

PARLIAMENT
OF THE
REPUBLIC OF SOUTH AFRICA

**ANNOUNCEMENTS,
TABLINGS AND
COMMITTEE REPORTS**

FRIDAY, 15 MARCH 2019

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OF THE REPUBLIC OF SOUTH AFRICA

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REPORT OF THE SOUTH AFRICAN DELEGATION TO THE REPUBLIC OF CUBA'S NATIONAL ASSEMBLY OF THE PEOPLE'S POWER

Havana, Cuba

14 – 22 September 2018



1. INTRODUCTION

The Speaker of the National Assembly (NA), Hon. B. Mbete, MP, led a multiparty parliamentary delegation to the Republic of Cuba, from 14 to 22 September 2018 as part of Parliament's bilateral international relations activities. The delegation comprised the following Members:

- Hon. B. Mbete, MP: Speaker of the NA and leader of the delegation;
- Hon. G. Boroto, MP: House Chairperson – International Relations (NA);
- Hon. J. Mthembu, MP: Chief Whip of the Majority Party;
- Hon. D. Dlakude, MP: Deputy Chief Whip of the Majority Party;
- Hon. J. Steenhuisen, MP: Chief Whip of the Official Opposition;
- Hon. F. Shivambu, MP: Chief Whip of the Economic Freedom Fighters;
- Hon. N. Singh, MP: Chief Whip of the Inkatha Freedom Party;
- Hon. T. Motara, MP: Provincial Whip: Gauteng in the National Council of Provinces (NCOP); and
- Hon. R. Lesoma, MP: Whip of the Portfolio Committee on International Relations and Cooperation.

The delegation was supported by the following officials:

- Mr D. Sithole: Division Manager – International Relations and Protocol (IRPD);
- Mr M. Mothapo: Division Manager – Parliamentary Communications Services and Parliamentary Spokesperson;
- Ms N. Nojozi: Executive Director – Office of the Speaker;
- Ms. N. Leibrandt-Loxton: Researcher – IRPD;
- Ms. S. Hlongwane: Personal Assistant to the Speaker; and
- Ms. E. Malekane: Executive Secretary – House Chairperson – International Relations (NA).

2. DISCUSSION

2.1 Meetings with the South African Embassy and various Cuban authorities and stakeholders

The delegation's programme entailed exchanges with numerous authorities and stakeholders within Cuba, notably the South African Embassy in Cuba, the Federation of Cuban Women, the Ministry of Foreign Affairs, the Ministry of Public Health, the Centre for Genetic Engineering and Biotechnology, the National Assembly of the People's Power (henceforth the Cuban Parliament), the Department of Foreign Trade and Investment, and representatives of South African students currently studying in Cuba. The Cuban stakeholders all expressed their appreciation for the deep historical and political ties between South Africa and Cuba, and noted in particular the friendship between former South African President Mr Nelson Mandela and former Cuban President Mr Fidel Castro. In turn, the South African delegation consistently expressed its appreciation for the role Cuba played in the liberation struggles of many African countries, including South Africa.

2.1.1 Meeting with the South African Embassy in Cuba (16 September 2018)

The delegation received a comprehensive briefing from South African Embassy officials on the country's relations with Cuba, the political and economic environment, as well as the modalities of its operations within the country. Their following key observations were noted:

- **South Africa / Cuba relations:** Despite existing scepticism of the relationship within the diplomatic community, South Africa and Cuba continue to enjoy strong relations due to its role in the fall of the Apartheid system, There are over 30 (thirty) signed bilateral agreements in place between the two countries covering vast areas of cooperation, including education, defence, science and technology, health services, infrastructure development, housing, water and sanitation and information and communications technology. South Africa and Cuba's excellent political relations have however not translated into a substantial commercial partnership yet. One of the biggest impediments to improved bilateral trade has been the unilateral Blockade / Embargo of Cuba by the United States of America (USA) and the

extra-territorial application of these sanctions on third countries.

- **The USA Embargo on Cuba:** This Embargo, which has its roots in Cuba's alliance to the Soviet Union during the Cold War, continues to prevent Cuba from trading with third party countries, mostly due to the latter's fear of potential penalties by the USA due to any business relations with Cuba. The Embargo has also resulted in Cuba not being able to compete with other countries despite the competitive advantage it may have in certain sectors. At the level of the United Nations (UN), the USA and Israel have consistently supported the Embargo, despite the end of the Cold War many years ago. This isolation of Cuba has led to many economic challenges for Cuba, as well as difficulty to travel for its citizens due to complex visa application processes via the USA. The political relations between the US and Cuba has also recently soured after USA allegations of sonic attacks against US Embassy staff. All staff that are US citizens has since left the US Embassy.
- **Political and socio-economic overview:** Cuba is a socialist country and had elections in March 2018. All Members of Parliament are members of the Communist Party. A new president, Mr Miguel Diaz-Canel (57), was appointed by the Cuban Parliament in April 2018 as the President of the Council of State (the executive branch) and of the country. The country at the time of the visit was in the midst of a constitutional review process, led by former President Mr Raúl Castro Ruz (86).

On 22 July 2018 the Cuban Parliament approved a draft of a new Constitution. The intention with the new Constitution is to formalise the island's economic and social "opening-up" while maintaining its socialist nature. Some of the reforms are reported to include recognising the right to own private property and the possible legalisation of same-sex marriage, among other economic, political and social changes. The document also encourages foreign investment and would significantly reorganise the government. It calls for creating the position of a prime minister, who would share power with the president, and governorships for the nation's provinces. Before it can become official however, the document, which would replace the current 1976 Soviet-era Constitution, will be put before the public in a

series of meetings around the country and then be voted on in a national referendum, a process expected to take months.

Key socio-economic issues on Cuba presented included the effects of the US Embargo which has resulted in a meagre growth rate of 1.6% for Cuba and Cuban citizens earning, on average, US\$35 per month. However, despite its economic challenges, the Cuban government provides free medical care and education to its citizens.

Cuba's key economic export industries include raw sugar, tobacco, hard liquor and pharmaceutical products to countries such as China, Spain, Brazil and Portugal. It imports food products from countries like China, Spain, Italy, Argentine and Mexico. Notably, South Africa imports vaccines from Cuba.

In addition to the infrastructure upgrading that South Africa has already assisted Cuba with through the African Renaissance Fund, the Embassy identified two sectors of opportunity and interest to South Africa; tourism and Small and Medium Enterprises (SMEs), particularly within Cuba's Free Trade Zones. The Cuban Government is keen on significantly increasing and developing its tourism sector, and investing in the SMEs in the hospitality industry may be most beneficial for both parties.

- **Health Collaboration:** The Embassy reflected on the implementation of the key agreements in the health sector between South Africa and Cuba, particularly the Public Health and Medical Science Agreement (2012) which is currently under discussion for renewal. Under the Agreement, approximately 2000 South African students, including the 80 students on the scholarship program, are currently receiving medical training in Cuba. From 5 July 2018, a group of 703 SA students returned from their medical studies on the Nelson Mandela/Fidel Castro (NMFC) programme in Cuba. The NMFC students returning from Cuba is the largest number yet of students graduating from 5th year in Cuba, to pursue their 6th year in South Africa. The Embassy submitted that the students of this programme come from previously disadvantaged communities that would not have been accepted in South African universities. The delegation also learnt that the students receive a subsistence

allowance of \$200 per month. Two key challenges were reflected on under this area of cooperation: (a) uncertainty about the number of jobs created for South African Cuban-trained doctors in the previously disadvantaged areas where they came from, as this had yet to be determined; and (b) South African students not being adequately prepared for everyday life in Cuba, which has resulted in culture shock, alcohol abuse, and other psychological issues.

- **Defence Collaboration:** As regards defence cooperation, the Embassy shared some insights regarding the training of South African soldiers in Cuba and the training Cuban specialists provide to South Africans in South Africa. The Embassy submitted that South Africa is keen on its soldiers learning the strong work ethic and patriotism of the Cuban military. However, some South African soldiers have struggled to cope with Cuban military training and, as a result, have returned to South Africa due to disciplinary issues.
- **Administrative modalities of the Embassy:** The delegation was further briefed on the administrative modalities of the Embassy and the challenges it faces due to Cuba's isolation as a result of the US Embargo. The Embassy struggles with sourcing basic goods and services due to limited stock availability, struggles to adhere to procurement regulations of National Treasury due to limited service providers, and faces budget cuts that might affect remuneration of staff during the current financial year. The Embassy hoped for a favourable outcome following its appeal to be graded as a Category 5 Embassy which, according to DIRCO's classification, will afford it more resources to fulfil its intended role in Cuba's challenging environment.

2.1.2 Meeting with the Ministry of Foreign Affairs (17 September 2018)

The delegation met with representatives of the Ministry of Foreign Affairs, under the leadership of the Deputy Minister H.E. Rogelio Sierra, that appreciated South Africa's continued support towards Cuba against the US Embargo, both at the level of the United Nations (UN) and parliamentary level. The Ministry appealed to Parliament to explore additional ways whereby it can engage legislators from the US on the need to forego the Embargo under which Cuba and its people continue to suffer economically.

2.1.3 Meeting with the Federation of Cuban Women (17 September 2018)

The Federation of Cuban Women is an organisation which is an amalgamation of many Cuban organisations into one. It is a very diverse organisation in terms of age, race and life stages. The Federation aims to ensure that women's interests are advanced through all Government programmes, especially since 49% of the Cuban workforce are women. These women are well represented in different spheres, including science, where women constitute more than 50%. The Federation has thus ensured that it remains very involved in the Cuban constitutional review process to ensure that women's interests remain on the agenda throughout. Some of the issues that Cuban women are currently faced with include:

- The need for more day care centres for working women, in addition to their already established 1 year's maternity leave (a full pay for the first 6 months, and 50% pay for the second 6 months);
- Care for the elderly;
- How to prevent gender-based violence; and
- The recognition of equal salaries for men and women.

2.1.4 Meeting with the Cuban Ministry of Public Health (18 September 2018)

The delegation met with representatives of the Cuban Health Ministry, under the leadership of H.E. Alfredo González Lorenzo, Deputy Minister of Public Health. Dr Lorenzo provided an overview of the Cuban health system and its evolution since 1959 with the creation of a national health system. The system's establishment saw the creation of a network of universities that provide comprehensive and free training at all levels; the creation of (amongst others) 150 hospitals, 450 clinics, 111 dentistry clinics, and 12 research institutes; and the adoption of a humanist approach to health care *at primary level* that focuses on prevention and early detection instead of treating the sick. The result of this approach has been a life expectancy of 80 years and more for Cuban people, one of the highest in the world. Following the delegation's requests for more detail on the Cuban health system in practice, its Cuban counterparts shared the following:

- Medical students are trained in the values of life, not mere academics, and are always encouraged to work in different countries for further training and exposure;

hence Cuban doctors are always willing to assist abroad in times of crisis;

- Training at all levels is free, covered by the annual health and education budgets which respectively constitute 27% and 28% of the country's total budget;
- Medical students are required to work where the government places them for three years; refusal to do so will result in their degrees being revoked;
- Doctors are expected to continuously train and specialise in key areas while teaching at universities as well;
- Cuba currently has one doctor and one nurse for every 122 people that must take care of the community in which they are placed. Their focus must be on preserving health and providing holistic care, not only to the sick, but their immediate family that undergo resultant stress as well.

The Cuban representatives further shared with the delegation the scepticism South African students have for the family medicine approach, although this was also the case for Cuban medical students when the system was first introduced. The Cuban representatives requested the forthcoming visit by the Portfolio Committee on Health to share with them how Cuban-trained South African doctors have integrated into the South African system.

2.1.5 Meeting at the Genetic Engineering and Biotechnology Centre (18 September 2018)

The representatives of the Centre provided an overview of the Centre's establishment and work, explaining that it manufactures drugs, vaccines, diagnostic systems and high-tech medical equipment, amongst others. Of the 881 generic drugs used in Cuba, 583 are manufactured at the Centre. The Centre's work entails a closed cycle approach, i.e. it entails research, manufacturing and commercialisation of its products. In enhancing South-South cooperation and technology transfers, the Centre collaborates with similar centres in various countries, including the Biovac Institute in South Africa. Some of the ground breaking work of the Centre includes treatments for skin cancer, arthritis, as well as advanced diabetes which can reduce the rate of amputation for many people suffering from diabetic foot ulcers. The Centre representatives explained that the US Embargo has had a significant impact on their work as it is unable to sell its products due to the financial blockages that prevent it from being paid for its work. The delegation also learnt that there are some regulatory challenges in South Africa that also impedes enhanced cooperation between the Centre and institutions within South Africa.

2.1.6 Meeting with the President (Speaker) of the National Assembly of the People's Power (19 September 2018)

The delegation met with a Cuban parliamentary delegation headed by the President of the Cuban National Assembly to reflect, amongst others, on the role the two parliaments can play in facilitating increased trade and economic relations between the two countries. Some of areas identified for possible collaboration included agriculture, renewable energy, mining and biotechnology. The President also shared with the delegation the progress related to Cuba's constitutional review process, emphasising that the whole population is being consulted on all the envisioned proposals. The visit concluded with a tour of the Cuban Parliament.

2.1.7 Meeting with the Cuban Institute of People Friendship (20 September 2018)

The Cuban representatives of the Institute of People Friendship gave an overview of the organisation's history and evolution since its creation by Fidel Castro in 1960. The organisation was established to facilitate Castro's vision of establishing and enhancing Cuba's relationship with the rest of the world, particularly African countries as a further expression of Cuba's solidarity with the continent. The Institute conducts its work through 11 international brigades to Cuba that conduct voluntary work. It works at national and provincial level, and it is these provincial structures that has engaged and supported South African students jointly with the South African Embassy in Cuba. The Institute's representatives conveyed their enthusiasm for enhanced networking with South African representatives at the 7th African Continental meeting of Solidarity with Cuba, due to take place in 2019.

2.1.8 Meeting with the Ministry of Foreign Trade and Investment (20 September 2018)

The meeting with the Foreign Trade and Investment Ministry built on the delegation's engagement with the President of the Cuban Parliament in terms of potential areas of enhanced trade and economic relations between the Cuba and South Africa. The following areas were identified:

- **Banking:** Hon. Mbete was particularly interested in how Cuba's banking sector operated outside the US Embargo, as well as how the sector could be improved through Cuba-South African collaboration. The Cuban

delegation explained that the impact of the Embargo has been significant, and that they have yet to adopt a general formula of how to conduct business outside of the Embargo. Presently, each business opportunity has been handled individually, to the extent where products have been exchanged instead of currency. The delegation further explained that Cuba already has hundreds of products ready for trade, and that there are no special requirements for trading with Cuban companies. As a member of the World Trade Organisation (WTO), trade with Cuba is free, so contact can be made with whichever Cuban company there might be an interest in and these companies are able to sign contracts the same way companies in capitalist countries do.

- **Agriculture:** The Cuban delegation observed that Cuba imports approximately 3 million tons of food products annually, of which 50% has the potential to be produced domestically. These imports come at exorbitant costs, hence the Cuban Government is open to joint agriculture ventures with South Africa to develop Cuba's local agricultural sector in terms of the production of fertilisers and importing good quality seeds.
- **Renewable energy:** Cuba is interested in developing its renewable energy sector. Renewable energy currently encompasses 4% of the country's total energy production, and the Government is keen to expand this to 24% by 2030.
- **Tourism infrastructure:** Cuba is interested in developing the infrastructure component of their tourism industry, notably theme parks and similar entertainment venues as well as their airports, not just hotels.
- **Medical tourism:** In this area, collaboration in terms of medical insurance for travellers was identified.
- **Pharmaceutical and biomedical areas:** Cuba is keen to expand its already existing collaboration with South Africa in these areas, notably in terms of diabetes and cancer treatments.
- **Mining:** The Cuban delegation was very interested in engaging with South Africa on mining collaboration due to the latter's vast experience in this sector.

Both delegations agreed that the Trade ministries of both countries need to look at Cuban / South Africa trade and business fares to promote collaboration. The South African delegation was also advised to note that 18 South African companies will be attending the Havana International Fair in

2019, and that the next Cuba / South Africa Joint Commission meeting will be held in Cape Town in 2019.

2.1.9 Meeting with representatives of South African students studying in Cuba (20 September 2018)

The South African Embassy to Cuba organised a meeting between the parliamentary delegation and the following student leaders and representatives of the South African students currently studying in Cuba:

By way of introduction, the Embassy officials shared the following with the delegation:

- That there are more male than female students, although the academic performance of the female students are significantly better than that of their male counterparts.
- The Western Cape Province is the only province that have not participated in the programme, hence there has never been a student from the disadvantaged communities of the Western Cape.
- The students generally are very concerned about their integration in South Africa once they complete the Cuban part of the programme.

The students each got the opportunity to share with the delegation their experiences and issues of concerns. In sum, these are as follow:

- **Standardisation of the programme across provinces:** The delegation learnt that the programme is managed at provincial level, and not nationally, hence there was no standardisation of the resources students received from provincial authorities. While some provinces, for instance, provided laptops and stationary others did not.
- **Readiness of universities and Department of Health to absorb them:** Students were anxious about the readiness of South African universities to absorb them upon their return, citing possible integration backlogs as a huge concern.
- **Anti-Cuban sentiments in South Africa, especially social media:** Students were very concerned about the anti-Cuban sentiment in South Africa which they felt was prevalent on social media. They felt these attacks on their abilities were ill informed and unjustified.

- **More emotional support from the psychologist:** The students proposed more consultations with the psychologist assigned to them for increased emotional support. They feel that this would assist them in dealing with being far away from their homes and families, as well as integrating more smoothly back in South Africa.
- **Concerns about living conditions:** Electricity outages, sporadic transportation to and from class, and food challenges were some of the key concerns students were facing in terms of their living conditions. They felt that Government needs to investigate these to ascertain whether the country is getting what it agreed to with the Cuban Government.
- **Review of the monthly allowance:** Students also requested a review of the monthly allowance they receive, in place since 1996.
- **Capacity of the office of the Health attaché:** The students requested additional capacity for the office of the Health attaché of the South African Embassy. This would assist the office to better support them in Cuba and also in terms of keeping them abreast of political developments in South Africa that may affect them.

The delegation undertook to engage the Executive on the issues raised, notably on the national standardisation of the programme, the need for gender parity, the possibility of completing the programme entirely in Cuba, and capacitating the office of the Health attaché. They also committed to use their oversight role through the relevant parliamentary committees on health and higher education to engage the relevant government departments on the students' concerns.

2.2 Cultural programme

The cultural activities of the delegation included the following:

- Visit to the African Founding Fathers Park: Wreath-laying ceremony for O.R Tambo
- Visit to José Martí Memorial: Wreath-laying ceremony for J. Martí
- Paying tribute to the fallen in Africa in the Pantheon of Veterans, and paying tribute to South African-born Anti-Apartheid activist Alex la Guma

- Tour of Old Havana
- Visit to Nelson Mandela exposition in Matanzas

3. MEETINGS RELATED TO THE UNITED NATIONS GENERAL ASSEMBLY (UNGA)

Following the bilateral engagements in Cuba, Hon. Mbete attended meetings related to the UNGA in New York. The Speaker attended meetings relating to the global fight against tuberculosis (TB), including the Africa Side Event, organised by the African Union and NEPAD -- *United to End Tuberculosis in Africa: A Continental Response*. Hon. Mbete addressed the *'Our Night with the Stars: A Gala to Celebrate the TB Champions'* event, which the Stop TB Partnership and USAID, among others, organised. She committed the South African Legislative Sector – led by Parliament – to work hard to ensure that public office bearers remain committed to the fight against TB.

4. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

Based on the above report, the following issues are recommended for Parliament to follow-up through its relevant structures, notably the parliamentary committees on International Relations and Cooperation, Health, Higher Education, Trade and Industry, and Tourism.

- Parliament to explore additional ways whereby it can engage legislators from the US on the need to forego the Embargo under which Cuba and its people continue to suffer economically.
- The need to review the parliamentary oversight processes related to the functioning and classification of South African Embassies to ensure that they are allocated the necessary resources to fulfil their required responsibilities.
- The Cuban representatives requested the forthcoming visit by the Portfolio Committee on Health to share with them how Cuban-trained South African doctors have integrated into the South African system.
- The delegation agreed with the Cuban Ministry of Trade that both countries' Trade Ministries need to look at Cuban / South Africa trade and business fares to promote collaboration. Based on the advice from the South African

Embassy to Cuba, this would be most beneficial for South Africa through the tourism and hospitality sector through SME's.

- The delegation undertook to engage the Executive on the areas that its Cuban counterparts identified as possible areas of collaboration with South Africa, namely: Banking, Agriculture, Renewable energy, Tourism infrastructure, Medical tourism, Pharmaceutical and biomedical areas, and Mining. Parliament is advised to do so before the next Joint South Africa / Cuban Commission meeting to be held in Cape Town, South Africa, in 2019.
- The delegation undertook to engage the Executive on the issues raised by the South African medical students in Cuba, notably on the national standardisation of the programme, the need for gender parity, the possibility of completing the programme entirely in Cuba, and capacitating the office of the Health attaché. They also committed to use their oversight role through the relevant parliamentary committees on health and higher education to engage the relevant government departments on the students' concerns as noted above.

END

COMMITTEE REPORTS

National Assembly

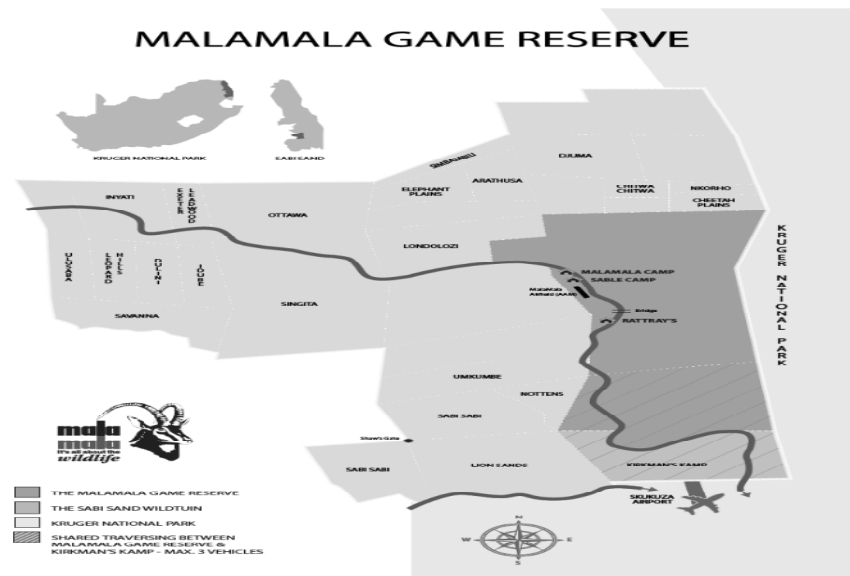
1. Draft Report of the Portfolio Committee on Rural Development and Land Reform on a fact-finding visit to the Nwandlamharhi Communal Property Association, dated 13 March 2019

The Portfolio Committee on Rural Development and Land Reform, having undertaken a fact-finding visit on 14-16 November 2018 to ascertain the relevant facts relating to and elucidating a situation of maladministration or breach of policy in the settlement of Mhlanganisweni community land claim commonly known as Malamala and explored the post-settlement arrangements under the N'wandlamharhi Communal Property Association, reports as follows:

1. Introduction

This report accounts for the fact-finding visit of the Portfolio Committee on Rural Development and Land Reform, henceforth referred to as the Committee, in the offices of the Department of Rural Development and Land Reform in Pretoria, the Board of Directors of Malamala, and the members of the Nwandlamharhi CPA. The N'wandlamharhi CPA is found in Lillydale village near Hazyview, Bushbuckridge Municipality in Ehlanzeni District of the Mpumalanga. It owns 13,184 hectares of land, including the Malamala Game Reserve, restored in terms of the Restitution of Land Rights Act, No. 22 of 1994.

Figure 1: Map for Malamala Game Reserve



1.1. The scope and key questions for the fact-finding visit

The focus of the fact-finding visit was three-fold. Firstly, it sought to gather relevant information about the settlement of the land claim, in particular the determination, and payment, of compensation which is alleged to be in excess of the market value and not in line with notions of 'just and equitable' compensation provided for in Section 25(3) of the Constitution. Secondly, the committee intended to gather information about the establishment, and the dynamics, of the CPA as well as all the relevant factors that underpin alleged non-payment of benefits to the deserving members of the CPA. Given this scope, the visit sought to establish, interpret and communicate the central facts about settlement and the dynamics of 'Malamala' land claim. The Committee viewed this fact-finding as part of available mechanisms that could place the facts in a proper context and allow the Committee to provide independent and objective examination of the evidence in order to enable it to endorse, or not, the earlier resolution for institution of a forensic investigation on the entire Malamala settlement.

To be precise, the visit will seek to provide answers to the following key questions:

Settlement of the land claim and payment of compensation to the landowners

- What were the relevant factors leading to the withdrawal of the land claim from the Constitutional Court and payment of R1.1 billion?
- Is the figure of R1.1 billion a just and equitable? Did the Minister and the Commission on Restitution of Land Rights default to market-value in determination of compensation to the land owners?
- Was the process appropriate, reasonable and in accordance with the relevant legislation and policy?

N'wandlamharhi Communal Property Association

- Has the verification process (and its outcome) and membership of the CPA conformed or complied to the relevant applicable pieces of legislation?
- Given the complex dynamics around settlement of the land claim, are members of the CPA realising benefits from the land bought for them?
- What are the current land uses? What is the model pursued in management of enterprises? Have there been any tangible benefits?
- Do financial statements and reports attest to a successful land restitution case, a case seen as the most expensive since 1994?

Co-management arrangement between the CPA and Malamala PTY (LTD)

- What are the key principles governing the arrangement?
- How is the business being run and what are the benefits to the CPA as a whole?

- What are the arrangements regarding ownership and control of the business as well as the risks and rewards in this arrangement?

1.2. *Composition of the delegation*

The fact-finding was conducted by a multi-party delegation of 10 members of the Portfolio Committee on Rural Development and Land Reform. The delegation was supported by parliamentary support officials.

Table 1: Members of the Delegation

Names of Members of Parliament	Political Party
Ms PC Ngwenya-Mabila: Leader of the delegation Mr PJ Mnguni Mr EM Nchabeleng Ms NW Magadla Mr A Madella Ms CK Matsimbi	African National Congress
Mr TCR Walters Mr K Robertson	Democratic Alliance
Mr NS Matiase	Economic Freedom Fighters
Mr MLW Filtane	United Democratic Front
Parliamentary officials who accompanied the Committee Ms P Nyamza (Committee Secretary) Dr T Manenzhe (Content Adviser) Ms C Maledu (Committee Assistant) Ms T Pepeteka (Researcher) Mr N Mjenzana (Parliamentary Legal Advisor) Mr S Mbata (Aid Assistant)	

1.3. *Structure of the report*

This report proceeds as follows: firstly, it discusses the guiding principles and methodological issues; secondly it presents an overview of the background to Malamala and then discusses the observations of the Committee. Thirdly, it presents the insights from the fact-finding and recommendations.

2. Guiding principles and approach

The Portfolio Committee is an extension of the National Assembly. Its function, amongst others is to hold the Executive accountable through a range of oversight mechanisms as envisaged in sections 43(3) and 55(2) of the Constitution. These sections respectively enjoin Parliament to scrutinise and oversee executive action as well as ensuring accountability of all executive organs of state in the national sphere of government. Fact-finding is one of available methodological approaches available to the Committees in order to enhance their oversight function.

In enforcing accountability, the fact finding visit places a particular emphasis on accountability as it has a real purpose to ensure that the Committee establishes the facts in order to hold the executive accountable. The fact-finding visit at Malamala was the beginning of the process to establish if there was any breach of policies and procedures set out by the Commission on Restitution of Land Rights and applicable policies and legislation. As will be discussed in the next section, the Committee has raised concerns about the payment of R1.1 billion in settlement of Mhlanganisweni land claim and the little or no benefits accruing to deserving members of the CPA. It is alleged that it is far above the market-value of the property and thus not meeting the standard of ‘just and equitable’ as envisaged in the Constitution.

The Committee interacted with relevant stakeholders and affected parties through focus group discussions, presentations by government officials and documentary review. The activities can be summarised as follows:

2.1 Group discussions (leadership structures and community meeting):

The Committee convened meetings of Executive Committee for the CPA, Board of Directors for Malamala, Monzo and Community Development Trust, and general community meeting of CPA members where an opportunity for open discussion with the Committee was afforded to those in attendance.

- 2.2 *Presentations:* The Committee received presentations from the Commission on Restitution of Land Rights and the Department of Rural Development and Land Reform. The Malamala Board of Directors also had an opportunity to make a formal presentation to the meeting. Other stakeholders such as the local municipality, tourism department and relevant entities also made inputs.
- 2.3 *Observations:* The Committee also spent half a day at the National office of the Department of Rural Development and Land reform visiting the CPA registry and with a view to observe the workings of the registry and make observations regarding the administration of, support to, CPAs.
- 2.4 *Documentary review:* The documents reviewed include CPA membership lists, financial statements of CPA, and Section 42D memorandum and agreements signed by the Minister. Although the Committee had requested the research reports and valuation reports, these documents were not yet made available to the Committee by the time this report was written.

The approach adopted by the Committee, and the activities as outlined in Table 2 of this report, generated empirical evidence that the Committee worked with to arrive at emerging insights and conclusions presented in the concluding sections of this report. As Table 2 demonstrates, the absence of the Minister and the Interim Committee of the CPA meant that some engagements which the Committee would have liked to have could not materialise. The Committee received apology from the Minister. With regard to the CPA committee, the Committee learnt that the CPA committee's term expired, and an interim Committee was set up to facilitate verification and election of the new Committee. However, the Interim Committee communicated through their attorney that they did not want to meet the Committee alongside the concerned groups.

Table 2 Report on scheduled activities

Dates	Time	Activities	
14/11/2018	11:00	1. Visit the CPA registry in the Department of Rural Development and Land Reform	<p>1.1 The Committee met with the Acting Director General, Ms R Sadiki.</p> <p>1.2 Mr Jeff Sebape and Mr Ramogaswa briefed the Committee on CPA registration, challenges in relation to verification.</p> <p>1.3 The Committee toured the CPA registry, observed the how it works and noted some of the challenges and areas of improvement required.</p>
15/11/2018	09:00	2. Setting the scene and context:	2.1 The Minister of Rural Development and Land Reform sent an apology to the Committee.
		3. Overview – Settlement of the land claim, and settlement agreement implementation.	<p>3.1 The CLCC , Ms N Ntloko-Gobodo who led a team of officials from the CRLR and RLCC, presented the status report on the settlement of the land claim, challenges and successes as well as CPA status and co-management enterprise.</p> <p>3.2 The Provincial Office of the DRDLR made inputs on activities to support the CPA, the status quo with regard to the dynamics of the CPA</p>
	4. Stakeholders' inputs	<p>4.1 The Bushbuckridge Municipality addressed the Committee in relation to local economic development and the centrality of tourism.</p> <p>4.2 Mpumalanga Tourism and Parks Agency addressed the Committee on the threats and risks posed by the existing CPA dynamics</p> <p>4.3 Representatives CPA concerned groups – Mavuraka and Malamala</p>	
	14:00	5. Community meeting with CPA members	5.1 The Committee held an open meeting for CPA members where about 20 community members spoke expressing their challenges
16/11/2018	09:00	6. Meeting with the Board of Directors and CPA Executive Committee	<p>6.1 Interim CPA Committee could not participate. An Attorney addressed a letter to DRDLR stating its non-participation at the meetings.</p> <p>6.2 The Board of Directors for Malamala briefing on the structure and the operations of the Malamala Game Reserve and the financial report.</p>
07/03/2019	09:30	7. Meeting interim CPA Committee	7.1 Meeting CPA leadership, and other entities, to discuss the affairs of the CPA, financial reports and related issues.
13/03/2019	10:00	8. Consideration of the Final Report	8.1 The Committee deliberated and adopted the report with recommendations

Given the limited time and resources available, the fact-finding was based on a qualitative investigation of the facts. On the basis of qualitative observations, the Committee documented a descriptive report with explanations that point to a need for further inquiry. As will be shown, this report makes causal inferences that link observations on breaches to practise and policies guiding research and verification of land claimants.

3. Observations of the Delegation

The following sections draw on discussion between the delegation and government officials, members of CPAs and concerned groups. As discussed above, the Interim Committee did not honour the meeting of the Committee, this report therefore does not include their contribution. Further, the Committee expressed willingness to engage with the Attorney working with the interim committee.

3.1. Land Claiming and establishment of the Communal Property Association

3.1.1. Settlement of the Mhlanganisweni Land Claim

By 31st December 1998, a claim on 21 properties including 9 farms owned by Malamala Game Ranch PTY(LTD) was lodged. This claim covered 63 farm portions measuring 65000 hectares. As Table 3 indicates, 21 different land claims were lodged but the RLCC facilitated a merger of these claims into Mhlanganisweni Community Land Claim due to overlapping rights. Having established the validity of the land claim, the RLCC published government gazette in 2002 and 2010 for interested and affected parties to express their interest in the settlement of the land claim.

In May 2008, the RLCC made an offer of R751,737,492, including the improvements to the value of R66, 169,492. This value was based R52 000 per hectare for 13184 hectares. The valuation included about 329 hectares that were initially not included in the gazetted. At the time, the Minister rejected the offer on the basis that it was excessive and unaffordable for the State. The negotiations collapse and the matter was referred to the Land Claims Court in 2009.

Table 3: Overview of the Settlement of Mhlanganisweni Land Claim

Claimants	Mhlanganisweni Community
Location	Bushbuckridge, Mpumalanga
No. of claims lodged	21 (Sabi Sands, incl. 2 duplicates)
Who lodged the claim	Z.L. Mhlongo and 20 others
The value of land as per valuation	R939, 360, 000.00
Asking price by landowner	R939, 360, 000.00
Value of improvements (excl. movable assets)	R73, 169, 492.00
Land use	Conservation and Eco-tourism
Total number of properties claimed	21 farms; 9 farms for Phase I
Total hectares claimed	65 000
Total hectares be restored (Phase I)	13 184
No. of households	960
No. of beneficiaries	5760

The Land Claims Court was to deal with the question of feasibility of restoration of the land in the context of Section 33 (cA) of the Restitution of Land Rights Act, Act No.22 of 1994. Section 33 deals with factors to be taken into account by Court in considering its decision in any particular matter. Section 33 (a) – (d) is as follows:

- “(a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
- (b) the desirability of remedying past violations of human rights;
- (c) the requirements of equity and justice;
- (cA) if restoration of a right in land is claimed, the feasibility of such restoration;
- (d) the desirability of avoiding major social disruption;”

In the matter of Mhlanganisweni Community v The Minister of Rural Development and Land Reform & Others, whose judgement was handed down by Gildenhuis J on 19 April 2012 in the Land Claims Court of South Africa, the Land Claims Court found that it would not be in the interest of

the public to pay such an exorbitant amount because the claimants have only been dispossessed of a living space, grazing rights and cropping land. Restoration of the property to them would amount to over compensation. Having been declined leave to appeal by the Supreme Court of Appeal, the claimants approached the Constitutional Court seeking leave to appeal against the judgement and order of the land claims court.

Whilst the matter was set down for hearing on 13 August 2013, the Minister of Rural Development and Land Reform, as the first respondent, filed an affidavit stating that he was no longer opposing the application but willing to purchase the land. The negotiations began immediately, led by the Chief Land Claims Commissioner herself. The final settlement agreed with the landowners was R939,360,000.00 for 13 184 ha. This amount to R71,250.00 per hectare. Further, the parties agreed to the acquisition of the improvements at the cost of R73,168,492.00 as well as R7million for movable assets. In total, government settled the claim at R1.1 billion for 1 community claim. It is important to note that in 2007, the land was valued at R725,120,000 and that the position of the Department then was that it was an exorbitant cost to pay. However, the change of heart in the department, as reported by the Commission, was that the Minister did not want the court to set a precedence on the matter of compensation. Further, he was concerned because of the failures at the Land Claims Court and the Supreme Court of Appeal.

Over the last three years, the Committee has noted with concerns reports about exorbitant costs of land acquisition. One of the cases of concern was the settlement of Malamala land claim at the value of R1.1 billion in 2014. It raises fundamental questions about the meaning of 'just and equitable' compensation, reflecting an equitable balance between the public interest and the interests of those affected, as provided for in the Section 25(3) of the Constitution. This cost makes it the single most expensive land claim to be settled by the Commission on Restitution of Land Rights since December 1998¹.

¹ The Restitution of Land Rights Act (1994) as amended provides that all claims must be received by the Commission on Restitution of Land Rights by no later than 31st December 1998.

Given the cost of settlement discussed above, a logical question to follow relates to the impact of the settlement to the claimants who were to enter into co-management or partnership agreement to sustain land use and productivity. Publicly available reports show that the intended beneficiaries are alleging that there is mismanagement and hoarding of profits by the CPA leadership. The section below describes the CPA operations and dynamics.

3.1.2. The establishment and functionality of the N'wandlamharhi Communal Property Association

Having negotiated the settlement of the land claim, the RLCC and the Department facilitated legal entity workshop which resulted in the formation of the Communal Property Association (CPA) named N'wandlamharhi. The CPA was duly registered in the CPA registry of the Department of Rural Development and Land Reform as per the Communal Property Associations Act. The CPA Constitution stipulates that the function of the CPA is to acquire and hold land on behalf of members (i.e. 960 land claimants in the verification list which is discussed elsewhere in this report).

The CPA Committee comprising 15 members was elected in accordance with the Constitution. This Committee would function as a governance structure responsible for land administration. In support of the CPA Committee, there are 4 sub-committees; namely, Social Cohesion Committee, Technical Committee, Economic Committee and the Governance Committee consisting of 4 members each. The Committee noted that CPA was experiencing internal strife to a state of paralysis. The key concerns were: governance (abuse of power, nepotism and corruption by the leadership), verification lists, distribution of benefits).

(i) Collapse of CPA governance and poor support systems

The Provincial Rural Development and Land Reform Office reported that the N'wandlamharhi CPA has not been reporting as required in terms of the CPA Act. Despite a number of interventions, the CPA has continued not to comply. As a result, there are serious deficiencies in terms of accountability

of the Committees. Further, the financial reports have not been prepared in line with the required standards. The Interim Committee has made it impossible for the Department to make intervention that could improve the state of compliance.

The CPA has different structures attached to it. For example, Mondzo Trust, and Community Equity Trusts. Different streams of funds flows into the two entities and the CPA as the sole shareholder. The Committee found that there were no clear mechanisms of accountability of the Boards of these structures to the CPA as the shareholder. Further, many members of communities alleged that the entities are run by one of two families, brothers and sisters, leading to abuse of power, nepotism and corruption. For example, a certain family has a member as leading Board member representing the CPA in the Malamala Board of Directors, his brother is the chairperson of the Interim Committee of the CPA, and their sister is the treasure of Mondzo PTY (LTD).

