural land.
- The Constitution is very clear on these matters; the state can expropriate. It provides mechanisms for restitution and redistribution to address the historical injustice. The problem is not the Constitution but government that had no will to implement the Constitution. What is important is to give farmers the title deeds and support them. There is thus no need to amend the Constitution. The problem is the current Government, which fails to implement laws and does not provide support to land reform beneficiaries. Expropriation without compensation is used for political purposes to hide Government inefficiencies in dealing with land reform.
- What is the purpose of expropriation of land without compensation? And what land is going to be targeted for expropriation? Some speakers questioned the purpose of expropriation of land without compensation, suggesting that Black South Africans do not want farmland, but they want to live in cities. They made reference to the fact that about 90% of land claimants have opted for financial compensation as opposed to land. Therefore, land redistribution program must address those land needs rather than wholesale expropriation of land without compensation.

### **5.9.3 Specific Proposals to the Amendments Bill**

Specific suggestions to the Amendment Bill received by the Ad Hoc Committee are as follows:

One dominant group of members of public whose inputs were closely linked suggested that –

The entire Section 25 must be overhauled to decolonise land ownership by introducing these clauses:

1. The State, including Parliament, Executive and Judiciary, carry an obligation to redress imbalances of the past through enactment of laws that will achieve redress and equitably redistributive all resources.
2. Property may be expropriated without compensation only in terms of law of general application, or a public purpose or in the public interest.

Remove sub-section 3 and replace with:

3. The State should be the custodian of all South Africa's natural resources, inclusive of land, mineral resources and water, and relevant legislation should be passed to clearly define and contextualise State custodianship of natural resources.
4. For the purpose of this section, the public interest includes the nation's commitment to land reform to bring about equitable access to all South Africa's natural resources.
5. Property is not limited to land, the State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
7. Remove sub-section 7
8. No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of Section 36(1).
9. Parliament must enact the legislation referred to in subsection 6.

The other dominant view was expressed by a number of speakers whose submissions could be closely linked. They recognise that willing buyer willing seller has failed and that expropriation of land without compensation is a just and equitable process to bring about socio-economic transformation in South Africa. They suggested that Sections 1,4,5,6 and 7 of the Constitution must not be changed.

They suggested the following changes to Section 25.

In sub-section (2), the Committee must add a new (c) to read as follows:

(2)(c (i) subject to without compensation or nil compensation under conditions laid out in a law of general application.

- Expropriation without compensation must remain with the Executive to avoid long process of going to court. In anyway, an individual has a right to go to court for review of the Executive decision around expropriation if necessary.
- Sub-section (3) add at the start of the sub section “Where compensation is payable”. So it will be as follows:

(3) Where compensation is payable, the amount of the compensation and the time and manner of payment must be just and equitable...

- Section 25(4) to remain as it is because property is not limited to land. It can include other things such as water. Similarly, Section 25 (5) and (6) must remain unchanged. Section 26(7) must not be changed however, there is a need to look at policy in relation to broader land redistribution.
- Section 25 (8) must be amended to insert, after “this section”, including the payment of compensation”

#### **5.9.4 Issues that transcend the ambit of the purpose of the Public Hearings**

While the Ad Hoc Committee’s public hearings related to a specific mandate, some land reform and other related issues were raised that are relevant to the exercise of the oversight mandate of Parliament and relate to the work of other Portfolio Committees. Some of the issues for consideration by other Portfolio Committees include:

- *Recognition of Khoisan as the First Nation and their historical ownership of land:* Representatives of the Khoi and San communities raised concern that as the First Nation, they have been undermined in the process of land reform and their rights to land as indigenous people have been deprived, contravening the United Nations Declaration on the Rights of Indigenous Peoples. They referred to a requirement for prior or informed consent under the said treaties. Therefore, participation of indigenous people in this discussion before any changes or implementations of amendments that affect their historical ownership of land.
- *Service delivery:* Complaints of poor service delivery featured strongly during the public hearings, more pronounced by speakers from De Doorns. They indicated that they live in informal settlements where there are no toilets, water, electricity or crèche facilities. They also expressed concern about illegal electricity wires that are running on the ground, which is dangerous for their children. These participants alleged that

they did not receive assistance from the local councillor because they were not members of the DA.

- *High unemployment rate:* A significant number of participants highlighted the challenge of high unemployment among the youth. As a result, many unemployed young people have turned to drugs. Allegations were made that those in power take advantage of the people's desperation for jobs. For example, people in De Doorns are asked to pay R150 for a job application. There was also an allegation that there is a preference for foreign nationals with regard to job offers.
- *Land for houses:* The increasing need for land for housing featured strongly in the public hearings. There were complaints that Black people are living in informal settlements or small RDP houses with big families while White people stay in big houses with small families. It was also mentioned that Black people do not have a space to extend their small houses. A case of residents illegally occupying and building shacks on land that was meant for a crèche in Zwelethemba was highlighted as an example that illustrates the high demand for land for housing in the area.
- *Access to land for grazing:* A significant number of participants indicated a great need for grazing land, especially in Zwelethemba. They complained that they are farmers without land and that their livestock is roaming the streets and are being impounded by the Municipality. They have to pay steep fees when their livestock is impounded.
- *Access to forest:* A representative of the Rastafarians raised concern that Rastafarians and traditional healers are denied access to forests by SANPARKS. This impacts their ability to get herbs they use for traditional medicine and therefore they are not able to carry out their profession and fully practice their traditional beliefs and customs.
- *Ill-treatment of Farmworkers/dwellers:* It was highlighted by some participants that farm dwellers live under poor conditions on farms, especially in De Doorns. In addition, farmworkers/dwellers are treated differently based on racial lines, with the Coloured workers treated better compared to African farmworkers.
- *Land claim challenges and Farmer Support:* Some speakers raised challenges with the land claim process and some indicated that there is a need for Government to support land reform beneficiaries. In particular, the case was highlighted of women who received land and were provided with training in Stellenbosch by the former Department of Rural Development and Land Reform but whose farm was not productive and in need of fencing. An appeal was also made to Government to support land reform beneficiaries, including marketing of their products in big retail shops, such as Shoprite and Pick 'n Pay.
- *Cultural practices:* The thrust of the submissions from traditional leaders related to availability of land for cultural practices. One traditional chief gave an example of payments being made to landowners for R5 000 per hut, for the initiates who go to initiation schools during the June and December holidays.

## **6. Conclusion**

This report captures the views of the public with regards to the amendment of the section 25 of the Constitution. The views presented here will assist the Members of the committee in their deliberations on the clauses of the Bill to amend section 25 of the Constitution.

## CHAPTER 4 ORAL SUBMISSIONS

### 1. INTRODUCTION

The committee took a decision to allow for organizations who have indicated an interest to make oral presentations to the committee as part of the public participation process. As part of this decision, the committee also decided to approach relevant departments to the issues related to land to provide their views in line with National Assembly Rule 275(b).

The organizations must have submitted their written submissions to the committee during the call for public submissions on the bill. The concerned organizations were identified from the list of submissions by both the support team and Members of the committee as everyone had access to the written submissions.

The following organizations made oral presentations to the committee:

**Table 4.1: Name of Organizations and Dates of Presentations**

Number	Name of Organization	Date of Presentation
1	SAKELiga	24 March 2021
2	Congress of South African Trade Union (COSATU)	24 March 2021
3	SA Property Owners Association	24 March 2021
4	Helen Suzman Foundation	24 March 2021
5	AgriSA	24 March 2021
6	Black Management Forum	24 March 2021
7	Land and Accountability Research Centre (LARC)	25 March 2021
8	Council for the Advancement of the South African Constitution - CASAC	25 March 2021
9	The Catholic Church	25 March 2021
10	AfriForum	25 March 2021
11	Black Land First (BLF)	25 March 2021
12	Freedom of Religion South Africa	25 March 2021
13	Banking Association of South Africa (BASA)	25 March 2021
14	National House of Traditional Leaders (NHTL)	25 March 2021
15	Ndifuna Ukwazi	25 March 2021
16	Legal Resources Centre	25 March 2021

The committee met on the 24<sup>th</sup>, 25<sup>th</sup>, 31<sup>st</sup> March and 09<sup>th</sup> April 2021 in order to receive oral presentations from the identified organizations and relevant departments.

The presenters were given an opportunity to make presentations to the committee on the 24<sup>th</sup> and 25<sup>th</sup> March 2021. Arrangements were made for the presenters to present before the committee i.e. informed of the invite to present before the committee and they responded

favourably to the invitation. As the Ad hoc committee on s25 oral submissions were held virtually, the link to the meetings were sent to presenters on time.