At the time of the visit of the Committee, the term of the CPA committee had expired. There was no constitutionally and democratically elected the Committee to run the affairs of the CPA. Various efforts to elect the CPA committee collapsed due to problems of CPA membership and questions about rightful claimants and beneficiaries. This, as observed during the meetings, emanates from bundling of 21 land claims. Now what was once a single claim during facilitation of the land claim is divided because some believe that Mavuraka should not have a share because their land was not yet restored.

(ii) *Verification lists as a source of conflicts and tensions within CPA*

The tensions and conflict within the CPA, as discussed above, are a result of verification lists (i.e. CPA membership) which is being disputed. The Committee noted that there are disputes regarding membership. The question that remains unanswered is whether the list was inflated with people who are not claimants? Whether it was members of community with valid rights in terms of restitution. The process of verification which had not been concluded at the time of the visit was meant to resolve this problem.

The Commission on Restitution of Land Rights reported that at the time of the settlement of the land claim, there was one community of Mhlanganisweni which agreed to the settlement of the land claim and transfer of the land to N'wandlamharhi CPA which is inclusive of all the 21 claims, 960 members and 5760 beneficiaries. There was never a stage where there was conflicts about membership and that some of the people were not part of the community. Due to allegations for exclusion of some members of the CPA, the RLCC decided to conduct second verification of CPA members. It further appointed a service provider on 7 April 2018 with an 8-months assignment. The service provider has encountered challenges with the verification, especially at Mavuraka, the most vocal group that has complained about exclusion.

(iii) Lack of distribution of benefits

A meeting held by the delegation with members of the CPA, mainly from the Mavuraka claimants, overwhelmingly demonstrated high levels of discontentment among beneficiaries. Almost everyone that addressed the committee reported that they either have not received any reward either from the dividends paid into Mondzo or lease fee paid to the CPA. Equally, the educational benefit from the community tourism levy deposited into the Community Equity Trust has benefited only a few. They also reported that there were no clear criteria used for the selection of educational fund beneficiaries or tenders at Malamala. They further allege that the benefits that were meant to accrue to beneficiaries have not been realised because some of the beneficiaries were eliminated from the beneficiary lists, depending on which group of the CPA you belong to. What has become quite clear at the end of the visit was that there was a problem regarding distribution of benefits among members. It is unclear how much has been distributed to date.

3.2. Co-management of the Malamala Game Reserve

From the date of transfer of the land in October 2013, the property was leased to MalaMala Ranch (Pty) Ltd under a Transitional Agreement until 28 February 2015, pending the conclusion of phase 2 of the settlement agreement by the parties. As illustrated in Table 4 below, the shareholders in joint venture operating company are MalaMala Ranch (Pty) Ltd and the CPA. The parties agreed that the shareholding will alter progressively over time, ultimately resulting in the dilution of the MalaMala Game Reserve (Pty) Ltd stake in favour of the CPA until such time as the Community holds a majority share. It is important to note the distinction between the Malamala Game Reserve and the operating company known as Malamala Game Reserve (PTY) Ltd which operates eco-tourism on Malamala Game Reserve (the land and buildings). The agreement is based on a 20-year lease with shareholding is illustrated in Table 4 below. Despite the commitment to empower the CPA for full ownership of the business, the Committee was concerned that there was not exit strategy, the terms of agreement ended at year 20 with parties holding 50/50 shares. It would appear that the idea of dilution to an extent that the CPA is the majority shareholder is not envisaged within the first 20 years of the agreement.

Table 4: Shareholding over 20 years period

Years	MalaMala Ranch (Pty)	CPA
0 - 5	70%	30%
5-10	60%	40%
11 - 20	50%	50%

As illustrated in Figure 2 below, the framework agreement entailed creating employment for community members, investment in the development of Malamala, rental payment, tourism levy, distribution of dividends and financing education through community tourism levy. In terms of the agreement, the CPA had three income streams; namely, property rental, dividends and community levy.

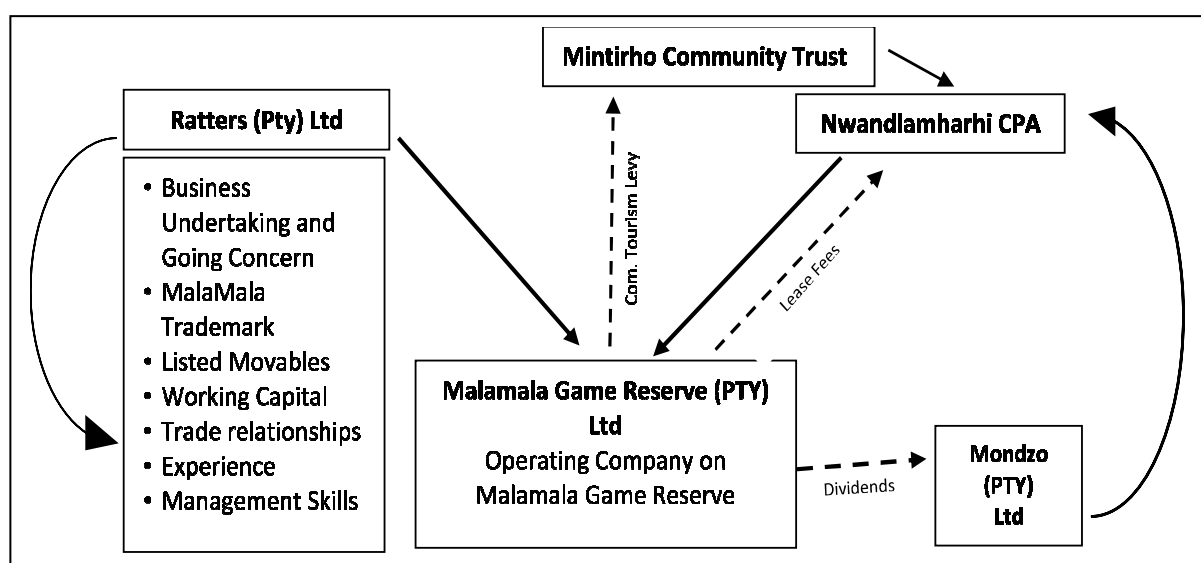


Figure 2: Corporate Structure - Malamala

The following paragraphs explain the revenue streams illustrated in figure 4 above.

4.1 *Property rental:* the operating company pays a monthly rental to the CPA for the lease of the property on terms agreed to between MalaMala Ranch (Pty) Ltd and the CPA. The rental fee is based on percentage of turnover. By December 2017, R36.2 million had been paid in leases to the CPA.

4.2. *Dividends:* The operating company pays annual dividends comprising no less than 50% of operating profit after tax to Mondzo PTY(LTD). This company is 100% owned by the CPA. As discussed above, it then transfers a percentage of the dividends to the CPA for distribution to the members. The company paid dividends of R40 million to shareholders. Mondzo received about R12 million which is 30% of the profit in line with the shareholder agreements. Mondzo in turn paid R6 million to the CPA.

4.3. *Community Tourism Levy:* The operating company pays a Community Tourism Levy of R125 per bona fide tourist, at the time of the visit it was estimated at R145.00 per tourist, who occupied bed night. The fund is channelled to the “Community Equity Trust”. As discussed the funds are used to fund education in ecotourism. By November 2014 about R5.5 million had been paid in tourism levy.

Table 5 below illustrates the amount of funds already paid by Malamala (PTY) LTD to the CPA, Mintirho Community Trust and Mondzo (PTY) Ltd. The Executive Directors however reported that Malamala has paid R73.5 million to community structures by 31st October 2018. About R 53.4 million of payments were made since the inception of the new business in March 2016. The Committee is yet to verify to whom the difference was paid to.

Table 5: Payments made CPA structures

Income Stream to CPA	Period	Total Amount
Lease fees	01 March 2016 – 31 October 2018	R26.1 million
Dividends	2017 FY	R10.2 m
	2018 FY (to 31 October 2018)	R8.1 m
Community Tourism Levy	February 2014 – 31 October 2018	R7.2 m
TOTAL		R51.6 M

In line with the terms of reference, the Committee was interested in understanding progress made in the implementation of the framework agreement. The Committee noted that Malamala Game Reserve (PTY) Ltd has met and exceeded its obligations in so far as implementing the key milestones. However, its successes were marred by the complaints of CPA members regarding nepotism in the recruitment of labour and lack of involvement of the CPA members in key decisions. The Committee further noted that most of these issues are external to the operating company, yet they impact the reputation of the company negatively such that the company might need to consider steps it can take to support the CPA without involving itself into its dynamics.

Table 6: Assessing implementation of the framework agreement

Agreed Milestones for Malamala Joint Venture	Achievements by November 2018
Employment of community members	<ul style="list-style-type: none"> - 84 permanently employed at MalaMala. - Additional 27 members were employed on short-term contract during the refurbishment of the Main and Sable Camps.
Redevelopment of MalaMala: R20 m invested by the end of year 8.	<ul style="list-style-type: none"> - By June 2018, R34 million was already spent on redevelopment of Main Camp and Sable Camp.
Payment of lease fee to the CPA: R700,000.00 p/m in the interim; and R560,000.00 p/m with annual escalation thereafter.	<ul style="list-style-type: none"> - Between November 2014 and December 2017, R36.2 million in lease rentals was paid to the CPA.
Payment of Community Tourism Levy of R125 per guest (for education and training of Community members in eco-tourism and conservation)	<ul style="list-style-type: none"> - Between November 2014 and November 2018, R5.5 million in Community Tourism Levy has been paid into the Community Equity Trust. - The fund has supported 15 members enrolled at various institutions so far.
Distribution of 75% of net profit yearly by payment of a cash dividend to shareholders	<ul style="list-style-type: none"> - 2017 FY: MalaMala joint venture paid a dividend of R40 million (i.e. 83% of 2017 FY's profit after tax). R12 millions (30% of the R40 million) was paid to Mondzo Community Investment (Pty) Ltd. - Mondzo paid out R6 million of the R12 million to the CPA.
MalaMala to spend R50 million in the development of a 42 bed Charleston Camp	<ul style="list-style-type: none"> - Phase 1 Development: Establishment of an 18-bed luxury tented camp of R60 million. Drawings have already been completed and the Environmental Impact Assessment (EIA) process is at an advanced stage.
MalaMala is to pay a minimum annual lease fee of R2.4 million in respect of the new Charleston Camp as from 1 March 2019	<ul style="list-style-type: none"> - Commencement date for payments has not yet been reached. 1 March 2019 was agreed upon as the date in order to allow for approval and construction processes to be completed.

4. Voices of the people

This section highlights some of the issues raised by the people to demonstrate their concerns and frustration.

Representative of the side-lined Mavuraka group.

- a) *“At N’wandlamharhi, there is one CPA under one management. When we had the Annual General Meeting, we resolved to commence with verification within 6 months. But to date, it has not been started. They are verifying people that are not from N’wandlamharhi, people that are not known by the claimants” he further said, “... the Annual General Meeting did not include the people, they just collected signatures”*

Concern around the verification process and criminality around it was echoed by many speakers during community meeting.

Speaker during the community meeting

- b) *“One family has usurped the powers of the CPA and is running it down. It has shut the Department out. This family is behind the dysfunctionality of the CPA... There is disbursement of funds without approval through the resolution of the CPA”*

Speaker during the briefing session

- c) *“we do not know who the co-management partners are. The people who agreed to the partnership did not have the authority to do so. They gave the Ratters 70% stake in the business. But why was it not 50/50? Those people sat with the documents until the last day, we are now suffering the consequences”*

A representative of group that regards itself as the rightful owners of Malamala and not the Mhlanganisweni Community, which in his view is artificial community.

d) *“Government only bought Malamala, formerly owned by the Ratters family, which is an extent of 13184 ha. They did not buy the entire Sabie Sands which has many people who have claimed the land. What happened is that, just as KNP has many people who claimed, government put all the people on Sabie Sands in one basket. The reason that it was joined is because there were clever people who ensured that it should be one. They brought in people who were not meant to be there. It is misrepresentation of history. These people must stop claiming benefits from Malamala and push for the restoration of their land”.*

The following are some of the speakers that presented their case during the open community meeting in Lillydale.

e) *“People are not being held accountable. The CPA has been captured by one family. The Committee is not elected by the people”*

f) *This CPA committee is a corrupt and illegitimate CPA... It must be dissolved, illegal and fraudulent activities must be investigated and people must be sent to jail.*

g) *“people have been removed from membership lists. This claim is led by wrong people. I was paid twice but when I started to question some of the decision of the Committee, I no longer received any stipend (from dividends”.*

h) *“Parliament must just freeze the account so that this illegitimate CPA committee cannot transact. We have been calling for government to come and assist. But government came too late and the thieves have embezzled our funds. These people must be jailed. Government must recover our moneys by attaching their properties and auction them.”*

- i) *“there is structure that is reportedly built at a cost of R18 million. I invite the committee to visit the structure before it leaves so that the Committee can see for itself that moneys are being wasted. We recommend that the CPA must be put under administration and conduct a forensic investigation”.*

5. Emerging insights

The fact finding visit has given platform for engagement to members of CPA who alleged that no one in government was willing to listen to their grievances. The Committee noted that there are other important players that it could not engage with for various reasons. For example, an Attorney representing the CPA Committee who is alleged to have transferred funds to an CPA Committee without the CPA resolution, and an Interim Committee that has written to the Department through their Attorney that they were not comfortable to meet in the presence of different concerned groups.

Given the recognised need for further engagement by the Committee, and further witnesses required to appear before the Committee, no recommendations have been made at this stage. The following paragraphs summarise emerging insights from the first leg of engagements on Malamala.

5.1. Settlement of land claim by the Commission on Restitution of Land Rights

- (i) *The CRLR operates outside its statutory mandate by involving itself in post-settlement support arrangements.*

Participation of the Acting Deputy-Chief Land Claims Commissioner sits in the Board of Directors for Malamala Game Reserve as a minister’s representative raises critical questions about the role of the Commission on Restitution of Land Rights after the claim has been settled. It is also

indicative of the blurred lines between the Department of Rural Development and Land Reform and the Commission on Restitution of Land Rights. The Commission is deeply involved in Malamala than the Department of Rural Development and Land Reform. It is not surprising that when there are problems in CPAs, the Department expected the Commission to intervene and resolve the disputes and conflicts. Unless the Commission is autonomous, it will continue to be a challenge for the Commission is reportedly operates with limited staff

(ii) The Minister's withdrawal from the Constitutional Court resulted in settlement of the most expensive land claim since 1994

What the Constitutional Court would have said remains anybody's guess. However, if all the outstanding claims around the Kruger National Park were to be settled in this manner, restitution could be unaffordable. Failure to test the issue of compensation, as envisaged in Section 25(3) of the Constitution, denied the State opportunity to set Constitutional Court's precedence on the interpretation of 'just and equitable' compensation. The Committee also noted the Minister's concern regarding the outcomes of the Land Claims Court and the Supreme Court of Appeal on the question of feasibility of restoration. In the event that the Constitutional Court found it not feasible to restore the farms, the judgement could have set a precedence that would potentially affect the remain restitution claims. Whether the payment of compensation of R1.1 billion (including the improvements) is a fair one is beyond the capacity of the Committee. The Committee does not have skills in property valuation and this could be a subject of further investigation, with the assistance of state entities with the requisite skills and capacity.

(iii) The CRLR's reliance on few individuals, as the face of the land claim, could potentially results in lack of transparency and entrenching skewed power relations.

Appointment of two individuals who acted as the face of the land claim, interfacing with the Commission and Malamala, involved in negotiations and elected as in the leadership of the CPA resulted in the Commission proceeding with the claim and settling it under the assumption that they

were consulting with the general membership of the community. The Commission never picked up the underlying tensions and divisions within Mhlanganisweni community, hence the Chief Land Claims Commissioner reported that “it came as a surprise that within Mhlanganisweni community there are different groupings and they do not identify themselves as a single community”.

(iv) *Bundling of different land claims into single community claim risks creating artificial communities*

Mhlanganisweni community land claim is an amalgamation of 21 land claims lodged individually. During the investigation of land claims, the Commission found that the claimants had overlapping rights and had a shared history. It was agreed that these should be merged into a community claim. Whilst it helped to fast track the settlement of the land claim without having to deal with boundary resolution and resolving conflicts that stage of the facilitation of the land claim, the CPA was at the time of the visit hamstrung the identity politics within the CPA. These manifest in the verification process, discussed below, and determining who qualifies for benefits from the land. As the Committee heard, certain groups do not believe that Mavuraka group deserve a share in the benefits because the farms on which they lived were not yet restored.

5.2. Claimant verification and CPA membership

(i) *CPA registration relies on verification lists done by the RLCC*

CPA registry does not have mechanisms to test the validity of the lists submitted for registration of lists. It depends on lists generated as claimant verification lists with assumption that the RLCC verified the claimants. In the event that there are problems with the lists, the Department refers the problem back to the Commission to redo verification of claimants. The blurred divide between the role of the Commission as mandated in terms of

the Restitution of Land Rights Act and that of the Department as mandated in terms of the Communal Property Associations Act is again amplified by the CPA challenges as seen at Malamala. However, what Malamala shows is that verification process, if not done appropriately, may affect the functionality of the CPA or Trust.

The Commission reported, in February 2019, that the second verification process which mainly affected the Mavuraka group was to be completed by end of February 2019. The Interim Committee also voiced their unhappiness with the verification process, firstly because they do not believe that Mavuraka people should have a stake at Malamala and secondly because there was allegedly never a verification for the Mavuraka group. Therefore, according to them this is an initial verification. The Commission was adamant that there was verification process which members of the CPA signed it off. The list that came from that process because the basis upon which CPA was registered and the land claim was settled for the entire group.

(ii) Lack of transparency and objectivity during claimant verification stage might negative affect functionality of legal entities.

The Committee noted that the list of members is 960 yet there are disputes about who is a member and who is not. What is unclear is whether the RLCC just inflated the lists with people who should not have been on this list in first place, thus impacting on the amount of grant funding available to the community. The final list that will emerge from the verification process underway will shed some light into this. The existing tensions that are visible today can be squarely traced back to the bundling of the land claim and the verification process. In the meantime, the agreement includes all the 960 members and are entitled to benefits therefore the Department and the Commission, which is involved on the basis of their verification and involvement in the Board of Directors for Malamala, should without delay ensure that the legally binding agreement and CPA constitution are implemented in favour of all the 960 members.

5.3. Governance in the Communal Property Association

(i) *Enforcement of the CPA constitution in relation to election of office bearers and general functions*

There appears to be general lack of CPA constitution enforcement and the DRDLR's support has not resulted in meaningful progress to ensure a functional CPA. The term of office for the executive expired and it has not been possible to elect a new committee. As a result, the interim committee runs the affair of the CPA. The Department, which is mandated to intervene when there are challenges, has not been able to successfully resolve the problems despite protest by some members of the CPA. The Department and the RLCC appear to believe that problems will be resolved by verification as discussed above. However, the Committee believe that resolving the challenges require much more than verification, especially adherence to the Constitution and ensuring that everyone understands the Constitution so that those in leadership could be held accountable.

(ii) *Maladministration by the Executive Committee is enabled by the lack of capacity within the Department to provide support as envisaged in the CPA Act.*

The problems observed suggest deficiencies in corporate governance, both from CPA leadership and general membership. Lack accountability has resulted in the interim committee operating outside its scope, i.e. to facilitate claimant verification. It transacts on CPA account without authority to do so. For example, the allegation that funds were disbursed without a resolution and not all members and beneficiaries have received their share of the funds distributed. The role of the Minister's representative in both Mondzo and the Malamala should be questioned. When Mondzo transfers money to CPA, and an interim CPA disburses funds, should not a Director representing the minister warn the Department for urgent attention? However, the Committee noted that all officials of the Department reported that they did not know how the funds were transferred from the Trust

Account of an Attorney to the CPA account. There is no evidence that the Department attempted to stop the interim committee to transact illegally, despite the CPA submitting annual financial statements. To this end, the visit by the Committee could not go into depth around these allegations. These would require further investigation by institutions with capacity to do so. For example, the SIU could assist with forensic investigation about all the CPA funds, the role played by different players in the CPA, Mondzo and the Community Equity Trust.

Other observations are as follows:

- The Interim Committee allege that it was given a mandate to transact on behalf of the CPA. This view is disputed by the Department of Rural Development and Land Reform as well as the Commission on Restitution of Land Rights. The Interim Committee could not produce a CPA resolution to prove CPA decision in this matter.
- The Treasurer for the CPA, the Mintirho Trust and the Mondzo Trust were not able to present their financial reports during the scheduled meetings. Similarly, an Attorney who had worked with the CPA on these matters, deliberately did not bring the financial reports on the Trust Account as requested.
- The CPA has an organisational development advisor and the legal adviser. The cost of the advisory services could not be established because the CPA representative and the legal advisor would not divulge the cost of legal service.
- Location of legal advice and legal representation in a single law firm raises critical question about the conflict of interest, especially where alternative dispute resolution mechanisms are not explored in favour of court which legal representation is required.

(iii) *Interface of Malamala Game Ranch (operating company), Mondzo PTY(LTD) and Community Equity Trust*

The Malamala Game Reserve (PTY) Ltd is managed professionally it is well on course to achieve key milestones agreed to during negotiations of the framework agreements. Notwithstanding the outstanding performance of the business, interface of the business with the CPA, Mondzo and Community Equity Trust risk impacting negatively on the brand Malamala. Increased incidences of Rhino poaching were allegedly linked to CPA disputes, whilst the operating company has been transferring funds to Mondzo and the Community Equity Trusts, CPA members that appeared before the Committee made serious allegations of corruption against some of the directors representing the CPA in the Board of Directors for Malamala. Further, the fact that members of a single family appear to occupy strategic positions such as chairpersonship (CPA committee), director (Malamala) and treasury (Mondzo) raises concerns in possibility of nepotism and predetermined outcomes of CPA structures as family members discuss CPA matters outside formal structures. For example, allegations that friends and family are beneficiaries of the bursaries awarded through the Community Equity Trust. It appears these institutions are not accountable to the CPA. Therefore, the Department should put in place mechanisms that would ensure that they account to the CPA. The CPA report to the Minister should therefore include the dynamics of these entities.

5.4. Business on the N’wandlamharhi CPA land

5.4.1. Ownership (who owns what?)

The separation of the CPA and business helps to ensure that the property of the CPA is protected in the event that the business collapses. The success of the co-management arrangement will be largely determined by the amount of capacity building given to CPA members in preparation of eventual takeover. However, the Committee noted that at year 20 of the partnership,

the ownership of the business will be on 70:30 bases. Whether the CPA will be ready to be a sole shareholder in the business is unclear.

5.4.2. Power relations

Given the shareholding arrangement, the day-to-day management decisions are the domain of the Executive of Malamala Game Reserve. General stake and powers are determined by the shareholding agreement as discussed above. The Board is a high level structure which is not involved. Due to the dysfunctional CPA, as CPA members reported, general membership is far removed from the operations and has no full information about the operations on their land. As some stakeholders suggested, it poses risk to the enterprise. For example, increase in Rhino poaching. Keeping everyone informed about the business and instilling sense of ownership of the business might help strengthen the brand of Malamala among the local communities.

5.4.3. Risks

As discussed above, the land and buildings are the property of the CPA and are not part of the business. The business leases the land from the CPA, therefore the exposure lies with the business rather than the CPA. Their exposure is in terms of the time they committed to the partnership and use of their restitution discretionary grants in the project. In the unlikely event of the collapse of the project, workers may lose their jobs. But the case shows further that the dynamics of the CPA, especially conflicts and tensions, might affect cause reputational damage to the business entity hence a need for speedy resolution of the existing challenges.

5.4.4. Rewards (who gets what?)

This model guarantees that the shareholders benefit in terms of profit sharing in line with the shareholder agreement, i.e. from 70/30 to 50/50 shareholding by year 20, deposited to Mondzo. Further, the CPA receives rental fee and Community Trust receives the tourism levy. Further, CPA members receive education and skills training, progressive job creation,

community development. The business would be progressively transferred to the CPA over time. All these ideas could be reduced to naught if the CPA conflicts were not resolved.

6. Recommendations

In view of the observations and insights documented in this report, the Portfolio Committee on Rural Development and Land Reform recommends that –

6.1. The Minister must institute forensic investigation on the settlement of Malamala claim, including the verification of members and the affairs of the Nwandlamhari CPA. During the fact-finding activities by the Committee, it was quiet evident that Parliament does not have sufficient capacity to conduct investigation of magnitude and complexity of Malamala and the Nwandlamharhi CPA. The terms of reference for the investigation, amongst others as the Minister may deem it necessary, should include the following:

6.1.1. The just and equitableness of the final cost of settlement of Malamala land claim, especially in light of the decision of the Minister of Rural Development and Land Reform to withdraw from the Constitutional Court.

6.1.2. The authenticity of the 950 members as opposed to 250 that the interim committee suggests is an authentic number of beneficiaries of the settled land claim. Did the DRDLR inflate the numbers? Is there a connection between an increase of the number of beneficiaries (ultimately CPA members) and the justification for the cost of settlement of land claim?

6.1.3. The flow of funds from Malamala Game Reserve to Mondzo PTY (LTD) and the CPA, and further flow from CPA to various accounts of members of CPAs or disbursement. Analysis of the financial reports of the CPA Accounts, Mondzo PTY (LTD) and Mintirho Trust in order to track all expenditure and purpose. The extent to which the

Interim Committee followed the CPA constitution in relation to decision-making around various transactions and use of CPA resources.

6.1.4. Access Section 86 Trust Account and track funds of the CPA. Where funds have been transferred to other accounts such as of the CPA or any other account, the recipients of the funds and the purpose for the funds must be clarified. Further, back up documents such as CPA resolution must be sought.

6.1.5. All affairs of the CPA must be in line with the CPA Act and the CPA Constitution. Against these documents, assess the legality of transactions, financial and/or otherwise, of the interim CPA

6.2. The Commission on Restitution of Land Rights should reconsider the merging of different land claims as a means to speed up settlement of overlapping land claims. Often, the settlement is unsustainable because different groups may find it difficult to cooperate under the CPA or any other communal ownership legal entity.

6.2.1. Adequate research should be done in order to ascertain land rights lost, interrogate notions of communities which often suggest homogenous groups whereas in practice there are differences and subsets which do not cohere.

6.3. The Commission should, as a final attempt to the resolution of the problem, facilitate conflict resolution between the Mavuraka and Mhlanganisweni groups, ensure that there is equitable distribution of dividends to members of Mavuraka group who did not receive their share of dividends. In the event that agreement is not reached, the Commission should consider approaching the relevant Courts to unbundle the settlement.

6.3.1. The process should be managed in a manner that does not put the business in danger. The process may entail putting the CPA under administration for the duration of the process to allow the Commission to find most appropriate settlement.

6.3.2. The Commission should, without delay, research and settle the remaining portions of land that were claimed by the Mavuraka group. Further, adequate resources should be made available to assist the group to proper verification, setting up of legal entities, and capacity building of members of the legal entity and the leadership structures.

6.4. The Minister of Rural Development and Land Reform, working together with relevant departments such as Tourism and Environmental Affairs, must consider relooking at the manner in which claims on parks are settled and ensure adequate support is provided in order to avoid the repeat of Malamamala.

6.4.1. The Minister must, within a month after the adoption of this report, submit a detailed plan of action around the forensic investigation, terms of reference and by when the investigation will be concluded.

6.4.2. The Minister must make available the report to the Portfolio Committee on Rural Development and Land Reform.

Report to be considered.

2. Report of the Portfolio Committee on Rural Development and Land Reform on study tour on the restitution of indigenous people's land rights in Canada, dated 13 March 2019

The Portfolio Committee on Rural Development and Land Reform, having embarked on a study tour from 23 to 27 September 2018 to draw lessons from Canadian experiences regarding redress for land alienation from the indigenous people and processes for reconciliation, reports as follows:

1. Introduction

Over the last 24 years, the government of South Africa has implemented a programme of land reform; restitution of land rights one of its critical components. Among the criticisms of restitution is its long-winded processes and the 1913 cut-off date which is seen as an impediment to the redress for colonial land dispossessions prior to 1913. The most affected groups are Indigenous communities, including descendants of the Khoi and Sans people. The Portfolio Committee on Rural Development and Land Reform, henceforth the Committee, had keen interest in other jurisdictions that grappled with related historical land injustices. One of those was the Canadian government processes of reconciliation with the First Nations and Indigenous communities whose land dispossessions dates as early as 1701. The Committee, therefore, undertook a study tour to draw lessons from the Canadian experience of redress of colonial land injustices and related development support to the Indigenous communities.

1.1 The rationale for the study tour

The program of restitution, as discussed above, has been criticised for its failure to permit claims to restitution of land rights lost prior to 1913. The Committee, and its predecessors, received complaints and petitions from people who felt excluded. Most prominent complaints

came from the Khoi and San descendants. In response to this critique, the Minister of Rural Development and Land Reform announced in 2013 that government would develop policy mechanisms that would entail exceptions to the 1913 cut-off date. The Committee, having noted limited progress in the development of the proposed policy, resolved to embark on a study to Canada as introduced above.

Both South Africa and Canada are part of the Commonwealth Nations. They share a history of settler occupation and deprivation of Indigenous people's land rights by confining them to the Reserves. However, it is important to note that the two countries have dissimilar economic, social and legal contexts, yet the similarities present Canada as a relevant jurisdiction for this claiming historical land rights. Both Countries have been experiencing sustained campaigns and struggles of the marginal groups for restorative justice with regard to land rights. In South Africa, the descendants of the Khoi-San and other tribal groups argue that entrenchment of the 1913 cut-off date in the Constitution undermines their entitlement to restorative justice. In Canada, the First Nations, Inuit and Métis are also complaining about failure of government to implement treaty agreements. The highlights from the Report of the Royal Commission on Aboriginal Rights (1996) shows that "Canada is a test case for a grand notion - the notion that dissimilar peoples can share lands, resources, power and dreams while respecting and sustaining their differences. The story of Canada is the story of many such peoples, trying and failing and trying again, to live together in peace and harmony."

At the time of the visit, the Committee learnt that the Government of Canada was developing, together with First Nations and Indigenous communities, a Recognition and Implementation of Rights Framework (RIRF) in order to address their grievances and achieve national reconciliation. Similarly, South Africa has been grappling with related issues and considering policy options to address the concerns and questions that land reform has brought forward. For example, Constitutional amendment to allow expropriation of land without

compensation, development of comprehensive policy on communal land tenure which directly impact on land rights for people in the former Reserves. One of the critical question relates to competing claims and interests in land by traditional communities on one hand and private investors such as mining companies on the other. This study tour, therefore, presented an opportunity for the Committee to draw lessons on a range of issues as outlined in Table 1 of this report.

Key question	Sub-set of questions	Possible area of interest for SA Parliament
Constitutional/legislative and policy framework for addressing the land rights of Indigenous people in their diversity.	<ul style="list-style-type: none"> - What are key constitutional provisions that the aboriginal people rely on to make claim to their land? - What are the key pieces of legislation that are relevant to the issues of access to land by indigenous people, together with planning and land use management? What are the successes and impediments that could be shared with the committee? - What are constitutional parameters with regard to foreign ownership of land in Canada, including ownership of land by non-community/band members in the reserves? 	<ul style="list-style-type: none"> - Constitutional parameters for land reform, including historical claims to land. - Spatial planning and land use management - Communal Land Tenure Policy and foreign ownership of land debates
Indigenous peoples' comprehensive land claims negotiations and agreements (modern treaties)	<ul style="list-style-type: none"> - How are claims for indigenous land filed? With whom? How are they processed? - Explain notions 'existing' rights in the context of land alienation that saw most land being ceded to the Crown under treaties? - What are the institutional support mechanism (government and non-government), including roles and responsibilities? How does Canada deal with coordination of various actors from federal to provincial government departments? 	<ul style="list-style-type: none"> - Pre-1913 land claims outside the restitution of land rights act, especially for Khoisan and other tribal groups in the former homelands and reserves. - Exceptions policy
Experiences of Indigenous groups, First Nations	<ul style="list-style-type: none"> - What are the necessary historical and contextual considerations to claim making by the Indigenous groups in Canada? What are the empowering legislative and policy tools? What are the socio-economic impact of implementation of policy instruments available? What is their greatest achievement and short-comings to-date in their struggle for secure independent ownership of land? How have land claims been settled over the years? 	<ul style="list-style-type: none"> - Land restitution and upgrading of tenure on communal land. - Tenure security and land sales or leases (administration of state and public land, and state disposal policy)

Settlement support and economic development (including cooperative development and support Young Farmers Fora)	<ul style="list-style-type: none"> - What kinds of support, including capacity building intervention, is provided by the State? At what level? - Are there joint interventions across the different levels of government? How is it coordinated? What are there models of cooperatives implemented in the reserves? - Are there any benefits of private sector partnerships? How is the level of youth engagement in agriculture? - What are the incentives or disincentives for both government, private sector and Indigenous groups, families or individuals? 	<ul style="list-style-type: none"> - Comprehensive Rural Development Strategy - Agri-Parks. - Rural Enterprise and Industrial Development. - Rural Infrastructure Development.
Parliamentary oversight and accountability	<ul style="list-style-type: none"> - How does Parliamentary oversight over the executive, especially at the level of the Committee, functions? - What are the observations made during Parliamentary Committee sitting? 	<ul style="list-style-type: none"> - Parliamentary oversight and accountability approach of the Committee.

Table 1: Summary of key questions for the study tour

1.2 Study tour objectives

The overarching objective of the study tour was for the Committee to engage Canadian counterparts and government with regard to legislative mechanisms to redress colonial land alienation, regulation of access and governance. The study tour, therefore, hinged on the legal framework and institutional arrangements enabling processing of comprehensive land claims as well as development support in the reserves broadly, including coordination of state and private sector participation.

Specifically, the Committee set out to -

- explore and draw lessons on the Canadian process of claim making and settlement of claims; further draw insights into the development support;
- draw insights on the types and functions of institutions set up for facilitation of claims, land ownership, governance and state support;

- draw comparison of South African and Canadian legislative frameworks for facilitation of Aboriginal people's land access and development, specifically on landholding mechanisms and spatial planning and land use;
- interact with Indigenous people in order to learn about the socio-economic impact of Comprehensive Land Claims (CLC), implementation of modern treaties and related economic development benefits;
- learn from the existing community capacity building strategies to enhance land management; and
- to draw comparisons with relevant parliamentary committees that conduct oversight on comprehensive land claims and rural development.

1.3 Key questions for the study tour

Having regard to the overarching concern of this study tour, the following key questions constituted the framework for engagement with the relevant Canadian authorities:

- What legislative and policy framework exist to address the Indigenous rights in Canada? What process does Canada follow in the development of policies and legislation? What is progress in the implementation of the relevant policies, treaties and agreements.

What is the role of civil society in shaping policy (stakeholders) as well as supporting the First Nations claims to the land?

- How does the Canadian government deal with the indigenous people's claims to the land? What is the legislative framework for facilitating land development with specific reference to legal entities and various landholding mechanisms including land use management strategies?

- How do First Nation communities view legislative processes and implementation, especially tenure arrangements, land use management and planning, government support services.
- What lessons does Canadian Parliament bring forward in relation to effective parliamentary oversight by committees?

1.4 Delegation

The delegation of Members of Parliament (MPs), accompanied by two parliamentary officials and an official from the South African High Commission in Canada, conducted its work over 5 days as will be discussed in this report.

Table 2: List of members of the delegation

Category	NAMES
Members of Parliament	MP Ngwenya-Mabila, Ms PC: Leader of the delegation (ANC) MP Mnguni, Mr PJ (ANC) MP Magadla, Ms NW (ANC) MP Nchabeleng, Mr EM (ANC) MP Robertson, Mr K (DA) MP Filtane, Mr ML (UDM)
Parliamentary Officials	Ms P Nyamza, Committee Secretary Dr T Manenzhe, Content Advisor
South African High Commission	Ms N Maponya, Third Secretary Political

1.5 Structure of the report

This report accounts for the activities and engagements of the delegation of the Committee, henceforth, the delegation, to Ottawa, Canada. Following this introductory part which outlined the background to the study tour and the Committee delegation, the report proceeds in three parts as follows:

- It highlights the delegation's approach during engagements with stakeholders and further outlines key activities that the delegation carried out during its visit to Canada.
- It summarises key points from conversations with stakeholders, both government and non-government;
- It summarises analysis of observations and key lessons; and
- It concludes by highlighting key recommendations to the National Assembly.

2. Approach to engagements

The delegation held structured meetings with different stakeholders as demonstrated in Table 3 of this report. There was a deliberate attempt to interact with as many stakeholders as possible in order to obtain a holistic view of perspectives of policy makers, bureaucrats, interested and affected parties. Overall, the meetings were successful except one which was cancelled and the trip to the First Nations which could not be undertaken. Whilst majority of the meetings were structured in terms of question and answer approach, the facilitators were careful not to confine the members. At times, the meetings were conversations between the delegation and the Canadians they visited in order to allow space for the delegation to share its experience with South African land reform. In some meetings, Canadians were so much interested in the South African debates on land expropriation without compensation and what it means.

The programme for the study tour was limited in terms of the amount of activities it could carry out. For example, the delegation could not visit some of the First Nations reserves. Due to short period of stay in Ottawa, the delegation could not accommodate stakeholders who were not available for the meetings requested.

Table 3: Key activities and list of stakeholders that the Committee interacted with

Date	Stakeholders		Theme
	Name	Organisation	
24/08/2018	Ms Sibongiseni Dlamini-Mntambo, High Commissioner	South African High Commission	Introductions and political-economic overview and relations between South Africa and Canada
	Mr Prakash Diar, Legal Counsel	Department of Justice	Constitutional (legal) framework for redressing the colonial land dispossession.
	Executive Directors	Assembly of First Nations	Coordination of national and regional dialogue, advocacy and campaigns, legal and policy analysis in support of First Nations
25/08/2018	Ms Nadia De Santi, Senior Project Manager; Planning, Landscape Architecture and Urban Design	WSP Global	Overview of spatial planning and landscape architecture - reserves
	Government Officials	Crown-Indigenous Relations and Northern Affairs Canada	Negotiations and implementation of modern treaties and self-government agreements, land management regimes and claims settlement
26/08/2018	TBC	Canadian Institute of Planners	Overview of planning environment in Canada; Principles of working with Indigenous Communities and Indigenous Community Planning.
27/08/2018	TBC	Cooperatives and Mutual Canada	Lessons learnt from the Co-operatives Development initiative. Current co-operative development in Canada
	Mr Robinson	Canadian Agricultural Partnership	Briefing on the Agri Competitiveness Program: Industry building on existing capacity and facilitating the sharing and expansion of skills, knowledge, and best practices.
	Members of Parliament: Canada	Standing Committee on Indigenous and Northern Affairs	Parliamentary perspectives on the issues of indigenous communities and land rights

3. Overview of the inputs by stakeholders

3.1 High Commissioner, Ms Sibongiseni Dlamini-Mntambo: Setting the context for engagements with Canadian government and stakeholders

The South African High Commissioner for Canada presented a context to the relations between South Africa and Canada. Firstly, she outlined the functioning of the politics of Canada as a parliamentary democracy with a federal system of government. Canada is a constitutional monarchy in which the Monarch is head of state. It has a multi-party system in which many of its legislative practices derive from the unwritten conventions of and precedents set by the United Kingdom's Westminster Parliament. However, Canada has evolved variations: party discipline in Canada is stronger than in the United Kingdom and more parliamentary votes are considered motions of confidence, which tends to diminish the role of non-Cabinet Members of Parliament.