The presenters were provided with the opportunity to make their oral submissions to the committee on the concerned dates. This reports thus presents the views of the presenters representing various organizations who had expressed their interest to make oral submissions on the bill amending s25 of the Constitution.

With regards to the relevant departments, the following departments were identified and presented as follows:

**Table 4.2: Presentations by Departments and Dates**

Number	Department	Date of Presentation
1	Minerals and Energy	25 March 2021
2	Agriculture, Land Reform and Rural Development	31 March 2021
3	Public Works and Infrastructure	09 April 2021
4	Justice and Constitutional Development	09 April 2021

## **2. ORAL PRESENTATIONS: ORGANIZATIONS**

The following organizations made oral presentations to the committee on the Eighteenth Constitution Amendment Bill.

### **2.1 SakeLiga Business Foundation**

The presenter argued that an essential requirement for the amendment of the Constitution is that amendments must be in accordance with the deeper principles of constitutionalism, such as respect for private property as a cornerstone of civil society. Put differently, the Constitution cannot be amended arbitrarily.

Furthermore, the 18<sup>th</sup> Constitutional Amendment bill proposes confiscation of property and is against constitutionalism. It was submitted that confiscation is the type of legal action that needs to be accompanied with compensation that is over and above market value.

Another view was that of legal fraud, where compensation was provided for at nil Rand but it had the same effect as confiscation.

SAKELIGA submitted that it does not accept the changes proposed in the 18<sup>th</sup> Constitution Amendment Bill as its passing will have the effect of dismantling the constitutional order of South Africa.

Upon exploration of the arguments put forward by the organization, the presenter argued that this amendment will fundamentally go against constitutional values, namely the protection of the right to property and suggested that the Committee consider the use of the term Asset forfeiture instead as that is what the bill will give effect to if passed into law.

## **2.2 Congress of South African Trade Unions (COSATU)**

COSATU made its oral submission in support of the 18<sup>th</sup> Constitutional Amendment Bill, due to South Africa still being amongst the most unequal nations in the world and the failure of land reform programmes since 1994.

It was submitted that the need for this bill comes out of the apartheid legacy where millions of people are still denied access to land. Many people are living in informal settlements, and the majority of land ownership is to-date dominated by White males.

Furthermore, that the majority of previously marginalised South Africans who were wrongfully dispossessed did not adequately receive recourse for the land and property injustices of the past and therefore the State can no longer put off the resolution of the land crises.

This bill provides a balance for the explicit provision of the resolution of the land question and many of the critics need to rather engage with the modalities that will emerge from the Expropriation Bill in order to contribute to peaceful and constructive ways to pass the will of the people into law.

In response to a questions about the best way to address the moral injustices of the past, the organization submitted that this amendment is a tool to advance land reform to expropriate unoccupied State land more effectively. Furthermore, this amendment bill is an opportunity for the government to address land reform in an amicable way.

## **2.3 South African Property Owners Association (SAPOA)**

SAPOA submitted that it was unnecessary to amend the constitution to achieve the desired effect as land expropriation without compensation is currently provided for in the Constitution.

The need for this constitutional amendment was not clear as the expropriation of land without compensation was provided for in the Constitution albeit implicitly. If this bill was being passed, it would result in a need for further amendment to the Expropriation Bill current before another committee of Parliament.

It would be difficult to identify the circumstances under which nil compensation would be permissible. The burden of proof should be placed on the expropriating authority and should not be left as administrative decisions and that was something a judge in a court of law should rule on. The presenter argued that the amendment must not be done in the Constitution but that it must be done in alternative subordinate legislation.

The submitter further submitted that there would be an undesirable drop in property prices and loss of investments if the 18<sup>th</sup> Constitution Amendment Bill would be passed into law.

In answering a question around the presenter's happiness with the status of access to land for the majority of South Africans, the presenter responded that there was a need for land reform but that does not entail a constitutional amendment of the property clause in the manner proposed.



The Committee noted that the presenter did not address the colonial acquisition of land by a majority of white beneficiaries of apartheid who were in the minority in terms of the country's landless black demographic. The presenter submitted that there are two schools of thought that this amendment was necessary because for one the wording of section 25 as is implicit and not as explicit as it needed to be, and the second view being that the lack of explicitness of the provision for expropriation without compensation did not necessitate an amendment of the constitution.

#### **2.4 Helen Suzman Foundation**

The presenter put land reform questions before the Committee for its consideration in its presentation document as follows:

- How are decisions on expropriation going to be taken?
- What criteria are to be applied in these decisions?
- Who are to be the beneficiaries and how will they be chosen?
- Will the process be transparent?
- Is post-settlement support to be provided to beneficiaries?
- What legal rights will beneficiaries have? Full legal title?
- Will a properly staffed and funded land reform agency manage the process in an efficient manner, in compliance with relevant legislation and regulations?
- Is there a political will to address these questions?
- Will the process be given sufficient certainty and predictability, to avoid a further shock to business and investor confidence?

The presenter emphasized that their view is not that the amendment should not be made but that, there is a need for legal certainty for investor's sake. The presenter made it clear that focusing on the amendment without answering the questions which arose from the need and effect of the amendment would not bring about a solution of the land question.

The presenter concluded the presentation by submitting that the lack of progress in land reform had nothing to do with the failure of the Constitution but due to lack of government action and corruption in the land reform processes.

#### **2.5 AgriSA**

The presenter submitted that they were a federation conglomerate of agricultural and corporate entities involved in the value chain of provincial retail suppliers. They claimed that they had been very visible and vocal in this debate and submitted that it was not politics that put food on the table but the agricultural sector.

The stance of Agri-SA was on the full protection of fundamental human rights to ensure food security. It was submitted that there were countries who protect and expend property rights.

Agri-SA submitted that the constitution is not the reason land reform had not progressed and therefore this constitutional amendment was not necessary. This amendment would send a negative signal to foreign and international investors and the country could not afford such. Comments on land audit done by Agri-sa and the productivity of the agricultural land

percentage has grown over time and this progress especially when considering that this was during a global pandemic.

The presenter presented that AgriSA did not take issue with land reform but were cautioning against how it was done. They concluded by stating that the constitution was based on restorative justice and not punishment of anyone for the wrongs of the past.

### **2.6 Black Management Forum (BMF)**

BMF supported the amendment bill, and would like it to be fast tracked so that the bill can be law. They also submitted that they would support the mechanisms and modalities which would give effect to the Expropriation Bill.

BMF was of the view that a Committee led by a relevant Minister on land matters needed to be formed with various stakeholders representing ordinary people on the ground with the support of experts on land and property matters.

The presenter argued that the loss of investors could not be an overwhelming concern at the expense of the living conditions of the landless people who wanted and had been promised access to land for decades.

The issue of food security should not be used as a scarecrow to delay the passing of this law because scores of Black people work the land, and the farmers who individually own more than 5 farms.

The principal of use it or lose it would apply where land had been allocated and not productively used.

Black experts on land, property and related legal matters need to be brought on board to capacitate the agricultural sector efficiently. In Vietnam, the economy was not adversely affected when land was expropriated without expropriation.

### **2.7 Land and Accountability Research Centre – UCT**

The Land and Accountability Research Centre (LARC) believed that the need for progress in the achievement of land reform to address continued injustices and relieve the desperation for land and security experienced by a majority of South Africans cannot be overstated. This view is rightly stated in the preamble of the bill.

Within the context of the Amendment Bill which aims to make “explicit that which is implicit” in the Constitution – so that an amount of nil compensation is explicitly stated as a legitimate option for land reform purposes, LARC submitted that:

The requirement, with the insertion of subsection (3A) in section 25 of the Constitution, that national legislation must set out the “specific circumstances” in which a court may determine that the compensation payable be nil, is likely to be an unconstitutional limitation of the power that the state has in terms of section 25, as it now stands, to constitutionally expropriate property for the purposes of land reform.

The Amendment Bill seeks to insert an additional proviso in section 25(2)(b), this stipulation – which is articulated in the intended subsection (3A) – provides that compensation can be determined to be nil where expropriation is for the purposes of land reform. However, this newly inserted subsection (3A) goes further than just ‘explicitly’ stating that compensation can be determined and confirmed as nil. In setting the constitutional parameters of expropriation with nil compensation, subsection (3A) requires that national legislation must set out the “*specific circumstances*” in which it may be determine that the amount of compensation is nil.

Furthermore, through the use of the phrase “specific circumstances” the ambit of the State’s power to expropriate with nil compensation for the purposes of land reform was seriously limited by the Constitution itself. Also was a court’s ability to exercise its constitutional function of adjudicating the provisions of the Constitution and carrying out the balancing act between the public interest and the interests of those affected by using the non-exhaustive list in subsection 3 of section 25 of the Constitution, this important function was effectively done away with.

The phrase “specific circumstances” when referring to when compensation can amount to nil constitutes an internal limitation of the rights and powers in section 25 as they relate to achieving land reform with the use of the State’s constitutional expropriation powers. This phrase, which seems to require an exhaustive list of circumstances in which the state can use its power to expropriate with nil compensation, unreasonably limits the mechanisms available to the state to effectively achieve land reform.

During the Constitutional Review process, LARC emphasised that one of the most important functions of section 25 was empowering the State to take action to promote land and related reforms that were aimed at reversing the injustices of our past. The Bill of Rights as well as the rest of the Constitution aimed to empower the State to enable it to achieve a society based on social justice and fundamental human rights. In South Africa’s context an important aspect of achieving that was to ensure that the State was sufficiently empowered to legitimately make significant interventions in South Africa’s existing distribution of wealth and property.

Land dispossession was at the centre of the injustices and indignities imposed on a majority of South Africans, achieving land reform was thus a fundamental aspect of beginning to create the society envisioned by our Constitution. It was therefore important to ensure the State had full access to the powers given to it by our Constitution which were necessary to achieve a society that recognised and sought to remedy the injustices of the past to ensure a brighter and dignified future for every South African.

But this current attempt at “making explicit that which is implicit in the Constitution” could severely curtail an important tool that the Constitution already made available to the State to achieve land reform. It was LARC’s contention that subsection (3A) would be an unconstitutional limitation of the power of the State to take necessary and constitutional steps to achieve land reform.

Continuing on the line of constitutional limitations, LARC argued that Section 25(1), and other provisions in the Constitution, already provided sufficient limitations on the State's power to expropriate. Section 25(1) provided a negative procedural right not to be arbitrarily deprived of property. The rest of section 25 articulated the procedures and positive rights that allowed for constitutionally compliant deprivation of property through amongst other things, requiring a law of general application and a balancing of rights and interests.

Before the current Expropriation Bill being considered by Parliament, no previous attempt had been made to articulate the state's post-apartheid powers of expropriation. The extent of the State's powers in terms of the Constitution, which LARC content already included the power to expropriate land with nil compensation, had never been articulated or tested. It was inappropriate to limit this power with an internal limitation as proposed by the current Amendment Bill. The Constitutional Court had made it clear that when giving content to constitutional rights and principles and the power of the State to give effect to those rights. A purposive and generous approach must be used to ensure that the aims of our constitutional project were achieved. When the state gave effect to a right in terms of legislation, it was able to legitimately limit that right through a law of general application in terms of section 36 of the Constitution. Section 36 was applicable to section 25 and thus an internal limitation in section 25 was not necessary.

Any limitation of the powers of the State to expropriate was better suited to being articulated in legislation, the reasonableness of which could be tested against sections 25 and 36 of the Constitution. Placing the limitation in the text of section 25 of the Constitution would prevent the testing of the ambit of this power and the development of a rich jurisprudence relating to what was "just and equitable" compensation looked like in varying contexts including when nil compensation would be "just and equitable".

LARC presented that starting from a narrow position in giving content to constitutional rights and powers when the objective was to give effect to those rights, was not a good idea. It eliminated the opportunity for any enabling legislation to use the full extent of State power currently available in terms of the Constitution. Put differently, a narrow empowering provision in the Constitution resulted in limited and restricted enabling legislation, less likely to serve the objects, spirit and purport of the Constitution. The Constitution should require that national legislation be passed that would not legalise arbitrary deprivation of property and that did not violate section 36 of the Constitution. What that legislation would look like needed to be left to Parliament to decide. If it decided that legislating a closed list of instances where expropriation with nil compensation was allowed, then Parliament could do that. As it had done with the current Expropriation Bill which was being drafted.

Leaving section 25 as was, allowed the legitimacy of Parliament's decisions in the Expropriation Bill to be tested against the standard of an appropriately empowering section 25, as well as the standard of "just and equitable" (including the non-exhaustive factors listed in section 25(3)) and reasonableness in terms of section 36 of the Constitution.

The intended subsection (3A) as it stands, with this internal limitation, would prevent any substantive enquiry into the reasonableness of nil compensation in circumstances that are not

part of the closed list. Doing so takes away opportunities to explore and develop what is constitutionally permissible.

## **2.8 Council for the Advancement of the South African Constitution (CASAC)**

The Council for the Advancement of the South African Constitution (CASAC) supported land reform, to alter the skewed land holding patterns in South Africa. CASAC believed that the history of land dispossession must be urgently addressed. Furthermore, CASAC noted that the assumption behind the proposed amendment was that the Constitution presently does not allow for expropriation with no compensation. This is an incorrect interpretation of the Constitution, argued the organization.

*The institutional re-organisation:* CASAC argued that the Commission responsible for restoration and restitution of land rights needed a new mandate and additional resources. It had failed to provide a proper institutional base for land reform.

*Focus on corruption and looting in land reform:* there were many indications that land had also become a site of corruption. Capture of the land reform programme by the elite presented a danger as great as the failure to distribute land to those who needed it the most.

The resolution of existing land claims in accordance with the order of the Constitutional Court in the matter of Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others (CCT40/15) [2019] ZACC 10; 2019 (5) BCLR 619 (CC); 2019 (6) SA 568 (CC).

A clear policy decision to focus on redistribution of land to those in need. While the restitution of land to those who were dispossessed remains important, it was now plain that land restitution would not resolve the shortage of land to those who needed it. The central challenge of the state was to shift its focus towards a framework for the redistribution of land based on need.

To affirm the centrality of the rule of law. No land reform programme could succeed if it was not based on the rule of law. There was a risk of the elite capture of the land reform programme to benefit state officials, politicians and those with access to funds.

The primary purpose behind section 25 was to transform property ownership patterns from the colonial and apartheid past to a future based on equality, dignity and freedom. Land ownership, however, was not the whole story. The manner in which the rights of occupiers, who had no rights of ownership, were regulated, was an important function of section 25. It was the primary constitutional function of the legislature to undo the legacies of dispossession. Because of the centrality of land dispossession in South Africa's history, section 25 was the primary instrument for the transformation of land rights.

- **Section 25 does not prevent expropriation with no compensation**

The expropriation of land is expressly mandated and allowed in the Constitution. Unlike during the days of apartheid, expropriation of land was not confined to State acquisition of land for

State use. Now land can be expropriated for general distribution to the public. This much was plain from section 25(2).

Much of the focus has been on the phrase “subject to compensation”. That had wrongly been interpreted to imply that compensation was compulsory for all instances of expropriation. CASAC submitted that the whole of section 25 must be placed in context to understand the compulsory nature of compensation.

Firstly, section 25 did not contain a right to property. Instead, it protected property holders against arbitrary seizures of their property. But if property was taken in terms of a law, and according to due process, that would not constitute an arbitrary taking of property. Secondly, any compensation payable must be “just and equitable”. In practice, however, that was contradicted by the government which had often paid market value for expropriation. Courts had also tended to prioritise market value above all other considerations in the Constitution. Thirdly, section 25(8) expressly provided that *“No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).”*

The Constitution recognised three forms of land reform, all three of which are designed to redress racial discrimination:

With the exception of *Msiza v Director-General for the Department of Rural Development and Land Reform and Others* (LCC133/2012) [2016] ZALCC 12; 2016 (5) SA 513 (LCC).

- Promotion of “equitable access” to land envisaged under ss 25(4) and (5) (**land redistribution**); to speedily assess contested restitution and labour tenant claims by significantly increasing the capacity of the Land Claims Court and the alternative dispute resolution mechanisms those statutes permit.

To provide the necessary pre- and post-restitution support to communities who were given land to ensure that they made effective and equitable use of the land.

To ensure that people – particularly in the former homelands – have secure tenure to their own land and were not subject to the whims of traditional leaders, or errant public servants.

- The provision of secure tenure under s 25(6) (**tenure reform**); and Restitution of land dispossessed after 19 June 1913 in terms of s 25(7) (**land restitution**).
- Land reform was often regarded as relating primarily to agricultural land. There was no reason why that should be the case. The idea of “*equitable access*” to land was not only about the amount of land that was owned by different race groups. It also related to where that land was owned. Measures that were designed, for example, to address apartheid urban geography should also qualify under s 25(8). For example, measures to

access land in inner cities to make them available to Black people who had historically been forced to live on the outskirts of cities could be justified under s 25(8).

It must also be accepted that reducing compensation and altering the manner in which it was determined were not, on their own, the answer to all issues regarding land reform. The State must still put in place the mechanisms to. Without these and other related reforms and investments, land reform would remain ineffective even with alternative compensation mechanisms. Allowing expropriation without any compensation was unlikely to be upheld by Courts as a default rule. However, it was possible to expropriate without compensation in limited circumstances.