On 14 April 2013, Mr Justin Trudeau, son of former Prime Minister Pierre Trudeau, was elected leader of the Liberal Party. Following his win, support for the Liberal Party increased considerably. Despite the grim outlook and poor early poll numbers, when the 2015 election was held, the Liberal Party had an unprecedented comeback. Gaining 148 seats, they won a majority government for the first time since 2000. It was pointed out that the Liberal Party has since embarked on an ambitious and transformative policy agenda. It was highlighted that Prime Minister Trudeau, on 13 July 2017, approved the appointment of Ms Julie Payette as the next Governor-General of Canada and she was installed in 2017. Ms Payette succeeded Mr David Johnston, who served as Governor General since 1 October 2010.

Canada, just like South Africa, has an evil past which Canadians are not proud of. There is a recognition from the highest level of government that land injustices must be addressed. This starts with acknowledgment that the present Canada is established on land that belongs to the indigenous people. Canadians have been interested in the experiences of South Africa, especially the Truth and Reconciliation Commission. Their Commission has developed some action points which the government of Canada is committed to implementing them.

The High Commissioner also affirmed that there was good political relationship between South Africa and Canada. The relationship was a longstanding cooperation with Canada, dating back from the days of struggle against apartheid where Canadians played a major role in assisting South Africa to attain its freedom. South Africans should continue to explore areas possible future collaboration, especially in the field of agriculture and food security. For example, Canadian farmers only farm for a short period of time in the open fields because fields are, most of the year, covered in snow. South Africa should consider exploring partnerships and exchange programmes that could be beneficial to South Africa's emerging sector. She however remarked that Canadians are also monitoring the debate on Section 25 of the Constitution. However, Canadians understand the context of the debate and expropriation of land without compensation, not the land grab, was well received within government circles. However, there are individual organisations representing particular sectors of the society who have protested against the idea of expropriation of land without compensation. Government of Canada has distanced itself from such activities.

3.2 Legislative context for indigenous rights: Mr Prakash Diar, Department of Justice

This meeting highlighted the current government processes to review laws and policies around aborigines' land claims. The purpose is to update the old Comprehensive Land Claims Policy. Government sought to advance reconciliation and find long-term solution that would ensure that the needs and aspirations of indigenous communities are met. At the centre of the process is to ensure economic benefits to indigenous

communities. Canada has a negative history of the discrimination and assimilation of the indigenous communities. For example, government policy sought to create Indian residential schools in the 1800s. These schools deprived children of their social fabric, family and self-identity as a people. The last school was closed in 1996. This is an example of some of the historical atrocities that the people of Canada are grappling with in order to ensure restorative justice.

Since 1701, in the British Colonies in North America (parts of Canada) the British Crown entered into treaties with indigenous groups. These treaties defined respective rights of Indigenous peoples and the Europeans on land that was originally occupied by Indigenous communities. Since 1763, treaties were signed to provide large areas of land (occupied by First Nations) to the Crown in exchange for reserves. Between 1701 and 1923, there were about 70 historic treaties that were signed. There has been challenges around the implementation of treaties.

Table 4: Summary of key provisions in the Historic and Modern Treaties

Historic Treaties (1701-1974)	Modern Treaties (since 1975)
Land/reserves set aside for First Nations use only	Consultation and participation
Annual payment of annuities to First Nations	Ownership of land
Hunting/fishing rights on unoccupied Crown land	Wildlife harvesting rights
Government pay for reserves' schools and teachers	Financial settlements
One-time benefits (farm equipment, animals, etc.)	Self-government
	Resource revenue sharing, participation in the economy

Over the years, Canada experienced a rise in a number of cases brought before the Courts to adjudicate some of these historical cases. However, it has become quite clear that the Courts might not be the best institutions to adjudicate on these matters. In this regard, the government, drawing from South Africa's Truth and Reconciliation Commission (TRC), established its own TRC to consider the historical injustices and to look into some forms of compensation to the

aborigines for the loss of their original land through government-sanctioned dispossession. Part of the terms of the recommendations was for the TRC to make recommendations of key action points for government. At the time of the visit, government of Canada was exploring the financial compensation option as a way of redress. The delegation was informed that government established a working group in 2013 to address a number of implementation issues.

In terms of the legislation, Section 35 of the Constitution Act, 1982 provides constitutional protection to the indigenous and treaty rights. These rights are recognized and affirmed. There is recognition, in the Constitution, that prior to the arrival of Europeans in North America the land was already occupied by Aboriginal societies. At the time of the visit, there were questions being raised about the reconciling the pre-existence of Aboriginal societies with the sovereignty of the Crown. Therefore, it was clear that processes to achieve reconciliation were necessary. The transfer of Aboriginal title was done in terms of the Royal Proclamation of 1763. There are many treaties that were never signed. This has been a major point of concern for many indigenous communities.

The Comprehensive Land Claims Policy emanates from the Supreme Court of Canada decision to recognize Aboriginal rights for the first time in 1973. Since then, about 25 treaties were signed. Some of them included right to self-government. These treaties provided for:

- Indigenous ownership of land and recognition of their initial rights before arrival of Europeans;
- Protection of traditional ways of life (including oral histories, fishing, hunting);
- Access to resource development opportunities; and
- Political recognition and self-government.

Section 35 of the Constitution opened platform for indigenous people to approach courts because government was not reciprocating with regard to the treaties. A key proposal to be considered by government was that there must be mechanisms outside the Courts to address the challenges confronting government and the Indigenous communities. The review process was expected to clarify some of the ambiguities in legislation and the constitution. What has become clear for many Canadians, through the Courts, is that government has a duty to consult, and where appropriate, accommodate Indigenous communities/groups when it considers development that might adversely impact Aboriginal rights or treaty rights.

3.3 Standing Committee on Indigenous and Northern Affairs perspectives

This section summarises conversation with the Canadian Members of Parliament serving in the Standing Committee on Indigenous and Northern Affairs. The Committee appreciates that Canadian government, being federal in nature, is structured differently. For that reasons, whilst some MPs from the South did not know about the land rights issues affecting the aborigines, it was mainly MPs from the North who had clear understanding of the concerns and issues.

The Committee recognises that land is pivotal to the culture and way of life for Indigenous peoples. Deprivation of access to and use of traditional territories has impeded social and economic prosperity.

Parliament was overseeing that the outcome of the TRC process, especially implementation of the 94 calls to action (recommendations). The Standing Committee emphasised that it was important for reconciliation process which government has committed itself to implementation. For them, redress of historical injustices is central to advancement of reconciliation. Settlement of claims is also seen as a central feature in addressing socio-economic conditions of Indigenous communities.

In summary, the following bullets summarise the highlights of the meeting:

- The Committee focus on a range of issues, mainly health care, poverty alleviation programmes, education in partnership with Indigenous communities
- Implementation of Aboriginal and treaty rights
- Economic development in the reserves
- Socio-economic challenges confronting the Indigenous communities. It was reported that Indigenous communities over-represented in prisons, hospitals. Poverty levels amongst them were very high.
- There has been delays in the claims processes, citing that it may take up to 18 years to settle a comprehensive land claim. In some cases, experiences of claimants (Indigenous people) suggests a process that is adversarial, not taking into consideration the cultural difference of Indigenous peoples.
- A need to alternative dispute resolution mechanisms other than the adversarial court processes.

The Committee oversees work of different government departments. For example, the Indigenous Service Canada and the Indigenous and Crown Relations Canada. It was important to highlight this in order to appreciate a need for inter-governmental coordination. Addressing the challenges cannot be achieved by silo approach of sector departments but a holistic intervention with long-term benefits. In summary, the Standing Committee has land claims, Indigenous and Treaty rights as one of its priorities. It often conduction hearings to understand the process and experiences of those who are affected by treaties. It further makes recommendations to the Indigenous and Northern Affairs Canada.

3.4 WSP Global

This section summarises inputs made by WSP Global in relation to planning across various levels of government. It further establishes the connection between national planning and the interest of Indigenous communities. As a Federal State, there are various legislative frameworks for different parts of Canada (federal, provincial and territorial governments).

About 1.4 million people are identified as Indigenous living in traditional territories. However, from a planning point of view, there are complexities around what makes a territory and boundaries. In traditional settings, there were no clear boundaries and the rights of indigenous communities overlap. What one finds on the ground is that different First Nation communities use the same land. These are some of the challenges that planners, who in most cases are outsiders, have to confront. Further local language poses problems during consultations and engagements. What planners have done was to secure reliable and trusted interpreters to assist. The Indian Act (1876) defines how government interact with 614 First Nations bands in Canada. The following are some of the provisions: It prescribed development planning and the involvement of communities of indigenous people. Often, planners find that there are tensions between development and Indigenous peoples' aspirations. Trading-off on priorities has not been an easy task. Canada does not have a one size fits all approach to planning. Canadian Environmental Protection Act places aboriginal participation with federal and provincial governments. Therefore, participation of Indigenous communities is central to sustainable planning.

In terms spatial planning, the following were key observations: Every territory has a different framework. Each Province delegates municipalities to conduct planning. In areas where there is no municipality, the province takes over planning responsibilities. However, there are challenges with regard to accountability. For

example, in matters relating to budgets and accounting for development funds allocated to bands. The overarching guidance is that all planning must be consistent with the Provincial Policy Statement. The statement has a section of interest to aboriginal communities conserving cultural heritage and archaeological resources

In summary, Spatial Planning authority has been given to municipalities. Where no municipalities exist, the Province maintains jurisdiction over planning. Planners work with Indigenous communities, drawing on elder's knowledge of the area. All land use planning decisions must be consistent with 2014 Provincial Policy Statement (PPS). PPS prioritises the interests of the aborigines. The techniques were reported to involve engaging indigenous people early in the process, understand and celebrate indigenous culture, be respectful and share experiences and further acknowledge in a caring way, and not by a know it all attitude, ask the elders to participate and invite them to participate.

3.5 Crown-Indigenous Relations and Northern Affairs Canada

3.5.1 Indigenous and treaty rights status quo

This section records discussion with government officials in the Department responsible for Indigenous relations and affairs. They gave a historical overview Indigenous Self-Determination after contact with the Europeans. The first contact was with military and trade allies, and the creation of Metis, a distinctive people who in addition to their mixed ancestry, developed separate identities from their Indian and European forebears. As more Europeans arrived, First Nations land and Metis land was required for settlement. Further, there was concerted effort to 'civilise' Indigenous people.

The Constitution Act (1867) gave the federal government jurisdiction over Indians and land reserved for the Indians. The Indian Act created a paternalist and cradle-to-grave control over First Nations and their reserves. The Royal Proclamation of 1763 provided for protection of Indigenous lands. They could only dispose of their land through a voluntary cession to the Crown. Over the years, the Crown and Indigenous people have been

negotiating rights and settlement of grievances through comprehensive land claims (modern treaties), self-government agreements and specific claims. As discussed above, with the Supreme Court of Canada's recognition of Indigenous title in 1970s, comprehensive land claims policy in 1973 as well as Constitutional protection of Aboriginal rights (1982), there was a need to review the approach to the treaty and Indigenous rights. The modern treaties, intended to address Aboriginal rights and title, it provided clarity with regard to: land and resource rights, ownership and access rights; intergovernmental relations and governance over settlement areas; and self-determination and self-reliance. Self-government agreements enable Indigenous peoples to assume responsibility for matters internal and integral to their communities. There are jurisdictions that are negotiable and those that are non-negotiable.

Implementation of modern treaties and self-government agreements has been a long standing issue. There are 24 Modern Treaties and 18 self-government agreements in place. These establish specific legal obligations for all signatories. For Canada, the obligations are held by the federal Crown as a Whole. Obligations are binding on Canada. Implementation required a Whole government approach. In July 2015, there was a Cabinet directive on the Federal Approach to Modern Treaty Implementation and Statement of Principles on the Federal Approach to Modern Treaty implementation.

Table 5: Modern Treaty Arrangements

Negotiable	Non-negotiable
<ul style="list-style-type: none"> • Governing structures, internal constitutions • Membership • Aboriginal language, culture, religion • Education, health, social services, child welfare, adoption, housing • Ammonisation/ enforcement of Aboriginal laws • Control of administration of land and resources 	<ul style="list-style-type: none"> • Powers related to Canadian sovereignty defence and external relations (e.g. national defence and security, international treaty-making, immigration and international trade. • Other national interest powers

The approach entailed the following: Modern treaty Implementation Office; creation of the Deputy Minister's Oversight Committee on Modern Treaty Implementation; Requirement for the completion of an Assessment of Modern Treaty Implications on all proposals to Cabinet; and creation of a Performance Measurement Framework and Annual Framework. All the above were underpinned by accountability, oversight and awareness (transparency).

Some of the implementation challenges were summarised as follows:

- Governance: Indigenous groups lack adequate capacity to implement self-government;
- Finance: It is difficult to ensure predictable, stable, appropriate level of funding
- Sustainability: self-government agreements are meant to be lasting arrangements therefore require commitment of resources that will be needed for the ongoing implementation
- Process: long-winded negotiation process for self-government

Specific claims are claims made by a First Nation against federal government relating the administration of land and other assets and to the fulfilment of pre-1975 treaties. The existing policy provides the framework for voluntary alternative dispute resolution process that allows the federal government to discharge its outstanding legal obligations through negotiated settlements rather than litigation. It thus reduces the Crown's contingent liability; and promotes reconciliation. Between 2008 and 2018, an average of 48 claims have been submitted annually and 60% of the claims have been accepted and are at various stages, i.e. assessment (172) and negotiation (264).

Institutional Arrangements can be summarised as follows:

In 2008, government established Specific Claims Tribunal, a statutory body that was established simultaneously with the Assembly of First Nations. It is an independent adjudicative body with authority to make binding decisions in respect of the validity of specific claims and to award monetary damages to a maximum of \$150 million. Members of the Tribunal are provincial superior court judges.

3.5.2 First Nations Land Management

First Nations land refers to what is commonly referred to as the Reserves. These are federal lands that have been set apart by Her Majesty for the use and benefit of a group of First Nations people. The total land amounts to 8.8 million acres (i.e. about 3.6 million ha). It amounts to 3.6 percent of the total land mass of Canada. The land title is held by Her Majesty; First Nations have exclusive use and occupation rights. The land cannot be seized by legal process. The land is administered in terms of the Indian Act. The Committee also noted that about 4 million acres of land is owed to First Nations to fulfil legal and treaty obligations. This is seen as an important component part of achieving Canada's reconciliation efforts.

(a) The significance of land management

Land is the most important cultural and economic assets to first nations. However, their cultural and economic life was interrupted by the reserve creation process, Indian Act administration and regulatory gaps. This in turn contributed to the following: non-contiguous lands, survey, boundary and title uncertainty, environmental issues, encroachments and poor land value and location. The process of reconciliation should see to it that these issues are addressed through the reconciliation process.

First Nation Land Management (FNLM) provides a formal mechanism to expose and address legacy land issues, restore jurisdiction at the local level and foster clarity and certainty on existing and new reserve lands. About 124 communities are under the First Nation Land Management. They operate under community-developed and approved land codes that enable them to manage their reserve land, resources, environment in terms of their cultural values, community priorities and objectives. FNLM is a sectoral self-government. Evidence from these communities suggests that FNLM contributes to more jobs, higher incomes, and a larger degree of investment on reserves, and contribute to community-based governance and cultural land management. The FNLM is supported by key institutions that are seen as partners to the FNLM (see table below)

Table 6: Land Management by First Nations (Continuum)

Legislative Instrument	Character
Indian Act	Federal Stewardship
Reserve Land Management Programme (RLEMP)	Delegated authority
First Nation Land Management(FNLM)	Sectoral Self-Government
Self-Government Agreement	Comprehensive Self-Government

The chronology of First Nation Land Management can be summarised as follows:

In 1991, a group of First Nations Chiefs approach INAC with a proposal to enable First Nations to opt out of the 33 sections of the Indian Act related to land and environmental management. As a result, Framework Agreement on First Nation Land Management between Canada and 14 First Nations was signed in 1996, paving way for the signing of the First Nation Land Management Act in 1999.

Table 7: FNLM Partners

Institution	Role
Land Advisory Board (LAB)	A political body comprised of representatives from chiefs and councils of operational signatory to First Nations
First Nation Land Management Resource Centre	A co-facilitator of FNLM and the technical arm of the LAB. It assists interest First Nations with the entry process; strengthens capacity through models, templates, course curricula and training programmes; and coordinates the First Nations component of the FNLM developmental process (e.g. land codes, community ratification plans, ratification votes)
CIRNAC Headquarters	Responsible for national policy coordination, financial management and operation support for Regional offices and external partners.
CIRNACISC Regional Office	Co-facilitators of FNLM and the point of contact for many First Nations. Provide services such as promotes FNLM, and assess readiness for First Nation FNLM entry readiness; capacity building, coordinating federal component of the FNLM developmental process; and advising on legacy land issues exposed through research reports and land description reports.
Natural Resources Canada	It provides technical expertise in the areas of surveys instructions, research reports and land description reports.

The progression process entails the following:

- **Pre-entry phase:** It focuses on identification and recruitment of interested First Nations for entry. It is a joint Federal and LAB effort. Pre-readiness projects and training are delivered through existing programmes.
- **Entry phase:** First Nations, the Chairperson of the LAB and the Minister sign the Adhesion to the Framework Agreement. First Nation signatories are formally added to the Schedule of the FNLMA
- **Developmental phase:** Participating communities complete a developmental process over 24 months' period.
- **Community approval phase:** Ratification vote is held on the land code and individual agreement
- **Operational phase:** First Nations operate under their own Land Code outside of the restrictions of the Indian Act.

3.6 Canadian Agricultural Partnerships

The presentation focussed on agri-competitiveness programme to national not-for-profit organisations to support sector-led activities such as farmer-oriented seminars, conferences, and exchange programmes to share knowledge and best practices; creation and dissemination of agricultural awareness and tools. Agri-competitiveness programme aims to help the agricultural sector to leverage, coordinate and build on existing capacity share best practices, provide mentorship opportunities as well as agricultural awareness, farm business management and farm safety information. The programme supports industry-led efforts to provide producers with information needed to build capacity and support the sectors development. There is funding commitment of \$20.32 million over five years.

Some of the key lessons from this programme are as follows:

- It sets clear parameters for applications and selection criteria for beneficiaries,
- It pays \$1 million per year per recipient up to a maximum of \$5 million over five years. It is important to note that the fund goes to organisations that help implement the programme.
- It prescribes the activities that can be funded under this programme. For example, sharing and expansion of skills and knowledge among industry development, development of business management, assessment and planning capacity and others.

Assessment criteria

The criteria set looks at the following:

- The applicant's capacity to deliver the project;
- How the proposed activities support the programme objectives?
- Reasonableness of the overall projected costs given the projected outcome
- Other sources of funding

Given the criteria set above, the program prioritises projects that -

- Help industry further development entrepreneurial capacity throughout the sector and help facilitate the sharing and expansion of skills, knowledge and best practice among industry members
- Can demonstrate a current or potential market need
- Demonstrate the impact to stakeholders and how the project will benefit the sector
- Can contribute to economic and sector growth.