CASAC proposed four possible circumstances where property could be expropriated without compensation:

- The land is abandoned or unused;
- The land is held purely for speculative purposes;
- The land is under-utilised and owned by public entities; and
- The land is actively farmed by labour tenants in the absence of a title deed holder.

CASAC believed that expropriation without compensation in these instances would be for the purpose of land reform and not for other public purposes such as the building of roads, dams and so on. Expropriation without compensation outside the land reform context was not justifiable. It was moreover doubtful whether expropriating that land alone would be sufficient to meet the demands for land reform. What might provide a far more effective way to achieve land reform was to combine expropriation without compensation in limited circumstances with limited compensation in other circumstances. The limits would relate to both the determination and the calculation of compensation.

### **Proviso in the Amendment Bill**

CASAC argues that the amendment was contained in a **proviso** to section 25(2)(b) which stated: “Provided that in accordance with subsection (4A) a court may, where land and any improvements thereon is expropriated for the purposes of land reform, determine that the amount of compensation is nil.” The proposed section means that a court may determine that in a particular case, land or improvements on land may be expropriated for nil compensation. In another proposed amendment (in subsection 4A) which enables national legislation to be passed to set out the instances where improvements to land may be expropriated with nil compensation.

There were some further ambiguities in the proposed amendment: assuming that land falls within the category identified in national legislation for expropriation with no compensation, how will a court determine if it should in fact be taken with no compensation? CASAC proposed that this should be answered by the formulation of “just and equitable” which was the centrepiece of section 25. So if land falls in a category identified by national legislation for compulsory taking with no compensation, a court must apply the formula of justice and equity to finally determine if it should in a specific instance be taken with no compensation.

The Constitution already draws a distinction between two separate acts. The act of expropriation and the decision to compensate the owner of expropriated property. The state retained the right to expropriate, subject to judicial review, but not the power to decide on compensation.

The power to decide whether compensation for expropriated land should be paid or not laid with the courts, not the government. The current formulation to section 25(2)(b) provided that any compensation to be paid to a property owner must either be agreed to “or decided or approved by a court.” CASAC submitted that, when read with section 1(c) – the rule of law – and section 34 – access to courts – section 25 must be construed as requiring the courts to determine just and equitable compensation in all instances where that was in dispute. Now the amendment would further entrench this by requiring courts also to decide whether or not compensation should be paid.

**In conclusion**, CASAC concludes that the final feature of the amendment was the importance of the rule of law and the centrality of courts as arbiters of disputes in society as entrenched in the Constitution. Not only is the law supreme, judicial pronouncements are final and binding on other organs of state. Thus the amendment affirms that notion. Thus, CASAC submitted that the rule of law is crucial to avoid arbitrary decision-making.

Another important element of the rule of law was the absence of wide Executive discretion. It noted that the amendment curtailed wide Executive discretion by leaving the contours of the law which may allow expropriation with no compensation to the legislature. The legislature will have to define: which land, for what payment, and for what purpose?

The true challenge of land reform still laid in the combination of weak and dysfunctional institutional structures, corrupt officials, greedy land owners, absence of a people-centred ethics in the political class and failures of the legislature to pass legislation, despite the obligation it had under the Constitution. Recently, the Constitutional Court, accepted that the failures in land reform must be placed squarely at the doors of the government, not the Constitution.

## **2.9 The Catholic Church**

The presenter appreciated and commended the Bill for allowance it made for the role of courts as arbiters on land related matters. However, expressed the need for clarity on expropriation of land without compensation where there has been developments on land after its acquisition for which there must compensation for those developments which would be determined by the Expropriation Bill.

The churches in South Africa are no longer significant land owners in term of land that can be nominated for expropriation without compensation.

The Members of the committee expressed their concern of the church being ambiguous about the land question when it was an issue perpetuated by a crime against humanity. The presenter noted the Catholic Church was avoiding sloganeering and in cases of expropriation of land without compensation would be clearer and where it was not, so obvious the courts would rule on such matters. The Catholic Church was of the view that considering all the circumstances



was a broader view and a more reconcilable way of reasonably approaching the land question. The Catholic Church did and/or had taken responsibility for the role it played for its historical deeds and asked for forgiveness during the Truth and Reconciliation Commission. The church would not choose sides on this topic, it was not a simple matter as it depended on the circumstances. The committee expressed that the Church was not ambiguous during colonialism, when land was dispossessed from African people. Furthermore, it could not be accepted that the church says that it apologised and cannot take a side, because it took sides and benefited past injustices. The church would not take a simplistic view in order to allow for constructive resolutions which followed due process.

Regarding a question on appeal processes, the Catholic Church replied that it was best for the courts to adjudicate all matters that require its involvement. Courts should be involved in the declaration of nil compensation from the inception of a claim and not allow administrators to decide and then get involved.

### **2.10 AfriForum**

AfriForum submitted that while the Bill declares that “there is a need for urgent and accelerated land reform in order to address the injustices of the past,” and that “the hunger for land amongst the dispossessed is palpable and the dispossessed are of the view that very little is being done to redress the skewed land ownership pattern,” all the available evidence points to the contrary. It put forward the following reasons in support its views opposing the Bill:

1. The vast majority of people in South Africa regard the need for land reform as a very low priority.
2. The so-called “hunger for land” is largely a myth – particularly with regard to rural or agricultural land. The hunger for title deeds for land that people are already living on does, however, exist with regard to millions of poor people (of whom the majority are black) who live on state-owned land, particularly in urban areas, and who do not have any property rights for the land that they live on.
3. People are in desperate need of responsible political leadership and economic stability – a state of affairs that is seriously threatened by the prospect of expropriation without compensation.
4. Government attempts at redistribution of land failed dismally, resulting in a loss of productivity and economic decline.
5. It is a well-documented fact – as is pointed out in more detail in the submission that follows – that South Africa

Section 25 of the Constitution sets out the parameters for state expropriation of property. Land and property are not synonymous. Land is a type of property, but it has been confirmed by our Constitutional Court that the term property refers to a range of other assets. Given the narrow scope of the enquiry before the committee, it would have been impermissible for it to recommend any changes to Section 25 of the Constitution that would alter the state’s current powers and obligations regarding the broad category of property. It only had the power to make recommendations about land.

Hanner Arens says the dependence on the labour of others gave the Boers their identity since it was dependant on natives for land to be worked. The presenter clarified that Hanner Arens would not want one totalitarian system with another, and conceded that that the Afrikaners made the mistaken of being dependent on the labour of Black African people for their sustainability. Therefore, the people cannot be dependent on the State if the state takes all the land it is the same thing.

The Committee expressed its concern that the AfriForum complained about the matter of land internationally even before the Committee sat and discussed the matter.

On the matter of land being taken illegally from its rightful owners, the presenter submitted that there were people who worked the land and earned, and were not beneficiaries of historical dispossession of land.

### **2.11 Black Land First (BLF)**

The presenter stated that the land matter needed to be resolved while posing a question on where land would be returned to the landless after this process. The presenter was of the view that the answer to the question was no, because the 80% of the land owned by White people will not be returned to the landless people, but will all become State owned land. However, the presenter made it clear that the land to be expropriated was unused land and had nothing to do with resolving the land ownership patterns in SA.

BLF suggested that the Portfolio Committee on Public Works should undergo its process of processing the Expropriation Bill after the Ad Hoc Committee work on section 25 was finalized because both the pieces of legislation speak to nil compensation. The Ad Hoc Committee should first complete this process and the Public Works Committee should proceed to detail the change of land ownership patterns in the country, instead of introducing the concept of nil compensation.

The presenter suggested enabling legislation which would state that all land in the hands of White people must be allocated to the landless Black people. The committee was urged to amend the Constitution by removing all clauses of section 25 and replace it with a law that will say all land belonging to White people must be given to landless Black people and then begin to process an Expropriation Bill to give effect to that.

### **Amendments were two-fold: Nil Compensation**

The “Draft Constitution Eighteenth Amendment Bill, 2019” indicated a strong resistance to land return without compensation. It firstly suggested the notion of “nil compensation” in the event that parties were amenable or if such nil compensation was determined by the courts. It secondly provided for legislation to be enacted to determine under what circumstances the “nil compensation” would apply. Here the Expropriation Bill published in December 2018, which refers to abandoned land, unproductive land, land laying fallow, abandoned buildings, and state land, was instructive as a guide in that respect. So all the unwanted land was what the land expropriation bill said would be expropriated - for which nil compensation would be paid.

BLF believed that the above indicated other circumstances where “nil compensation” won’t apply. To this end, where market value would apply. The memorandum attached to the Bill made it clear that “nil compensation” was but one of the options to be considered. The idea that the landless and land thieves can agree on no compensation is silly and an insult to Black people. If the idea of land donation by land thieves was viable, there would be no need for a land redistribution policy.

The idea suggested that there were land thieves out there waiting to give back land for nil compensation. Moreover, in the event that the matter was decided by the court, then “fair and equitable compensation” must apply - and it was already determined by the courts that the first consideration was that of market value.

### **On “just and equitable” compensation**

The fact was that the “Draft Constitution Eighteenth Amendment Bill, 2019” was not intended to realize land expropriation without compensation. The presenter described the bill as expropriation of land without land expropriation. And while the Bill says land expropriation without compensation, it actually failed to give the land expropriation without compensation. It was so because it did not deal with the big question of compensation.

Section 25 of the Constitution makes the provision that in any situation where you're going to take land or property, a person must pay what was “just an equitable compensation”. “Just an equitable compensation” was critical for Section 25. The bill did not deal with this issue of compensation. What it did, it provided for was “nil compensation” and an amendment to the Constitution that says under what circumstances there must be nil compensation.

The key question that rendered Section 25 a clause that legitimised land theft was the provision of “just and equitable compensation”, in all instances of land expropriation. Case law showed that in each case of expropriation, market related compensation was to be paid. Thus the whole argument on paying for stolen property turned on the phrase “just and equitable compensation. BLF advanced the view that the defenders of the status quo sold the lie that the Constitution as it stands made land expropriation without compensation possible. There was no truth to this back hand defence of land theft. As indicated above, the full bench of the Appellate Division has now settled the matter. It overturned the mild decision of Ngcukaitobi in the Msiza matter elaborated below and in fact decided that the market value be paid to land owners. That decision was made in September 2017, and no one is challenged the decision. Thus, a precedent had accordingly been set. So, to be truthful to the demand for land expropriation without compensation, criteria that clarified the meaning of “just and equitable compensation” so as to ensure no exchange of monetary compensation to land owners was important.

### **BLF proposal**

Repeal of Section 25 of the Constitution and the new land clause inserted as follows:

- a. All the land held by Whites in South Africa was stolen property.
- b. The primary purpose of the redistribution of land to the Black majority was for historical redress.
- c. All Black people had a right to land in South Africa without any payment.

- d. The eviction of farm workers and poor people from land was illegal (in this regard there must be an end to the strange distinction between legal and illegal evictions).
- e. A new department, which shall be called the Department of Land Redistribution, must be established. Its sole mandate shall be the redistribution of land. (Right now South Africa did not have a department that solely focuses on land redistribution).
- f. A process must be outlined where land ceilings shall be effected in accordance with the soil capacity of each of the regions and provinces.
- h. The value of mortgage bonds must be adjusted to a value that excluded land in determining housing price because land must be offered to all for free.
- i. Land occupation by the landless was lawful.
- j. That constitutionally determined targets be set and the responsible Minister be held accountable. To this end, BLF proposed that in the next five years 80% of the total land be redistributed to Black people".

Commenting on where BLF stood with regards to non-racialism; expropriation of land under the administration of Traditional Leadership in order to enable women access to land; and expropriation of land without compensation be applied to White South Africans, the presenter noted that all land must be confiscated or expropriated was all semantics. BLF was interested in the means by which the land would be returned to the people and not the State.

On what was meant by Black people was taken from Steve Biko and its Black people who are so called Coloured and Indians who are South Africans, all the people who were formerly oppressed and those who take a position of blackness.

## 2.12 Freedom of Religion South Africa

Freedom of Religion South Africa contended that Section 15 of the Constitution protects the fundamental right to religious freedom. Furthermore, Section 31(1) of the Constitution protects the right to practise one's faith in a community, a right which it expressly says one may not be denied. Also, Section 7(2) and 8(1) of the Constitution - the State is bound by the Bill of Rights, and has a duty to respect, protect, promote and fulfil the right of believers to meet together to practise their faith.

The organization stated its concern and opposition to the Bill on the following basis:

- No criteria included for consideration before expropriation without compensation could occur.
- No exceptions for land used for religious purposes.
- Unintended and potentially disastrous consequences, including the potential expropriation of church land / land used for religious purposes.

Thus, it recommended that:

1. The proposed sections of the Bill be more narrowly drafted: i.e. that a closed list of criteria for EWC be included in the Constitution itself;

*Alternatively,*

2. That a clause containing land which was exempt from expropriation without compensation be inserted. Here the organization specifically proposed: "*Land that is owned and used in connection with the exercise of the constitutional right to religious*

*freedom and the rights of religious communities, is hereby exempted from the applicability of section 25(2).*

### **2.13 Banking Association of South Africa (BASA)**

BASA acknowledged that the current land ownership and food production in SA was not sustainable due to uncorrected historical injustices. It accepted the draft bill as the outcomes of a democratic process and submitted that land reform can be done in legal and sustainable manner that did not affect property rights.

BASA presented that the arbitrary deprivation of land was not supported and there should be compensation for improvements and developments on land expropriated without compensation. The presenter was of the view that land reform needed to be undertaken in a legal manner that protected property rights.

Commenting on instances where compensation could be nil for expropriated land, BASA responded that the circumstances would be determined by the court, and where found to be nil compensation by a court of law, the banks would adhere to such a decision.

Answering a question on profits made by bank, BASA expressed its willingness and commitment to assist government in resolving the process of land reform and redistribution. Furthermore, it noted a 48% decline in profitability of all banks in South Africa during the current financial year and confirmed that the banks declared their profits every March. The presenter confirmed the existence of annual programmes designed to share profits with the marginalised.

On the number of houses repossessed by the banks, BASA committed to responding in writing. At the time of writing this report, it had not done so. Consequently, the required information was not included in the report.

### **2.14 National House of Traditional Leaders (NHTL)**

NHTL acknowledged the legacy of exclusion and marginalization from access to land by colonialism and apartheid resulted in the challenges of inequality, poverty and unemployment in South Africa, particularly rural areas.

Traditional leaders supported the amendment of section 25 of the Constitution to allow for expropriation of land without compensation. However, the expropriation of land without compensation should not cover the 13% of land owned by traditional communities and that land should be transferred through title deeds to traditional authorities.

NHTL submitted that section 3(a) be amended as follows”

“National legislation must, subject to subsection 2 and 3, set out specific circumstances where a member of the Executive Council may determine that the amount of compensation is nil, and the decision of the Executive Council may be reviewed by a court of law.”

The NHTL further proposed the amendment to section 25(1)(b) as follows”

“subject to compensation, the amount of which and the time and manner of payment which have been agreed to either by those who affected or decided or approved by the court: provided that the member of the Executive Council may, where land and any improvements thereon are expropriated for the purposes of land reform, determine the amount of compensation is nil”

The NHTL further proposed that the national legislation proposed in section 3(a) must remove the date of 1913 and replace it with the time that land was taken.

Commenting on questions around giving people in communal land title deeds; views on women and married females not being permitted to own land even land allocated to their husbands; best model for land ownership when the traditional leaders are in control of all communal land, NHTL suggested that land already given to Black people should not be tempered with. furthermore, there had been transformation and land was not given to unmarried people whether you are men or woman. Woman were not allocated land and there were women also in the leadership structures to ensure empowerment of women. The case where women were denied land can be dealt with on a case by case basis because it went against the process of the House of Traditional Leaders.

### **2.15 Ndifuna Ukwazi**

The organization supported expropriation of land with or without compensation as a means of achieving land reform and combating spatial inequality. Expropriation, if properly utilized, was one of the tools to broaden access to well-located urban land to people currently excluded from land markets, especially poor and working class residents.

South Africa is the most unequal country in the world, with inequality following racial, gender and spatial lines. One of the primary drivers of this structural inequality is the skewed pattern of land ownership and the acute shortage of well-located affordable housing in urban areas. The poor and working--class live further away from jobs, spend more of their limited resources and time on transport, and have fewer options to access healthcare, education and basic services on the outskirts of South African cities and towns.

Recent research has shown that there is a direct relationship between where people live in South African cities and the likelihood that they will find and maintain employment. Far flung townships and informal settlements therefore end up trapping the poor in a cycle of structural poverty.

The state’s failure to advance land reform in South Africa is mainly attributed to the failure to give effect to existing constitutional provisions that oblige the state to carry out land reform (sections 25(5) to 25(9) of the Constitution) and the plethora of laws, policies and programmes that seek to give effect to these provisions. The state has consistently struggled to properly prioritise, implement and monitor its land reform programmes. As former Deputy Chief Justice Dikgang Moseneke has stated, the South African land reform project has been “beset by bureaucratic inadequacies”.