Among the recipients of the programme are organisations that focus on youth development programmes. The programmes include **Agricultural Youth Green Jobs Initiative** which help fund internships for post-secondary graduates and high schools structure working in the agricultural industry. The internships include activities or projects that benefit the environment. For this purpose, funding is available through the Green Farms Stream and the Green Internship Stream. Secondly, the **Career Focus Program** provides funding to organisations for the creation of agricultural internships that provide career related work experiences for recent graduates. Thirdly, the **Canadian Agricultural Loan Act Program (CALA)** which is a loan guarantee programme designed to increase the availability of loans to farmers and agricultural cooperatives. Farmers can use these loans to establish and improve and develop farmers while agricultural cooperatives may also access loans to process, distribute and or market the products of farms. Under CALA, the federal government guarantee, to the lender, repayment of 95% of a net loss on a liable loan issued. Maximum loan is \$500 000. Lastly, **Farm Credit Canada's Young Farmer Loan (FCC)**. It lends money and provides services to primary producers, agri-food operations and agribusiness that provide inputs or add value to agriculture. The fund reports to Parliament through the Minister of Agriculture and Agri-food. Eligible farmers must be under 40 years of age. Its features are purchase of agricultural related assets up to \$1 million.

3.7 Assembly of First Nations

Assembly of First Nations (AFN) is an advocacy body that promotes the rights and interest of First Nations. The AFN brings together all the Chiefs. The focus of the AFN is on land rights, implementation of modern treaties, and comprehensive claims. The national chief is elected by about 600 chiefs across Canada. They further elect 10 Chiefs who sit on the Board of the First Nations. The Board deliberates issues of interest to First Nations and take resolutions which become key advocacy points and further inform policy positions for the First Nations. The national body engages the Federal government on behalf of the First Nations in matters such as funding from the Federal government and other policy matters. It also plays a significant role in coordination across different regions.

One of the critical issue they have fought for is to opt out of the 33 sections of the Indian Act as stated above. The Indian Act controls every aspect of First Nations. They had to request for permission on anything they do. The Act created dependency on the Federal government. However, self-government is an attempt to get the First Nations out of government control and let people do things for themselves. The success of the process, according to the Assembly of First Nations requires: independence of the processor of claims, claims tribunal closest to the people, oversight of the work of the tribunal. They recognise a need independence, efficiency and responsiveness of the Tribunal. This Tribunal will be an independent commission that reviews the claims. There must be judicial oversight based on the legal principles. It should be noted that the tribunal is an important institution, however it is not the court.

3.8 Cooperatives

Co-operatives are seen as community-focused businesses, legally incorporated and are owned by members who use cooperative's services and purchase their products. Cooperatives balance people, planet and profit. They can provide virtually every product or service and can be either for-profit or non-profit enterprises. The basis for formation of cooperatives is the existence of a void that has to be filled in a community and seizing of local opportunities to meet the needs of members (owners). Members, customers, employees or residents, have an equal say in what the business and sharing of profits which are proportional to the amount of business a member do with a co-operative. From a local economic development perspective, co-operative businesses keep the money circulating within the local economy, provide secure employment, and help revitalize, build and sustain healthy communities.

3.8.1 Types of Co-operatives

There are different types of co-operatives operating in many different business sectors. The foremost kinds of co-operatives include: consumer, producer, marketing, worker, financial, and housing. Cooperatives can provide a diverse range products and services such as agricultural products and services, tourism, art and culture, child care, housing, retail goods,

transportation, social services, natural resources, financial and insurance services, and even funeral services. They can be large businesses, medium-sized operations or small organisations.

The Committee was informed that Canada has a long history of co-operatives and in alliance with the global network of cooperatives. There are about 9 000 co-operatives, credit unions, and mutual with an approximately 18 million members. Co-operatives employ large pool of labour in excess of 150 000 people. It thus became evidently clear that co-operatives play a major role in the economy and access many sectors in Canada. For example, about 1 200 agricultural co-operatives occupied 15 to 20 percent of the market. Most of these co-operatives are in processing, marketing, farm supply, and farm equipment.

3.8.2 Principles of cooperation

The Co-operatives in Canada, as is the case around the world, are organized according to the seven international principles of co-operation listed below.

- Voluntary and open membership
- Democratic member control
- Member economic participation
- Autonomy and independence
- Education, training, and information
- Co-operation among co-operatives
- Concern for community

3.8.3 How are co-operatives structured?

The discussion above points to the fact that co-operatives are just another form of business enterprise with particular differences in their governance structure. What sets cooperatives apart from other businesses is that the power of a corporation is in the hands of the people. Co-operatives are democratic in their form and structure. A cooperative consists of a volunteer

board of directors which is elected from among the membership, may have different committees, and members. The board and committees govern the co-operative, oversee management and report to the members through annual general meetings or member meetings. There is a difference between the Board of Directors and management or a business structure. These structures report to the Board of Directors whose responsibility is oversight of the day-to-day operations of the cooperative.

The following bullets summarise some of the highlights shared with the delegation

- Canada, being a federal state, allows for provinces to pass legislation to govern cooperatives. Each province has regulatory body, regulated at a federal level. There are 27 regulatory bodies. However, not all the Acts support one another.
- Those not in compliance with the governing legislation as declared illegal. However, government has been careful not to destroy the informal economy with legislation governing cooperatives.
- It is understood that cooperatives occupy 3.5% of the total GDP. However, the difficulty with cooperatives is that they find it difficult to speak in one voice, especially when it engages government. Coordination and alliance of cooperatives is vitally important.
- Cooperatives require effective capacity building for them function in the formal economy.
- Cooperatives thrive where there is need. Without that need, it impossible for them to thrive.
- There is a dedicated effort to bring youth participation, not only at an operational level but at leadership and governance levels too. Therefore, has been concerted to reserve space for youth.

- Over the years, there has been an increase in worker cooperatives where employees own cooperatives. Because of their values, young people like the idea. Youth want to be involved in the cooperatives, could be in any field and these initiatives have been empowering to youth.
- Cooperatives Development Initiative (CDI) provides an advisory service, innovation co-op development, and research. It also plays a lobbying role at the federal government level to support co-operatives development.

4. Summary of key observations and lessons

Colonialism, in many parts of the world, left a path of destruction resulting in the struggles by Indigenous people of First Nations of the World and their descendants to reclaim what was rightfully theirs and to build a sustainable future. Such state of Affairs is equally true for both Canada as demonstrated in this report and South Africa. This study tour offered the Portfolio Committee on Rural Development and Land Reform to reflect on progress South Africa has made against the experiences of Canada.

This sections teases out key lessons for South Africa and links the lessons to relevant government programmes. In like with the key questions of this study tour, the section summarises the lessons in five broad areas; namely, (1) legislative and policy framework to enable citizens and government to work together to resolve the challenges; (2) Claims making process and Indigenous peoples' experiences; (3) Settlement and development support; and (4) parliamentary oversight and accountability.

4.1 Legislative framework and implementation

There has been a fundamental shift from the Constitution Act (1867) to the 1982 Constitution (Section 32). One critical issue was the Constitutional protection of Aboriginal rights. It is exemplified by commitment to provide clarity, in legislation, land and resource rights, ownership and access rights, intergovernmental relations and governance over settlement areas as well as

self-governance and self-reliance. The reality as experienced by First Nations was that it took time to implement and honour the modern treaties and self-government agreements, hence renewed efforts to drive process of reconciliation. This commitment is exemplified by national recognition of the fact that Canada is established on land previously owned by the Indigenous communities.

At the time of the visit, the Committee was informed of a comprehensive review process which seeks to avert overreliance on Courts to settle the land rights disputes between Indigenous communities and government. However, Canadians also welcomed the role that the Courts played in interpreting the Constitutional provisions regarding the extent of protection of the land rights of the Indigenous people. For example, the decision of the Supreme Court of Canada to recognize Aboriginal rights for the first time in 1973 was ground breaking. Therefore, creation of independent and efficient institutions to deal with land claims by Indigenous communities was cited as one of the greatest achievements.

The Constitution and treaty agreements affirm Indigenous ownership of land and recognition of historical rights before the arrival of the Europeans, protects traditional ways of life, protects access to resource development opportunities and assures political recognition and self-government. Inadequate progress in resolving treaty and self-government agreements has not been due to lack of legal instruments. As representatives of the Assembly of First Nations stated, it was due to lack of political will to do so. However, stakeholders have expressed trust in the renewed commitment to fast-track reconciliation and legal review to clear any ambiguity in legislation and policy.

Insofar as legislation and policy is concerned, it appears that South Africa and Canada are somewhat confronting the pressing colonial legacy issues by reviewing legislative instruments. In South Africa, legislative apparatus to address tenure rights in the former reserves have not been achieved. Whilst there are adequate provisions in the Constitution, Section 25(6) of the Constitution, there is legislative vacuum because the existing legislation is a

stop-gap measure, in the name of Interim Protection of Informal Land Rights Act, in the absence of a comprehensive tenure legislation. Parliament should consider reviewing legislative instruments to protect land rights in the former reserves, i.e. access and control of land and resources.

4.2 Indigenous claims (comprehensive land claims)

The legacy of Royal Proclamation (1763) and the Constitution Act (1867) continues today. The ceding of land to the Crown and the ongoing struggles to reclaim the land is something the Assembly of First Nations and many other Indigenous people of Canada continue to struggle for. The 24 Modern Treaties and 18 Self-government agreements required whole government approach, from federal, provincial to territorial governments. The 2015 Cabinet directive on Federal Approach to Modern Treaty Implementation (FMTI) and Statement of Principles on the FAMTI. One of the critical elements to the approach was creation of an implementation office, an Oversight Committee in the Office of the Deputy Minister (Crown Relations and Indigenous Affairs), and creation of Performance Measurement Framework. The Committee noted the challenges around governance, finances, sustainability and long-winded processes.

Whilst the Department of Rural Development and Land Reform, as well as the Commission on Restitution of Land Rights, have internal directorate responsible for monitoring and evaluation, the effectiveness of internal M&E is yet to be demonstrated. Given the Committee's concerns around the reliability of data from both the Commission and the Department, especially about the number of claims settled, finalised and outstanding, there is a need for renewed efforts on internal M&E and collection of baseline data to measure not only performance but the socio-economic impact of government interventions. Another key area that the Committee has noted is the extent to which South Africa can shorten the bureaucracy around access to land (redistribution) as well as the settlement of land claims.

4.3 Development support

Each Comprehensive Land Claims Agreement is accompanied by plans indicating implementation actions, timeframes, and responsibilities for role players and is costed. Oversight mechanisms in the Deputy Minister's office appears to be a step in the right direction to ensure transparency and accountability. In South African context, each land claim settlement agreement provides high-level statements of intent and commit support from line function departments. Most of the details are left for project specific plans and business plans. To ensure accountability of government officials, in ensuring implementation of support, South Africa should consider ensuring that settlements are accompanied by clear and specific plans, with time frames and costed allocation of resources.

Development support is also in the form cooperatives development support. Whilst government plays a critical part in funding support, most cooperatives are member-initiated and driven. Co-operatives for the indigenous communities are allowed to develop from below rather than heavy reliance on government. Government should not drive cooperatives because they tend to not succeed if they are run by government due to reliance on government funding. Coordination and network is facilitated by civil society and community-based organisations outside government. Government plays a critical role in setting legislative parameters. As a federal state, each province is allowed to set legislative parameters for cooperatives within its jurisdiction. Civil society organisation Proper care is taken to ensure that legislation does not destroy an informal economy whose contribution in the economy is appreciated.

Agri-competitiveness programme provides partnerships between government and not-for-profit organisations to run sector-led activities that seeks to build capacity among farmers. This initiative has proven that civil society organisations and governments can enter into partnerships to advance development. In the South African context, this approach could add value in the support of Communal Property Associations which have been reported to be struggling and various government interventions have not yielded desirable outcomes.

The not-for-profit organisations have dedicated programmes for youth development. The Agri-Competitive Programme has also set its focus on youth development. Funding that has specifically targeted youth has a potential to make a difference in terms of job creation and investment in future generation. In this case reference is made to the work of the Agricultural Youth Green Jobs Initiative, Career Focus Programme, the Canadian Agricultural Loan Programme, Farm Credit Canada's Young Farmer Loan. These initiatives are indications of targeted programme for youth development. Similarly, special programmes targeting women, rural women in particular, could make a difference. What has become clear is that silo approach to development will not yield positive results. Therefore, an integrated and whole government approach to development is required rather than boxing rural development in a single department.

4.4 Institutional arrangements

South Africa has advanced in terms of setting up institutions to advance land and agrarian reform. For example, the Land Claims Commission and the Land Claims Court have been set to represent the interest of the landless and facilitate resolution of their land claims. Further, the amendments of the Restitution of Land Rights Act to enable settlement of land claims through an administrative process has been a major advancement in how government of South Africa has dealt with land claims. Given increasing tensions and conflicts within and across communities as well as communities and land owners against government, the idea of Tribunal to resolve land rights disputes appears to be a reasonable proposal which lessen the burden of cost of legal route. As the High Level Panel proposes, South Africa should consider the idea of a Tribunal or a Land Rights Protector. The status of this office and its roles should further be clarified.

4.5 Parliamentary oversight

Interaction with Standing Committee on Crown Relations and Indigenous Affairs, in the House of Commons, has elucidated some points for reflection. Whilst majority of the members of the Committee were not conversant with the land issues mainly because of the geographical location they came from and the constituencies they represented, some members

who represented constituencies in the Northern had critical issues and important lessons to share with the Committee. Special reference was made to the TRC process and calls to action made which government of Canada was committed to. Therefore, the fact that each member of Parliament in the House of Commons represent an electoral district (commonly referred to as a riding) and directly elected by Canadian voters, their issues do not fall under the radar. However, it was entirely clear why some of the members of the Committee, including the chairperson, were not so conversant with the challenges. The only explanation could be that the committee has prioritised education, health and other social problems amongst the Indigenous communities. A report which the committee made reference to indicates that there are serious challenges with regard to implementation of treaty agreements. However, clear recommendations have been made to the Executive. Perhaps this stance of Parliament confirms whole government commitment and explains the renewed commitment and interest in dealing with the treaty agreements and Aboriginal rights.

5. Recommendations

In view of the observations, key lessons and implications for South African land reform and agrarian reform discussed above, the Committee recommends the following:

Recommendation #1: *The National Assembly should consider ensuring the various legislative review, including the Report of the High-Level Panel on Assessment of Key Legislation and Fundamental Change, Report of the Constitutional Review Committee on the Review and amendment of Section 25, and the Ad Hoc Committee on Amendment of Section 25 of the Constitution, are followed by clear policy review that will result in a national vision for land and agrarian reform documented in a comprehensive White Paper on South African Land Policy. The White Paper must be an outcome of wider consultation process with citizens.*

The Committee has observed how the Department of Justice in Canada is in the forefront of legislative and policy review so that the government of Canada can deal with the historical injustices. South Africa, with the comprehensive review commissioned by the Speakers forum, the Report of the Constitutional Review Committee regarding review and amendment of Section 25, has adequate evidence and empirical material to shape the long awaited Land Policy in a form of a White Paper.

Recommendation #2: *Minister of Rural Development and Land Reform should coordinate relevant Ministers and Departments, especially Water and Sanitation and Agriculture, Forestry and Fisheries, and Small Business Development, to develop a whole-government comprehensive strategy for settlement support to land reform beneficiaries and other producers.*

Adequate institutional mechanisms enable Canada, as a Federal State, to coordinate federal, provincial and territorial governments with multiplicity of legislative apparatus, to address the pressing challenges confronting Indigenous people. South Africa, as a unitary state, with coordinated policy and legislation could make a difference if there is intergovernmental cooperation in development and agreement on key priorities and areas of focus. What is lacking is institutional arrangements to drive coordination. It is vitally important that a semi-government (parastatal) structure be established to drive this work. For example, the Rural Development Agency that was to be introduced in the last five years.

As observed in Canada, area of great need is development focusing on youth and women. One of the areas of great interest in South Africa could be strengthening cooperatives and implementing capacity building programmes as well as funding programmes. However, the cooperatives should be owner-driven and not government-driven because it risks dependency and dysfunctionality.

Recommendation #3: *The Minister of Rural Development and Land Reform should consider prioritising addressing the land needs of the descendants of the Khoi & Sans in terms of the Redistribution programme. This approach implies that there has to be a programme to interact and identify land needs of the people through an area-based approach so that their needs and aspirations are met.*

The struggles of the Khoi & San descendants and other tribes relegated to the former reserves whose lost land rights cannot be address under the current legislative regime for restitution will not quieten or disappear until their grievances are met and restorative justice is awarded. These communities and groups, through the needs analysis facilitated at local municipal level, should be encouraged to use historical evidence to target the respective areas they lost land rights from. The Minister of Rural Development and Land Reform should use available revenue to acquire the land for these groups, including expropriation if necessary.

Recommendation #4: *The Minister of Rural Development and Land Reform should, in line with the Section 25(6) of the Constitution, develop a comprehensive land tenure policy to secure land rights, access and control of land-based resources, of people living in the former homelands or reserves.*

The renewed interest and commitment of Canadian government to streamline legislation and policies to address treaty rights and secure people's tenure rights on their land has ignited the spirit of reconciliation across all sectors of the society. Similarly, South Africans in the former homelands have been left with a weaker interim measure (IPILRA) to defend their informal land rights. There is a need for wider public consultation around the kinds of tenure rights people in the former reserves wish to have. As observed, treaty agreements also included keeping the way of life of the Indigenous communities including tenure rights. It therefore suggests that titling land cannot be the only solution. Other means of recordable social tenures should be explored.

Comprehensive policy must also address limitations in the farm tenure legislation. This could potentially involve consideration of the recent amendments and revision of the Regulations to make ESTA more effective. The Minister must pay attention to implementation of ESTA and other tenure related legislation in protection of the rights of the poor.

Recommendation #5: *The Minister of Rural Development and Land Reform, together with the Minister of Justice and Constitutional Development should consider building capacity in the Land Claims Court as a matter of urgency in order to address some of the emerging legal disputes in the land sector. However, not all disputes should end up in Court. Therefore, the Ministers must development alternative dispute resolution mechanisms outside the formal court process in order to improve accessibility.*

Experience from Canada show that the idea of a Tribunal with different committees has gained much traction within government and across the stakeholders and interested parties. In South Africa, the High-Level Panel report has recommended that a Land Rights Protector be instituted to address land tenure disputes, inter community disputes against government, landowners dispute against government and *vice-versa*.

Recommendation #6: *The Minister of Rural Development and Land Reform should, without delay, restore the independence of the Commission on Restitution of Land Rights as envisaged in the Restitution of Land Rights Act.*

The independence of the Commission is of great importance to the process because all land claims are lodged against the State.

Recommendation #7: *The oversight strategy of the Committees of Parliament should find mechanisms of formally creating space to address queries submitted to the Committee and members' issues from the Constituency work.*

Report to be considered.

3. Report of the Ad Hoc Committee to identify suitable candidates for the filling of vacancies in the Commission for Gender Equality dated 14 March 2019

The Ad Hoc Committee (herein referred after as the Committee) was constituted to identify and recommend suitable candidates for the filling of vacancies of commissioners in the Commission for Gender Equality (CGE), as requested by the National Assembly, reports as follows:

1. Introduction

- 1.1 In compliance with provisions of section 193(5) of Constitution Act 108 of 1996, on the 11 September 2018, the National Assembly resolved to establish an Ad Hoc Committee to identify suitable candidates for the filling of vacancies in the CGE.
- 1.2 The Committee executed its duties in terms of the Rules of the National Assembly.
- 1.3 The initial deadline of 16 November 2018 for the Committee to conclude its business and report to the National Assembly was first extended to 27 February 2019 and later to 20 March 2019.