The State’s failure to use its own land to champion land reform, particularly in the urban context also formed part of failure to implement land reform. The state, at national, provincial

and municipal levels, as well as state--owned enterprises own vast tracts of unused or underutilised land that could contribute substantially to land reform. However, the State had been reticent to release this land for the promotion of land reform and particularly the development of affordable housing. In fact, in recent years, Ndifuna Ukwazi has increasingly become aware of both municipal and provincial government disposals of strategically located public land through sale and/or lease. Releasing strategically located pieces of public land would send an unambiguous signal that the State was serious about land reform. However, to date, the state had not done that.

The Constitution had never presented a barrier to land reform. The constitutional property clause, particularly sections 25(5) to 25(9) provided the basis for progressive land reform programmes. Among the various constitutionally mandated measures, the Constitution allowed for the expropriation of land through a law of general application as a key policy tool for the advancement of land reform, provided that such expropriation was for a public purpose or in the public interest. Moreover, the State's power to expropriate was not dependent on the willingness of the land owner. Thus, the principle of "willing buyer, willing seller" did not appear in the text of the Constitution but was a self-imposed policy restriction of previous governments. Although the Constitution provided that the expropriation of land must take place against the payment of "just and equitable compensation", it was entirely possible that the factors listed in section 25(3) might mean that "just and equitable" compensation would be "well below market value, or as little as one rand".

Existing law already permitted the State to expropriate land for the purposes of land reform or spatial transformation. This power was expressly and implicitly provided for in a range of redistributive laws. For instance, the Expropriation Act 63 of 1975 ("the Expropriation Act") had always allowed for the possibility of the state expropriating land subject to compensation. Section 9(3) of the Housing Act 107 of 1997 ("the Housing Act") provided that a municipality might expropriate any land for a housing development if it was unable to purchase the land through an agreement with the owner. However, the State had rarely used these mechanisms in existing laws and policies to expropriate land.

Ndifuna Ukwazi broadly supported the Constitution Eighteenth Amendment Bill as an affirmation of the State's recognition of the importance of land reform to South Africa's ongoing project to address and reduce inequality. However, it was concerned that an amendment of the constitutional requirement to pay compensation in instances of expropriation (as set out in the draft amendment bill) to further land reform would not, by itself, speed up the processes of urban land reform and spatial transformation.

### **Specific Concerns with the Amendment Bill**

- *Maintain the core oversight role for the courts*

The current language of the Bill reserved an oversight role for the courts. However, Ndifuna Ukwazi was concerned about various comments about limiting the role of the courts in determining the amount of compensation in cases of expropriation for the purposes of land reform made by Members of Parliament (MPs) during the meetings of the Ad Hoc Committee.

The organization maintained that court oversight was essential and that it would be deeply problematic to give any Member of the Executive the primary oversight function in relation to determining in which circumstances compensation for expropriation could be nil. There were two key reasons why the primary power to determine compensation in cases of expropriation for land reform should vest in the judiciary and not in the executive.

- First, land reform and spatial transformation was not a political project that could be subjected to the priorities and/or policies of the government of the day. The courts are an independent and impartial branch of government and were therefore ideally suited to furthering a long-term land reform project. Courts should therefore retain oversight over compensation in the context of expropriations for the purposes of land reform.
- Second, limiting the role of the judiciary to a review function may, ironically, delay the land reform project more than giving the courts more wide-ranging powers to determine the amount of compensation or determine appeals. This is due to the fact that judicial review can only take place *after* an administrative decision has been taken (in this case the determination of the amount of compensation or lack of compensation in a case of expropriation) and all internal remedies have been exhausted. The effect would be that an official in the executive branch would make a decision, which could still be subject to judicial review which would already delay the process. The courts' oversight role is therefore essential to ensure accountability of the executive branch of government.

**National legislation should specify under which circumstances a court may determine that no compensation should be paid**

It was concerning that the state did not release national legislation, including guidelines, at the same time as the constitutional amendment as that could have encouraged more comprehensive and informed comments. The primary reason for this was that the impact of the constitutional amendment would be felt through the national legislation that aimed to give effect to the constitutional amendment.

The process presents further difficulties that relate to the well-established public law principle of subsidiarity. The subsidiarity principle means that a legal issue should where-ever possible first be determined with reference to more particular, indirect constitutional norms; before applying more general, direct constitutional norms. The principle therefore implied that it would be not be useful to apply more general direct constitutional norms where more specific non-constitutional norms can be applied to solve the legal question.

The same principle applies to national legislation that gives effect to a constitutional provision in this case, the law that would explicitly provide for guidelines and factors for the court to determine the amount of compensation paid for expropriation, including whether the payment should be nil. Much will depend on this national legislation. Without the national legislation on the circumstances when a court may determine that no compensation should be paid, it will jeopardise the public's ability to determine the full effects of the constitutional amendments.

For the reasons noted above, Ndifuna Ukwazi remained concerned that this national legislation has not been published for comment at the same time as the constitutional amendment. It



strongly urged Parliament to speedily proceed with the process of enacting the national legislation referred to in the constitutional amendment, before, alternatively simultaneously with this constitutional amendment. The national legislation was essential to provide much-needed guidance on how expropriation without compensation would be realised in practice.

## 2.16 Legal Resources Centre

### **The quest for land reform must remain an executive function**

The three wings of government were equally instrumental in delivering a system of democratic governance. They were all collectively inclusive yet all perform independent functions. With the proposed amending provisions, this provision was proposed:

*“3(A) National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil.”*

The provision appears amiss as it did not deal with the issue of what land can legally be expropriated on the basis of nil compensation as a means of land reform. We submit that the determination of compensable and non-compensable expropriation falls within the ambit of the President and the national executive as prescribed in the Constitution. Such determination can then be reduced to legislation which will then guide the courts. The submission was made on the basis that a clear assessment, guided by a collection of data, submissions, historical dispositions, and other credible sources that can inform the legislation that determines nil compensation that will be followed by the courts. Relegating an executive role to the judiciary would be a herculean task for the courts, in exercising a duty that did not form a judicial function. The courts provided meaning and justice to the law as determined by Parliament and ensure that legislation complies with the Bill of Rights.

Drawing lessons from other jurisdictions was important in determining the course South Africa should take in this task. They submitted that approaching land reform in a formally legal and structured way could avoid devastating experiences like those of Mexico and Russia where land reform was a result of revolutionary action. With legislation that guided courts, the desired equal and fair distribution could be achieved.

### **Categories of land and public interest examples where expropriation without compensation may be appropriate**

- **Labour tenants**

The initiative was extremely important to farm dwellers (labour tenants<sup>23</sup> and occupiers<sup>24</sup>), to landowners and to the country as a whole. Land reform, including tenure security and restitution, was of fundamental importance in addressing persistent patterns of inequality. It had significant implications for rural economies and the agricultural sector, both subsistence and commercial.

The Land Reform (Labour Tenants) Act No. 3 of 1996 (“LTA”) was enacted to give effect to the right in section 25(6) of the Constitution which guarantees those with insecure tenure the right “*to tenure which is legally secure or to comparable redress*”. The Act targeted labour tenants, some of the most vulnerable people in South Africa. It protected them from unlawful evictions, and allowed them to apply to the Director-General of Rural Development and Land Reform for rights over the land that they occupy, including ownership.

- **The history of the acquisition and use of the property**

It was important to state that in terms of sections 3(1) and 16(1) of the LTA, labour tenants are entitled to acquire the land that they were occupying and using on the 2 June 1995. Most labour tenants who have made applications for acquisition of land were still occupying and using the land that they were using on 2 June 1995 and before. This meant that most of the owners of land have never used the land occupied and used by labour tenants.

Furthermore, most of the land owners had acquired land through donations and inheritance. A small number of them had paid nominal purchase prices.

- **The current use of the property**

Almost all land occupied and used by labour tenants was used by land owners for agricultural purposes. Some were using land for stock farming, growing crops, and game farming. As such, the land occupied and used by labour tenants should be valued as agricultural land.

- **The market value of the property**

The simple question was whether the land occupied and used by labour tenants should be valued as agricultural land, or as land with the potential for other development. A related question was how the existence of the labour tenant claim should factor into the determination of market value.

There was always a possibility that property would be used for a purpose other than its current use. There would always be buyers who might be willing to pay more than other buyers because of the potential value they saw in a property if it was used differently. The question to answer was when those possible future uses converted into a different determination of market value.

### **Communal Land**

In terms of S25(6) of the Constitution, parliament must enact legislation that would provide security to “*a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices*”. Customary communal tenure is a prime example of such insecure tenure.

The insecurity of such tenure (pre-constitutionally) was at least twofold and entirely based on racial discrimination: on the one hand, the status of customary law as law and therefore as the source of ownership and other land rights was wholly undermined, while on the other, the prohibition on black common law ownership meant that communal land rights holders could never find security within a property regime that recognized common law private property only and protected it at all cost.

### **Implications of Gender in Land Expropriation without Compensation**

Black South African women, especially rural Black South African women, were especially vulnerable to poverty and disempowerment. As part of the colonial and imperial project that developed into apartheid, women's ties to land and their roles as landowners were diminished and erased. Colonial law makers excluded women from their understanding of customary law and understanding of land tenure when developing laws such as the *Black Administration Act 38 of 1927* and the *Native Land Act 27 of 1913*.<sup>39</sup> Customary laws and understandings of gender and land were distorted by this process that emphasized only patriarchal elements of indigenous South African customs and community structures.<sup>40</sup> Gradually legislation like the Natal Code of Zulu Law Proc R151 of 1987 codified and fossilized “*misconstructions of African life...without acknowledging the strong rights of wives to security of tenure and use of land.*”

It was recognized that patriarchal elements were present in customary social structures, but the colonial project almost entirely erased women from the understanding of land ownership.

The result of the above process was that Black women, especially rural women, were among the most vulnerable and impoverished in South Africa. Since 1994, only 5% of land was owned by Black South Africans, and most of that was held by men. Access to land represents access to financial security via means of production, access to food security and access to shelter.

### **3. ORAL PRESENTATIONS: RELEVANT DEPARTMENTS**

In line with National Assembly Rule 275, the committee is required to give relevant departments an opportunity to make submissions on the Bill. Various departments were invited to make oral submissions to the committee on the 18<sup>th</sup> Constitution Amendment Bill. Thus, the following section of the report reflects the views of various and relevant departments on the 18<sup>th</sup> Constitution Amendment Bill.

#### **3.1 Department of Public Works and Infrastructure**

The presenter indicated the right of a government to expropriate private property for public use as a worldwide practice (called Eminent Domain in the USA; Expropriation in South Africa). Currently in South Africa, Expropriation occurs under the 1975 Apartheid-era Expropriation Act.

Furthermore, the 2019 Final Report on Presidential Advisory Panel on Land Reform and Agriculture, determined that the current Expropriation Act 63 of 1975 should be urgently repealed as it is not aligned to the Constitution. Thus, the purpose of the Expropriation Bill 2020 was to align legislation with the Constitution and replaced the Expropriation Act 63 of 1975.

Also, the Presidential Advisory Panel stated:

“The panel draws attention to the continued use of the Expropriation Act 63 of 1975. As this Act precedes the 1996 Constitution of South Africa, its use did not align with the transformative mandate of the Constitution...the panel proposes speedy replacement of Act 63 of 1975, thus the finalisation of the Expropriation Bill of 2019”

In addition, Section 25(8) of the Constitution speaks to the importance of redress.

In reference to the history of the Expropriation Bill, the Department submitted that:

- The Department’s mandate to review the Expropriation Act 63 of 1975 was derived from a Cabinet approval of 15 September 2004.
- Two iterations of a revised Expropriation Bill were tabled in Parliament.
- A third iteration of the Expropriation Bill [B-2019] was published in the Government Gazette for public comment on 21 December 2018.
- Approximately 50 000 written responses received and considered.
- On 9 October 2020, the Bill was gazetted and submitted to Parliament.

The current Expropriation Bill [B23 - 2020] is currently under consideration by the relevant Portfolio committee in order to achieve the following:

- The Bill sought to repeal the Expropriation Act and to provide a general law of application, in line with the Constitution, to guide the processes and procedures for expropriation of property by organs of state
- The existing Expropriation Act dates back to 1975.
- The 2019 Final Report: Presidential Advisory Panel on Land Reform and Agriculture pointed out that it was “*inconsistent with the Constitution*”, and “*the correction of this had been long-delayed*”. The Panel pointed out that the 1975 Act “*undermines the constitutionally enshrined principles of lawful, procedurally fair and reasonable administrative justice*”.
- The Bill brings certainty to South Africans and investors because it clearly outlines how expropriation can be done and on what basis.
- It also provides for instances where expropriation with nil compensation may be just and equitable.

**The Nil Compensation principle is dealt with in Section 12(3) of the Expropriation Bill:**

**Clause 12(3):** “It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to—

- (a) where the land is not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;
- (b) Where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;
- (c) Notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;
- (d) Where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and
- (e) When the nature or condition of the property poses a health, safety or physical risk to persons or other property.

In the event of a dispute of the expropriation or the offered compensation amount, the courts would be the final arbitrator (Chapter 16 of the Bill). The courts would be the final arbitrator because Section 34 of the Constitution states that “*everyone has the right to have any dispute that can be resolved by the application of law in a fair public hearing before the court*”

In conclusion, the Department noted that The Presidential Advisory Panel on Land Reform and Agriculture noted that the current Apartheid-era Expropriation Act of 1975 as:

- “*inconsistent with the Constitution*”, and
- “*undermines the constitutionally enshrined principles of lawful, procedurally fair and reasonable administrative justice*”.

The purpose of the Expropriation Bill [B23-2020] was to repeal this 1975 Act and provided a general law of application, in line with the Constitution, to guide the processes and procedures for expropriation of property by organs of state. Section 12(3) of the Bill outlined the circumstances where Nil Compensation may be just and equitable. Lastly, the courts would be the final arbitrator for any disputes.

### **3.2 Department of Minerals and Energy**

The main object of the Bill was fully supported in as far as it sought to provide that the right to property may be limited in such a way that where land is expropriated for land reform, the amount of compensation payable may be nil. Such limitation must be regarded as a legitimate option for land reform. The Bill in its current form would bring much needed legal certainty in that it explicitly stated what was already implicitly provided for in section 25.

#### **The Current Constitutional Dispensation**

The co-existence in section 25 of the constitutional protection of existing property rights alongside the constitutional imperative of redress through land related reform is perceived by many as anomalous. However, section 25 in its current form already permitted the enactment and implementation of restorative legislation without compensation obligations. Since the commencement of the Constitution, legislation such as the National Water Act and the National Environmental Management Act have been promulgated to vest the Country’s natural resources under State custodianship.

#### **Mineral Resource Reform**

The Mineral and Petroleum Resources Development Act, 2002 (Act No 28 of 2002)“ was a profound example of restorative legislation. Through its enactment, land and related reform has been achieved by providing for the vesting of the nation’s mineral resources under state custodianship without the obligation to pay compensation. Confirming the legitimacy of this regime, the Constitutional Court in AgriSA cautioned against over emphasis of private property rights at the expense of the state’s social responsibilities. Therefore, whereas Section 25 in its current form already implicitly provided for circumstances where compensation of nil would be just and equitable, the Bill now explicitly provided that the right to property was not absolute

and that where land was expropriated for land reform, the amount of compensation payable might be nil.

In conclusion, the Bill and its main object to accelerate land and related reform was supported. It brought about long needed legal certainty by clarifying the existing anomalous relationship between absolute protection of existing property rights and the State's restorative obligation to redress past injustices through land and related reforms.

### **3.3 Department of Justice and Constitutional Development**

#### **Land Claims Court**

1. The focus of recent discussions had been on the role and functions of the Land Claims Court (the Court) established by section 22 of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) (the Act) and also on the existing structure of the Court and its jurisdiction.
2. The current role and functions of the Court:
  - (i) To adjudicate on disputes referred to it by the Commission on Restitution of Land Rights (the Commission) established by section 4 of the Act. (It deals with matters on a referral basis, that is matters which the Commission has not managed to resolve in its statutory mediation role).
  - (ii) The Court also has exclusive jurisdiction to deal directly with matters in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996) and the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997).
  - (iii) The Court's focus is, however, on land claims and restitution, being a specialist court with limited and exclusive jurisdiction.
  - (iv) The Court does not have jurisdiction to deal with, for example, expropriation of land without compensation.

To summarize the following shortcomings had been identified that gave rise to the request that a Land Court Bill be promoted:

1. The single biggest challenge that the Court was facing was its lack of permanence which results in the Court not functioning optimally.
2. The current legislative framework owed its existence to the initial point of departure that the Court would have a limited lifespan within which to deal with restitution claims. (The reality, however, is that the land restitution process had been a very protracted one and was far from complete.)
3. The processing of land claims was slow and there were backlogs.
4. The current legislative framework had given rise to the situation where most judges were either seconded or appointed in an acting capacity.
5. Matters dealing with labour tenancy status were dealt with by the Court at its seat in Randburg, whereas restitution matters were dealt by the Court sitting elsewhere in the Republic, as the need arose. That meant that the parties in labour tenancy matters sometimes had to travel long distances in order to have their matters dealt with in Randburg.
6. A further issue raised by the Office of the Chief Land Claims Commissioner was the reliance placed on pre-trial conferences in order to enforce compliance with the

rules which were made by the President of the Court in terms of section 32 of the Act. (This, it is suggested, emanates from the informal nature of the Court, being a court of equity, giving rise, in practice, to relaxed compliance by parties with court directives/practice notes which, in turn, gives rise to unnecessary delays.)