2. Committee Membership

- 2.1 The initial membership of the Committee composed of eleven members as published in the ATC of 12 October 2018 as follows:

AFRICAN NATIONAL CONGRESS

- Ms CN Ncube-Ndaba
- Ms C Chueu
- Ms BJ Maluleke
- Ms W Newhoudt-Druchen

- Dr Z Luyenge
- Ms GK Tseke
- Dr P Maesela* (alternate)

DEMOCRATIC ALLIANCE

- Ms D Robinson
- Ms T Stander

INKATHA FREEDOM PARTY

- Ms LL van der Merwe

ECONOMIC FREEDOM FIGHTERS

- Ms H Mkaliphi

NATIONAL FREEDOM PARTY

- Mr AM Shaik Emam

2.2 As the Committee progressed, a change on the initial membership was effected, when Ms Morutoa replaced Ms Chueu and Dr Maesela who then became a permanent member of the Committee replacing Dr Luyenge who resigned as a Member of Parliament.

2.3 Ms MS Khawula and Dr SS Thembekwayo replaced the initial member representing the EFF, Ms H Mkaliphi due to inability to attend the Committee meetings.

3. Committee meetings

3.1 The Committee elected Ms CN Ncube- Ndaba as Chairperson on 24 October 2018.

3.2 The Committee adopted committee programme on 31 October 2018 and agreed to request an extension of the initial deadline of 16 November 2018 to 27 February 2019, which was later approved by the National Assembly on 15 November 2018.

This extension was to enable the Committee reasonable time for the application process, allow adequate time for civil society to comment on candidates and for the security screening and verification of qualifications of all candidates.

- 3.3 On 22 January 2019, the Committee met for an update on the progress made in relation to filling of vacancies of Commissioners in the Commission for Gender Equality (CGE). The Committee received information about the number of applicants and/or nominations received; uploading of candidates' names on Parliamentary website; progress in relation to screening of candidates by the State Security Agency (SSA) and verification of qualifications by the Parliament's Human Resources (HR) section.
- 3.4 On 23 January 2019, the Committee met to discuss and agree on the shortlisting and interview framework. The SSA, on this day was meant to brief the Committee about the security screening of all candidates. The SSA was unable to report to the Committee, as the security screening report was not complete. The Committee raised its disappointment and subsequently agreed to postpone the shortlisting process.
- 3.5 The Committee met on the 19 February 2019 to consider amending its programme, as necessitated by delays in getting reports from the SSA and HR. The Committee as such resolved to seek the intervention of the Speaker concerning the delays in security screening of candidates. The Committee also considered and noted correspondence from former chairperson of the CGE Ms Nare and her legal representative to the Speaker of the National Assembly. The Committee resolved to refer the matter back to the Office of the Speaker.
- 3.6 On 26 February 2019, the Committee met for shortlisting of candidates. The Committee unanimously agreed to shortlist twenty- four candidates. The Committee was satisfied with the shortlisting process and considered it fair and just. The Committee also agreed to request the SSA to conduct the security screening of the twenty- four shortlisted candidates.

3.7 The Committee met on 12 and 13 March 2019 to conduct interviews for the shortlisted candidates.

3.8 On 14 March 2019, the Committee deliberated on the outcome of the interviews and decided on preferred names to be recommended to the President for appointment. The Committee also considered and adopted the committee report in order to report to the National Assembly.

4. Legal framework and process

4.1 The Committee's process was guided by the Constitution Act 108 of 1996; Commission for Gender Equality Act 39 of 1996, as amended and the Rules of the National Assembly.

4.2 The standard guidelines for appointment of commissioners of CGE as approved by Parliament in 2018 also was of great assistance to the Committee.

4.3 The Committee also agreed to replicate some of the successes of the previous Ad Hoc Committees on CGE.

5. Advertisement

5.1 In fulfilment of its mandate, the Committee issued an advertisement requesting nominations and/or applications for the positions of commissioners for CGE from members of the public.

5.2 The advertisement appeared in all official languages in various newspapers throughout the country as well as on Parliament's website.

5.3 The advertisements placed on 18 November 2018 stipulated a closing date of 10 December 2018. A set of qualifying criterion based on the legislative provisions as stipulated in section 193 of Constitution and section 3 of the CGE Act 39 of 1996, as amended was set out as follows:

- The candidates must be South African citizens.
- Candidate to be fit and proper persons for appointment to the Commission.

- Candidates to be broadly representative of South African community.
 - Candidates to have a record of commitment to the promotion of gender equality.
 - Candidates to have applicable knowledge of and experience in matters connected with the objects of the Commission.
- 5.4 The advertisement also clearly stated that the appointment by the President of commissioners on recommendation of Parliament would be for a term of office not exceeding five years either on a full-time or part-time basis.
- 5.5 The advertisement also made provisions to consider those candidates who had served a term as commissioners at CGE in terms of section 3(7) of CGE Act 39 of 1996 as amended.
- 5.6 The advertisement also informed applications and/or nominations about publishing of names on the Parliamentary website to allow members of the public to comment on the suitability of candidates.
- 5.7 The Committee received 90 *curriculum vitae* (CVs) in response to the advertisement. Out of the 90 CVs, one candidate withdrew her nomination. It also came to the attention of the Committee that one CV received was a supporting document for nominating another candidate, thus leaving the Committee with 88 nominations and/or applications to consider.

6. Public Participation

- 6.1 In line with Constitutional imperatives as outlined in section 59(1) of the Constitution Act 108 of 1996, the Committee agreed to an open and transparent process that caters for public involvement and participation.
- 6.2 The Committee also being aware of public interests on gender equality issues provided a platform for civil society to comment on all candidates.

6.3 To facilitate public participation, the Committee on the 11 December 2018, published the names of all candidates with their accompanying CVs on Parliament's website to allow the public to comment. The closing date for public comments was 18 January 2019.

7. Shortlisted Candidates

On 26 February 2019, the Committee shortlisted twenty-four (24) candidates to be interviewed. The shortlisted candidates were:

- Ms Jennifer Smout
- Ms Esther Euphane Aletta Watson
- Ms Magdalene Moonsay
- Mr Mbuyiselo Botha
- Dr Tlaleng Mofokeng
- Ms Mapitsi Mary Mononela
- Ms Nomasonto Grace Mazibuko
- Busisiwe Deyi
- Ms Nomsisi Lindelwa Batha
- Ms Tasneem Fredericks
- Mr Louis Laurens Gaum Botha
- Ms Rachel Kediseletse Matlhaba
- Ms Mmabatho Euginia Ramagoshi
- Ms Octavia Lindiwe Ntuli- Tloubatla
- Prof. Renier Steyn
- Ms Liliwe Eliza Mlilwana
- Ms Ayanda Mfusi
- Ms Mummy Nomvulazana Constance Jafta
- Ms Priscilla Lynette Fundisile Ndzimande
- Ms O'hara Ngoma- Diseko
- Ms Mothubi Getrude Dibeela
- Prof. Sylvia Thidziambi Phendla
- Ms Elizabeth Margaretha Lemmer
- Mr Bhekizenzo Tembe

8. Interviews

- 8.1 The Committee agreed not to have pre- determined questions for the interviews to eliminate unfair advantage for candidates interviewed later, due to media broadcasting of the interview sessions.
- 8.2 The Committee agreed that interview questions should be relevant to the objects of CGE.
- 8.3 The Committee also agreed that interview questions should be about ascertaining the candidate's knowledge about gender equality practises, legislative framework and principles; and to determine the candidate's commitment to promotion of gender equality.
- 8.4 The Committee also agreed on posing questions aimed at identifying the behavioural attributes and skills of candidates. The Committee agreed on leadership, interpersonal, conflict management, team building, motivation and innovation as preferred behavioural attributes and skills.
- 8.5 The candidates were each allocated forty-five (45) minutes to answer all questions posed.
- 8.6 The Committee afforded those candidates with negative SSA and HR reports an opportunity to clarify these reports during the interviews.
- 8.7 On 12 March 2019, the Committee interviewed the following candidates:
 - Ms Magdalene Moonsamy
 - Ms Jennifer Smout
 - Ms Fundisile Priscilla Lynette Nzimande
 - Ms Mmabatho Ramagoshi
 - Ms Tasneem Fredericks
 - Ms Mapitsi Mary Mononela
 - Ms Esther Euphane Aletta Watson
 - Mr Louis Laurens Botha Gaum
 - Ms Liliwe Eliza Mlilwana
 - Ms Octavia Lindiwe Ntuli- Tloubatla

- Prof Reiner Steyn
- Ms Nomsisi Lindelwa Batha

8.6 On 13 March 2019, the Committee interviewed the following candidates:

- Ms Elizabeth Louis Lemmer
- Ms Ohara Diseko
- Ms Mothubi Getrude Dibeela
- Ms Rachel Kedisaletse Matlhaba
- Mr Bhekizenzo Tembe
- Ms Nomasonto Grace Mazibuko
- Mr Mbuyiselo Albert Botha
- Prof Thidziambe Sylvia Phendla
- Ms Mummy Nomvulazana Constance Jafta
- Busisiwe Deyi
- Dr. Tlaleng Mofokeng
- Ms Ayanda Mfusi

9. Deliberations

9.1 The Committee met on 14 March 2019 to deliberate on the interviewed candidates and select preferred candidates to fill the eight vacancies within the CGE.

9.2 The Committee also agreed to recommend ten (10) names instead of eight (08), in case there are candidates who are unable to accept appointment by the President.

10. Recommendations

10.1 Having considered the request of the National Assembly for the Committee to nominate and recommend candidates for appointment as Commissioners for CGE, the Committee recommends the following candidates:

- Ms Octavia Lindiwe Ntuli- Tloubatla as a full time commissioner

- Ms Jennifer Smout as a full time commissioner
- Mr Mbuyiselo Botha as a full time commissioner
- Dr Tlaleng Mofokeng as a full time commissioner
- Ms O'hara Ngoma- Diseko as a full time commissioner
- Ms Nomasonto Grace Mazibuko as a part time commissioner
- Ms Dibeela Getrude Mothupi as a part time commissioner
- Busisiwe Deyi as a part time commissioner

10.2 Taking into consideration the three current vacancies within the CGE, the Committee further recommends for immediate appointment by President of the following candidates:

- Ms Octavia Lindiwe Ntuli- Tloubatla
- Ms Jennifer Smout
- Mr Mbuyiselo Botha

10.3 The Committee, also having considered the vacancy for the position of chairperson of CGE hereby recommends that the President consider appointing one of the three above-mentioned candidates as Chairperson of CGE.

10.4 Should any of the eight (08) above-recommended candidates be unable to accept appointment as a commissioner for CGE by the President of the RSA, the Committee recommends consideration of the following candidates as replacement:

- Advocate Bhekizenzo Tembe
- Ms Priscilla Lynnette Fundisile Nzimande

10.5 The Committee further recommends that:

10.5.1 Parliament should ensure provision of adequate, appropriate and timeous support for Ad Hoc committees for efficient and effective execution of mandates within allocated timelines. The required support to include timeous allocation of interpreters for Members who require that support

- 10.5.2 .Prospective Ad Hoc Committees on CGE to consider limiting the security screening and verification of qualifications to shortlisted candidates only.
- 10.5.3 The advertisements issued should explicitly inform potential candidates about the requirement to submit original fingerprints at own costs for the security screening process by all the shortlisted candidates. In addition, advertisements issued should include a request for certified copies of all qualifications listed in the CVs to accelerate the process of verification of qualifications.
- 10.5.4 The Portfolio Committee on Women in the Presidency should intensify its oversight function over gender equality matters on both the government and the private sector.
- 10.5.5 In order to strengthen the independence of the CGE, the National Assembly should revise the funding of this chapter nine institution.

11. Appreciation

- 11.1 The Committee would like to thank all Members for making themselves available and working long hours to ensure success in carrying out the mandate of the Committee.
- 11.2 The Committee would also like to thank all candidates for making themselves available to be considered for appointment to the Commission for Gender Equality.
- 11.3 Furthermore, the Committee wishes to convey appreciation to the support staff for their contribution to the success of the Committee.

The majority of the political parties represented in the Committee agreed in support of the report, except for the Democratic Alliance which reserved its right to support the report.

Report to be considered.

4. Report of the ad hoc Committee to amend section 25 of the Constitution of the Republic of South Africa, 1996, dated 13 March 2019

1. Introduction

Following the adoption of the Report of the Joint Constitutional Review Committee on the possible review of section 25 of the Constitution, the National Assembly resolved to set up an *ad hoc* Committee to undertake the work in amending section 25 of the Constitution in order to make explicit that which is implicit in the Constitution, with regards to expropriation of land without compensation.

In approaching its work, the ad hoc Committee appreciated that in amending the Constitution, there are specific legal prescripts that must be followed and therefore sought legal advice from the Parliamentary Legal Services. The ad hoc Committee was mindful that the task of amending the supreme law of the land must be undertaken with all the sensitivities required and ensure that such an amendment will meet the various objectives among which, being nation building. Therefore, in developing a work program the ad hoc Committee ensured that all processes were undertaken so as to achieve consensus on the outcome.

This report therefore gives an outline of the work done since the constitution of the ad hoc committee which will give the National Assembly the scope of work that the committee should follow in amending the Constitution.

2. Mandate of the Committee

- 2.1. On 6 December 2018, the National Assembly noted that the Report of the Constitutional Review Committee (CRC) on the Review of section 25 of the Constitution, 1996 was adopted by the Assembly and the Council on 4 and 5 December 2018 respectively, recommending that Parliament, amongst others –

- a) amend 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, 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;
 - b) urgently establishes a mechanism to effect the necessary amendment to the relevant part of section 25 of the Constitution; and
 - c) tables, processes and passes a Constitutional Amendment Bill before the end of the Fifth Democratic Parliament in order to allow for expropriation without compensation;
- 2.2. The National Assembly resolved to establish an *ad hoc* committee in terms of Rule 253 of the Rules of the National Assembly, and mandated the committee to initiate and introduce legislation amending section 25 of the Constitution. The ad hoc committee was instructed to have regard to the recommendations as contained in the Constitutional Review Committee report.

3. Constitution of the Committee

- 3.1. The ad hoc committee was established by resolution of the National Assembly as provided in Rule 253(1)(b) of the Rules of the National Assembly. The Resolution provided that the Committee should consist of 11 voting members and 14 non-voting members. On 5 February 2019, the Speaker of the National Assembly published the names of members of the committee in the Announcements, Tablings and Committee Reports (ATC), No 6-2019, as follows: voting members of the Assembly: African National Congress 6, Democratic Alliance 2, Economic Freedom Fighters 1 and other parties 2; and non-voting members of the Assembly, as follows: African National Congress 2, Democratic Alliance 1, Economic Freedom Fighters 1 and other parties 10.

- 3.2. At its first meeting, held on 12 February 2019, the Committee noted that the Inkatha Freedom Party had two voting members. The Committee agreed that this was incorrect and resolved to approach the Chief Whips Forum and the Speaker so that membership of the committee could be corrected. On 21 February 2019, the Speaker corrected the representation of the IFP in the Committee and published further names of members to represent other parties in the ATC. (**Annexure A**).

4. Process followed/programme outline

The Committee had its first meeting on 12 February 2019, where Mrs AT Didiza was elected Chairperson of the Committee. On 21 February 2019, the Committee agreed to adopt its programme (**Annexure B**) and undertook to do proceed as follows:

- Briefing by Legal Services on the legislative process and the High Court application by Afriforum;
- Briefing on the summary of the Report of the Joint Constitutional Review Committee on the Review of section 25 of the Constitution;
- Presentations by identified experts;
- Committee discussions on Policy framework that will inform the drafting of a Committee Bill;
- Presentation of Committee Bill by Parliamentary Legal Services and Committee deliberations on the Bill;
- Public participation process on the Bill, including referral to the National House of traditional Leaders and Provincial Legislatures;
- Tabling of reports on the Bill;

5. Presentation by Legal Services on processes to initiate a Committee Bill and to amend the Constitution

5.1.1. The Constitution outlines the process that Parliament should follow when considering a Bill amending the Constitution. The Committee agreed to a briefing on the process so as to ensure that its processes were constitutional.

5.1.2. Adv. C van der Merwe briefed the Committee and indicated that:

- The Committee should prepare a draft Bill and memorandum on the objects of the Bill.
- The Bill should only include provisions related to the constitutional amendments and matters connected with the amendments.
- The Bill should be published for comments in the government gazette.
- The Bill should be referred to the National House of Traditional Leaders and Provincial Legislatures.

5.1.3. The Committee noted the presentation (**Annexure C**) and requested Legal Services to draft a clear roadmap (with timeframes) on the process to be followed. The roadmap will assist the committee in determining what can be done before the general elections scheduled for 8 May 2019.

6. Afriforum NPC v Chairperson of the Joint CRC of Parliament and Others

6.1.1. The Committee also noted the High Court application brought by Afriforum NPC against the Chairperson of the Joint CRC of Parliament and Others and agreed to invite Parliamentary Legal Services to brief it on the implication(s) of the application to the Committee's processes. The Committee wanted to establish the facts of the case; seek

guidance so that it could avoid any possible mistakes committed by the CRC; and to understand the nature of the order granted by the court.

6.1.2. Mr N Mjenxane briefed the committee and indicated that **(Annexure D)**:

- Afriforum had sought an urgent interdict to suspend the decision of the Constitutional Review Committee (CRC) taken on 15 November 2018 (Part A of the application) and a declaratory order declaring the report of the CRC and its decision to adopt the Report to be constitutionally invalid (Part B of the application).
- The Court dismissed Part A of Afriforum's Application and directed the Parties to agree to a timetable in order to bring Part B before the Court.
- Mr Mjenxane highlighted that there was a view that the Afriforum matter was moot, as the challenge had been overtaken by current events. The Afriforum decision was not an impediment to the work of the ad hoc committee. The *sub judice* rule also had no bearing on the work of the ad hoc committee.

6.1.3. The Committee noted that the Afriforum order had no bearing on its work and agreed to continue with its processes.

7. Summary of the Report of the Joint Constitutional Review Committee

7.1.1. The Resolution of the National Assembly required the committee to have regard to the recommendation of the CRC when initiating and introducing legislation amending section of the Constitution. Mr S Denyssen, Content Advisor, briefed the committee on the process followed and recommendations made by the CRC. The purpose of the presentation was to highlight key aspects of the CRC Report **(Annexure E)**.

7.1.2. The Report listed the following key observations:

- Inequality and skewed land ownership continues to exist.
- The dispossessed expressed the view that very little was being done to redress the skewed land ownership patterns.
- The security of tenure for farm workers, farm tenants and those residing on communal land held in a Trust must be assured.
- Corruption, an insufficient budget for the land reform process, and a lack of capacity within the state were some stumbling blocks that stymied land reform.
- The State should formulate a clear strategy for land redistribution to address the injustices of the past that was inflicted on the majority of South Africans.
- While the Constitution implicitly provided for expropriation of land without compensation as a legitimate option for land reform, it needed to be explicitly stated.

7.1.3. The CRC recommended that:

- a) *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, 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.*
- b) *That Parliament must urgently establish a mechanism to effect the necessary amendment to the relevant part of Section 25 of the Constitution.*
- c) *Parliament must table, process and pass a Constitutional Amendment Bill before the end of the 5th Democratic Parliament in order to allow for expropriation without compensation.”*

8. Briefing by Experts

- When the programme of the Committee was considered, members proposed names of experts to advise the Committee on the policy that would inform the amendment to section 25 of the Constitution. All suggested experts were approached, but a few could not assist. Former Deputy Chief Justice Moseneke was not available due to prior commitment with the Presidential Envoy to Lesotho and Adv. Ntsebeza expressed concern over possible conflict of interest. The Management Committee decided not to invite Deputy Judge President M Madondo given that he is a sitting judge. The Management Committee also took the decision that AgriSA, PLAAS; Nkuzi Development Association and other practitioners should participate during public hearings on the Bill.
- The experts were requested to offer advice and respond to the following question: *“Considering the Report of the Constitutional Review Committee and the proposed amendment of section 25 of the Constitution, what would your views and suggestions be on the sections to be amended and why?”* The following people/experts made presentations before the committee:
 - a) Mr MV Moosa
 - b) Retired Judge A Sachs
 - c) Prof. R Hall
 - d) Mr P Meakin
 - e) Adv. W Trengove
 - f) Adv. T Ngcukaitobi
 - g) Acting Valuer General
- The presentations received by the Committee are discussed in short below:

8.1. Input by Mr MV Moosa

- 8.1.1. Mr Moosa’s presentation focused on the Constitution making process. He pointed out that this is the first time that the Bill of Rights is being amended. Mr. Moosa cautioned that the Committee must carefully consider what it wants the country to look like in 20 years and from that vision draft an amendment.