The Inter-Ministerial Committee on Agriculture and Land Reform (IMC) mandated the Department to:

- (a) prepare a Bill that not only established a fully capacitated Land Court under its own founding legislation with jurisdiction to deal with matters currently dealt with by the Land Claims Court, but to broaden its mandate to also adjudicate on matters in respect of other land-related legislation; and
- (b) furthermore, incorporated structures which encourage the use of alternative dispute resolution.

To achieve the above, IMC Ministers/Departments were requested to identify land-related legislation for inclusion in the Bill, and also to identify the most pressing land-related legislation and the provisions thereof that are suited for ADR in the form of mediation and arbitration.

#### **Land Court Bill**

1. The Land Court Bill was approved by Cabinet for submission to Parliament on 24 February 2021.
2. The Bill, as approved by Cabinet, was currently being scrutinised by the Office of the Chief State Law Adviser with the view to provide the final certification of the Bill.
3. The Rule 159 letters were submitted to the Speaker of the NA and the Chairperson of the NCOP on 24 March 2021.

The broad purpose of the Bill was to enhance and promote access to land on an equitable basis, promote land reform as a means of redressing the effects of past discrimination and facilitate land justice and for this purpose the Bill aims to:

- (a) establish a Land Court with jurisdiction to grant any order, any other appropriate relief or impose any sanction, as provided for in the Bill or any other law that conferred jurisdiction on the Court;
- (b) establish a Land Court of Appeal to hear and determine appeals emanating from the judgments and orders of the Court; and
- (c) provide for court ordered mediation or arbitration.

***Establishment and status of court:*** The Land Court was established as a High Court that had the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of South Africa had in terms of the Superior Courts Act in relation to matters under its jurisdiction.

***Composition of court:*** The Court consists of a Judge President, Deputy Judge President and so many other judges as may be determined in accordance with the prescribed criteria, and approved by the President.

***Jurisdiction of the court:*** The Court had exclusive jurisdiction in respect of all disputes that arose from land reform initiatives that were aimed at giving effect to section 25 of the Constitution and the Land Court would be situated in the area of jurisdiction of each Division of the High Court. The Court would also have jurisdiction to adjudicate on disputes arising from the Expropriation legislation insofar as those disputes relate to expropriation of land in the public interest. A provision was also made for the Minister, after consulting the Chief Justice, for the purposes of adjudicating land disputes and in the interest of access to justice, to define the specific area of jurisdiction of each Court.

### **Powers of the Court**

The Court, in short, had all such powers that a Division of the High Court had in civil proceedings at a place where the land in question was situated. The Court had the power to decide any issue in terms of any other law, which was not ordinarily within its jurisdiction but was incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so. The Court also had the power to reserve any question of law that arose in the proceedings for the decision of the Land Court of Appeal, and pending that decision the Court might make an interim order.

### **The Land Court of Appeal**

The Bill established the Land Court of Appeal as a court of law and equity. Except for the Constitutional Court, the Land Court of Appeal was the final court of appeal in respect of all judgments and orders made by the Court in respect of the matters within its exclusive jurisdiction. It was a superior court with authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal had in relation to matters under its jurisdiction and was a court of record.

eThe Land Court of Appeal consisted of the Judge President of the Court, a Deputy Judge President and such number of other judges who were judges of the Court or High Court, as might be required for the effective functioning of the Land Court of Appeal.

### **Mediation**

If, at any stage during proceedings, but prior to judgment, it becomes evident to the Court that there was any issue which might be resolved through mediation, the Court might make an order:

- directing the parties, to attempt to settle the issue through mediation; and
- that the proceedings be stayed pending such process.

If the Judge President decided that the matter must be referred for mediation, he or she must make an order directing the registrar to transfer the matter to the mediator. The order of the Judge President must specify the time, date and the place where the process was to start and appoint a fit and proper person as mediator to chair the first meeting between the parties. The parties might, however, at any time during the mediation by agreement appoint another person to mediate the dispute.

## **3.4 Department of Agriculture, Land Reform and Rural Development**



The interim Constitution acknowledged the need for Land Reform in South Africa as a mechanism that would redress the imbalances of the past. As part of the Constitution making process, Land Reform was neatly embedded as part of the Bill of Rights which gave every citizen the right to property. Given South Africa's history of dispossession, the drafters of the Constitution ensured that in order to effect this right to property by all, the State must undertake Land Reform.

In implementing this injunction of the Constitution, a White Paper on Land was agreed upon in 1997 in which it set out the framework of land reform. In 1995, The Restitution of Land Rights Act was promulgated in order to ensure that those who were forcibly removed from their land from 1913 would receive a form of redress for the rights lost at the time. The form of redress included Land Restoration, Alternative Land and Financial Compensation.

The institutional arrangements provided for in law was the setting up of the Restitution Commission, and the Land Claims Court. The Policy framework on land redistribution was also put in place by amending some of the existing laws and drafting new laws that would provide for the State to redistribute land in order to address land inequity, address the human settlement challenge, livelihoods and agrarian reform. Tenure reform was also identified as an important area of reform given the dual tenure system that South Africa.

### **Challenging impacting the pace of land reform in the past 27years**

- The Reconstruction and Development Program envisaged that the State in the first 5years would redistribute 30million hectares of agricultural land to those who were historically disenfranchised
- The instruments both in policy and legislative framework were inadequate to effect this ideal.
- If one were to take the case of Restitution. After the promulgation of the legislation in 1995, the Land Claims Court only became operational in 19...without full time Judges except the Judge President.
- The claimant communities and individuals had to lodge claims until the cut of day of 1998, a year before the end of five years.
- The Commission and the administrative supporting the commission had to be put in place.
- The need to undertake research in order to validate the claim took longer than envisaged.
- The acquisition strategy was through "willing buyer, willing seller" principle.
- The application of section 25(3) on how to determine just and equitable became difficult in two aspects.
  - a) Archival material which gave the history of the acquisition. The constitution clause assumed that all land was acquired, where else we all know that after the promulgation of the then 1913 Native Land Act, those who were beneficiaries were allocated the land. Subsequent owners may have been dependents who may have later sold the land. Therefore, when determining the history of acquisition where would one start?

b) The subsidy that the state had given was another challenge as some of the subsidies may not have been direct, or in some instances enabling infrastructure that benefited more than one persons

- Just and equitable from a valuation point of view, there were no variables that were developed in order to aid Professional Valuers to utilize in order to determine what value is just and equitable
- Therefore, these factors contributed in not being able to adequately negotiate fair value for land that was and still is acquired in the open market compounded by the fact that the state is the sole buyer in the market
- The lack of coordination across government also made it difficult for beneficiaries of land reform in order to create productive assets of what they have received. This is now address through the IMC on Land and Agriculture
- Post settlement support has been minimal at best disjointed between spheres of government
- The choices exercised by individual families and communities saw most of the claimants opting for financial compensation as opposed to restoration
- Land Redistribution has been largely skewed towards those who want land for agriculture as opposed to human settlement. It therefore has had a rural bias that enabling the land inequality in the urban and peri-urban centers.
- The weaknesses in the land administration system has also been exposed particularly when one looks and the allocation of land through leasehold
- The change of programs often has resulted in confusion on how the state support those who require land in particular farming land
- The weakened capacity in the administration has also contributed to the slow pace

### **Interventions**

Some of the interventions have been put in place to address some of the challenges identified:

- Inter-Ministerial Committee which addresses issues of coordination across government and spheres.
- Beneficiary and Allocation policy.
- Land Donations Policy.
- The Reconfiguration of the Department will also help in the alignment.
- Building capacity through filling critical post.
- Building institutional capacity for land administration.
- Aligning processes between National Departments and Provincial.

### **How will the amendment of S25 assist?**

- Giving clarity on that would remove ambiguity
- Re-looking at the applicability of the factors that must be taken into consideration when the State expropriate as reflected in 25(3)
- Giving further elaboration of section 25(2) which already talks about expropriation that such depending on a range of factors may enable the state not to pay compensation.

## **4. CONCLUSION**

The report reflected on the oral submissions by various organizations invited by the committee to present before it. In addition, it presented the views of various and relevant departments in

line with NA Rule 275(b) which required that the committee gives relevant departments opportunity to make submissions on the Bill.

The below link takes readers to the documents/presentations made by the presenters to the committee. It must be noted that only presentations received before or on the day of presentation are attached to this report as per committee decision on the 16<sup>th</sup> April 2021.

<https://docs.parliament.gov.za/share/s/5FzBkrt5SJyaLTrwQHVMA>

Report to be noted.