He requested that the Committee communicate more with the people. He said that the people do not realise that land reform is a global question and that this process is part of a very necessary debate.

8.1.2. He reminded the Committee that when considering why the Constitution is the most trusted brand in South Africa, it will become clear that it is not only because it is worded in such a way that it is one of the best Constitutions in the world, but also because of the process that was followed to adopt it. Society owns the Constitution and it must own any amendment that is made. He pointed out that it is absolutely legal to amend the Bill of Rights and section 74 of the Constitution sets out the minimum requirements for the procedure to do so. The Rules of the National Assembly also expands on this. He however proposed that although the Constitution and the Rules set out the requirements to amend the Bill of Rights, the Committee should go further and ensure that the amendment contributes to nation building and becomes a legitimate document that is accepted by the people. This process, being the first of its kind will set a precedent and he encouraged the Committee to invent a process to amend the Bill of Rights. He cautioned that the amendment of the Bill of Rights is not the same as amending an Act of Parliament: It cannot happen every few years. He commended Parliament for the process followed to date, especially in respect of the public hearings held by the Constitutional Review Committee.

8.1.3. He cautioned that in amending section 25, the Committee must take care not to dispossess those who have been dispossessed in the past. Black people are now owning property. The Committee cannot cause uncertainty for these people and take a step backwards that puts them back in an era where they did not have security of tenure and could not own property.

8.1.4. He suggested that regular and clear communication of what the Committee is doing and what rights the Committee aims to affect with the amendment to section 25 (land only), will assist the economy as potential investors are currently fearful of what the proposed law might contain. The type of property affected must be clearly defined. Property is not limited to land – see subsection (4)(b) of section 25. The Committee must be clear on what its mandate is and focus on that in the amendment. A question was raised on whether water should be included in the amendment related to expropriation without compensation. Mr. Moosa reminded Members that water is owned by the state. However, it would not be sensible to provide a person with agricultural land without water. When drafting a Bill, this must be kept in mind.

8.1.5. Mr. Moosa made it clear that section 25 was never intended to protect land that was stolen. It was not a “sell out” clause. It was very carefully considered before including it into the Constitution. It created a fair balance to acknowledge existing ownership, but addressing injustice. One of the most humiliating things of Apartheid was that Africans could not own land and could be removed without notice or compensation. This was foremost in the minds of those who crafted the current section 25. That is why the concept of “willing buyer – willing seller” was not included in section 25. He opined that it was the right thing to include this right in the Bill of Rights. His view is that it is not the wording of section 25 that is the main obstacle, there are other factors that are more of a concern. At most, section 25 is a peripheral obstacle. He commented that land restitution has a dismal record when it comes to implementation, but he pointed out that this performance concern is not within the mandate of the Committee, but rather an issue that should be addressed through oversight.

8.1.6. A question was raised on the inclusion of 1913 into the section and Mr Moosa indicated that the 1913 Act was central to the struggle and it provided a neat cut-off point. The Constitution does not limit any person who suffered an injustice before 1913 from seeking redress.

8.2. **Input by Retired Judge A Sachs**

8.2.1. Judge Sachs expressed concern at the apparent haste with which the amendment is approached and he cautioned that the drafters of the Constitution were very careful when it was drafted and set out procedures that must be followed when amending it. He proposed that the amendment Bill could either be a short amendment, or it could contain a preamble. A preamble could result in more debate, but it would guide future generations and courts when considering the amendment contained in that Bill. He also proposed that the conclusion in the Constitutional Review Committee's report could assist the Committee in drafting such a preamble. He also indicated to the Committee that he has wording to propose once the Committee is ready to provide the instruction to draft a Bill.

8.2.2. Judge Sachs pointed out that providing for expropriation without compensation in the Constitution, would be insufficient to address the failures of land reform. More is needed: Amongst others, a programme of implementation must be developed. He also referred to the High Level Panel Report and its inputs on and reform and the failures to date in this regard. He indicated that he has not applied his mind to whether new national legislation is required, or if existing national legislation could simply be amended to address any shortcomings.

8.2.3. Judge Sachs commented that South Africa needs a new property dispensation. Countries have different systems of regulating property. In South Africa we adopted the Roman Dutch Law. He

used the examples of Sectional Title, a concept that was strange to Roman Dutch law. It involved buying a house but not owning the land on which it is built. Now this concept is accepted. He also referred to the Ingonyama Trust and the questions around ownership that is currently being discussed. People want the security of a legal title, but in African culture the concept of the land belonging to one person is foreign, rather stewardship of the land is more accepted. When mining rights are exercised people must be compensated. He also mentioned other concepts that could be considered such as 50:50 ownership, overlapping rights, share-holding, shared interest that could incrementally become more in favour of the workers on the land, mixed ownership, land tenure and environmental conservation as a few examples. He stressed that the first step in nation-building is to acknowledge the tension that exists and then find solutions and work together. Judge Sachs did mention the Law Reform Commission, but was also concerned that going that route may take too long.

- 8.2.4. Judge Sachs acknowledged that a lot of his comments refer to the “how” of land reform, which is not in the mandate of the Committee. It is perhaps something that the Committee could refer to as a need in its report to the House.
- 8.2.5. Judge Sachs cautioned against excluding courts from the process. Although court processes are abused to draw disputes out, courts are also the bulwark against risks such as corruption and nepotism. There should be a good balance between courts being an external control, and not delaying the process. The Rule of Law aspect of Land Reform is essential to the process and must be overseen by the judiciary. It must play a crucial role in the amendment and its role must be strengthened to enable it to operate effectively.

8.3. Input by Prof R Hall (Annexure F):

- 8.3.1. Prof Hall reflected on the development of the Constitution and stressed that the Constitution does not protect a right to private property. The idea was to create a Constitutional rights framework which would place a duty on the state to enable the landless to obtain land.
- 8.3.2. She referred the Committee to the timing and manner of payment of compensation referred to in subsection (3), but indicated that there is not case-law on this aspect yet that she could access to advise the Committee on.
- 8.3.3. Prof Hall highlighted subsections (5), (6) and (7) as the three pillars of land reform, with subsection (8) being the overarching provision. If section 25 is read as one, subsection (8) clearly states that the requirement of compensation cannot be a mechanism to stop land reform. When considering compensation as contained in the Constitution, Prof Hall reminded Members that the Constitution only requires that compensation is just and equitable. It is not linked to market value. She described the purpose of expropriation as a tool to break a deadlock, a tool to speed matters up and to do it cheaply. But the problem with expropriation according to her does not lie in the wording of section 25.
- 8.3.4. Prof Hall presented four options to the Committee regarding expropriation without compensation. The first was a form where the state takes custodianship of all land. She pointed out that in this model, that custodianship would not constitute expropriation. She referred to the case of *Agri South Africa versus the Minister for Minerals and Energy*, Case CCT 51/12 [2013] ZACC 9 (“AgriSA case”) where the Constitutional Court found that it does not constitute expropriation if the state does not benefit from the deprivation of property (in that case,

minerals). She did caution that it cannot simply be accepted that the state would give property away for free though. The second option presented by Prof Hall was to always expropriate without compensation and in this regard she cautioned that such a policy would violate even the limitations clause in the Constitution (section 36) as well as section 1, as it would treat all people the same without regard for individual circumstances, including whether the person was previously disadvantaged or not. The third and fourth options related to compensation only being withheld in certain circumstances, either without (option 3) or with (option 4) an amendment to section 25. In respect of an amendment, she identified subsections (2)(b) and (8) as possible areas for amendment.

8.3.5. Prof Hall also provided an example of Brazil where the requirement is that land should perform a social function. This example shows what could be done if citizens are given more power.

8.3.6. Prof Hall made the following proposals:

- a) Parliament should expedite the Expropriation Bill.
- b) A compensation policy should be developed. The manner of calculating compensation needs to be clarified.
- c) There should be a Land Records Bill as well as legislation related to the Administration of Land.
- d) A Land Redistribution Bill should be drafted and expedited.

8.3.7. Prof Hall stressed that Parliament should not only look toward restitution as a solution, but must consider redistribution of land as well. She criticised the processes around restitution of land as it is slow and promises were made that were not kept. Redistribution of land can be done faster and will enable the state to make good on these promises.

8.4. Input by Mr. P Meakin (Annexure G):

8.4.1. Mr. Meakin made a presentation to the Committee on the concept of “working villages”, where a community is developed with the focus on the community becoming self-sufficient. This would contribute to food security. The concept could also be used in respect of social housing schemes in urban areas. He also commented on providing security of tenure in perpetuity where a person occupies more than 250m² of land. The major part of his presentation focused on possible mechanisms to address land reform. As this falls outside of the mandate of the Committee, his presentation is not included here, but it is attached to this report for consideration. He acknowledged that it is possible to amend section 25 and specifically to provide more clarity. In this regard his proposals focused on using vacant or unused land in all land reform processes, considering the inclusion of indirect subsidies, as well as replacing the income tax regime and value added tax regime with a land tax regime.

8.5. Input by Adv. W Trengove

8.5.1. Adv. Trengove started his presentation by reminding the committee that the objective is the need to redistribute land to address past injustices and not only just about restitution. Restitution is very important for land reform and is a very important part of restorative justice, however the object is also about redistribution in order to ensure equality. He advised the Committee to continue to ask itself “what is it that this Committee wants to achieve?”. How far will Parliament go in amending the Constitution? These questions should remain the focus of Parliament, as amending the Constitution may affect other constitutional rights.

8.5.2. Adv. Trengove spoke of “three spaces in section 25” that already allows for expropriation without compensation: The first space relates to the case of *Agri South Africa v Minister for*

Minerals and Energy CCT51/12 [2-13] (Agri SA case). Adv. Trengove pointed out that it must be understood that the taking of property does not constitute expropriation if the State takes land only to distribute such land, and does not take it for itself. This would constitute deprivation under section 25 (1). He directed members specifically to paragraphs 58, 59, 67 and 69 of the judgment. He is of the view that should section 25 be amended to provide for expropriation without compensation, it cannot be applied to the space created by the Agri SA case because the deprivation of property according to the principles set out in the Agri SA case does not constitute expropriation. The Agri SA case provides an ideal opportunity to the State to effect redistribution.

8.5.3. The second space is contained within section 25, which provides for legislation that deals with redistribution. Although section 25 has its own inbuilt limitations he reminded members that the rights that are built into section 25 can also be limited by section 36 of the Constitution. He stressed that currently as it stands section 25 does not require the concept of “willing buyer – willing seller”, but rather section 25 strikes a balance between the owners’ rights vs the rights of the nation who are entitled to redistribution. He pointed out that the willing buyer-willing seller concept is only contained in national legislation and is not a constitutional requirement.

8.5.4. In his discussion relating to the third space, Adv. Trengove reminded the Committee that the rights entrenched in the Constitution are not absolute. This is why the spirit of the Bill of Rights is wide and undefined. Very few of the rights clauses are explicit in spelling out a right. It allows for change in society. Adv. Trengove cautioned that when amending section 25 the impact of the right should be looked at together with the limitations clause, section 36. The rights contained in the Bill of

Rights evolve over time, through the interpretation of the Courts. Parliament should therefore provide the “meat” to section 25 rather through the enactment of national legislation. Furthermore, section 25(8) reminds us that the right to property is not conclusive. Nothing within the section prevents Parliament from limiting the rights set out in section 25 to ensure land reform.

8.5.5. According to Advocate Trengove it is the current Expropriation Act that does not do justice to the freedom of expropriation, and expressed the view that the Expropriation Bill does not go far enough to address the mischief that envisaged with land reform and could be much more dynamic in enabling the state to achieve its land reform goals. He gave an example of how this could be achieved: The Bill could include a “presumption of privilege” when land is owned by a white owner. If ever the origin of land is disputed and the owner is white, that owner then has the burden of proving that the land was not acquired through the dispossession of people or through laws that catered for white privilege during Apartheid.

8.5.6. Adv. Trengove concluded that although he was not of the opinion that the Constitution required an amendment as a matter of law, but going back to what the committee seeks to achieve, perhaps it is a political imperative in order restore the land balance. However, the Constitution may not be the correct place to create this imperative.

8.6. **Input by Adv. T Ngcukaitobi**

8.6.1. Adv. Ngcukaitobi began his presentation with a reminder of the three aspects of land reform: Tenure security, redistribution and restitution. In his opinion these have not been translated into a practical reality. He stressed that Parliament should not only look toward restitution as a solution, but must consider

redistribution of land as well. Parliament must think creatively when addressing land reform, and think beyond compensation. Restitution cannot correct the historical problem alone as restitution has inbuilt limitations and these will not be resolved by debates on compensation. He proposed that it may even be necessary to delink compensation and land reform as the current disputes about compensation is delaying expropriation. This could entail an amendment related to subsection (3) in respect of “time and manner” of payment.

- 8.6.2. He then proceeded to unpack the three reasons behind the failure of restitution, which included the cut off date of restitution claims which is set by 1913 (as referred to in section 25(7)). He pointed out that only 7% of all land was controlled by Africans by 1913, therefore even if all that land was returned, there would still be serious inequality in respect of land ownership. He also pointed out the effects of urban migration, even across borders of provinces: People are occupying inner cities and not agricultural land. Adv. Ngcukaitobi reminded the Committee that redistribution of land is future looking whereas restitution is backward looking. Secondly the focus has changed significantly from the first document on the topic “Ready to Govern”, issued in 1992 where is discussed in detail. The focus was on redistribution as there was a need for land. That concept was transformed into the words used in section 25, “access to land on an equitable basis”. In 1994 the next document, “RDP” tried to give effect to “Ready to Govern” but with time the focus shifted to restitution. “RDP” envisaged the Land Claims Commission and Court to only exist for five years and that redistribution of commercial farms would occur at about 6% per year – that was more or less the percentage of commercial farms available on the market each year. The state tried to give due consideration to tribalism, but at the time found it difficult to settle who owns what land. Restitution has slowed down to a rate that is less than

annual commercial sales. Adv. Ngcukaitobi stressed that there is in fact not enough land in South Africa that will address the past injustices through restitution – the population has increased many times, but South Africa still only consists of so many hectares. He pointed out that redistribution can however only be affected by national legislation and not through an amendment to the Constitution. Adv. Ngcukaitobi expressed the view that in fact there was no need to amend section 25, it was rather a case that Parliament itself has failed to implement the redistribution provisions within section 25 through the enactment of national legislation (he did however acknowledge the political need to amend the section).

- 8.6.3. Adv. Ngcukaitobi considered the reasoning behind compensation, and delved into the history behind the requirement for compensation of land. He pointed out that the individual who is the holder of the property should not be burdened by a national problem, and for this reason the state compensates that individual for the national good. It for this reason that he stressed that only courts or an independent and impartial tribunal should be able to determine whether no compensation is payable. The Rule of Law aspect of land reform is essential to the process and must be overseen by the judiciary. The judicial arm of land reform must be strengthened so that it can operate effectively in this process. This would also ensure that there was a balancing of the rights of the owner and the right of the person seeking redistribution. He cautioned leaving this decision to the executive. Adv. Ngcukaitobi informed the Committee that either the amendment to section 25 or national legislation must take cognisance of all the role players in the ownership of land. Land is often purchased subject to finance. If land is expropriated without compensation, the state cannot take on any mortgages that are still on that property, as that would still result in an expense to the state. It is also open for abuse. It seems that

owners are currently re-mortgaging property as a guarantee against expropriation without compensation. He recommended that the Committee should unpack the risks around mortgages and agree on a policy direction.

- 8.6.4. Adv. Ngcukaitobi warned that any amendment of section 25 that includes expropriation without compensation may lead to further dispossession of land from indigent people, and the example of mining rights conferred in terms of the Mineral and Petroleum Resources Development Act was provided. In these instances, the only recourse some communities have against mining companies lies within the current formulation of section 25(3) and the right to just and equitable compensation. However, with due consideration to aforesaid, Adv Ngcukaitobi made considerable proposals (**Annexure H**) to the amendment of section 25 and these are captured in paragraph 9 of this Interim Report.

8.7. **Input by the Acting Valuer-General (Annexure I)**

- 8.7.1. The Valuer-General uses both market value and production value (or the value of the use of the property). Members were questioning how the fact of being forcefully removed from your property is included in this calculation. The Office of the Valuer-General pointed out that it does not determine compensation but rather value and thus this consideration is not yet included. In their opinion the need for a policy may not be part of the constitutional amendment, but the need for a policy to define how calculations should be done is needed.
- 8.7.2. The Office of the Valuer-General unpacked its “formula” that it used when determining value and explained that this is set out in section 25(3)(a) – (e) of the Constitution. In their experience although these factors are useful, they have difficulty in accessing information. The Office of the Valuer-General is of

the opinion that using the current “formulae”, could result in a “just and equitable value”, and that such value could be closer to zero by applying these factors set out in section 25(3)(a) – (e). This is often achievable where land is unproductive or abandoned therefore the current value of a property equals zero and further where the state subsidies and benefits on property are equal to or greater than the present market value of the property, i.e. municipal land. It is for this reason that the Valuer-General felt that it would be practical to amend section 25(3)(a) to “current use value of the property” as opposed to “current use of the property”. Lastly, more than often the Office of the Valuer-General cannot calculate the extent of direct state investment as per section 25(3)(d) as there is a reliance on the owner to provide such information. Therefore, a practical amendment to this factor must be made.

- 8.7.3. However, the Office of the Valuer-General felt that the Expropriation Act should be aligned to the Constitution and any possible amendments. The Office of the Valuer-General warned Parliament that the amendment should be practical, as the Office rely on the factors contained in section 25(3)(a) – (e). The Office of the Valuer-General welcomed any regulations to the Expropriation Act that would assist it by providing explicit criteria so to ascertain how the land to be expropriated without compensation will be identified so as to minimise uncertainty in the market. Furthermore, the Office of the Valuer-General questioned how zero compensation would affect bonded properties, and who would reimburse the banks. The Office of the Valuer-General questioned that if the state would be reimbursing the banks, what would be the overall implications on the fiscus of the government?

9. Amendments proposed by the Experts

- 9.1. Some of the experts who presented, did not restrict themselves to the question that they were asked to respond to, but they also made some proposals on how section 25 could be amended to make explicit that which is implicit in the Constitution as well as to address current challenges.
- 9.2. The following were proposed in respect of the drafting of a Bill to amend the Constitution. Some presenters also provided inputs that went broader than the mere inclusion of the explicitly stated” expropriation may be done without the payment of compensation”.
- Preamble: If the Bill includes a preamble it would show the purpose of the amendment and the role of the Bill in the country. The concluding paragraph of the Constitutional Review Committee report could be used as a preamble as it acknowledges that an injustice exists, but it also acknowledges existing rights.
 - S25(2):
 - o A proposal was made that this subsection could be amended to empower the Land Claims Court, or another forum as the rate of restitution has slowed down significantly. There are periods where there are no judges available. The proposal in this regard was to include the words “any other independent and impartial tribunal or forum established by an Act of Parliament” after the words “approved by a court”.
 - o S25(2): This subsection could also house the condition that expropriation does not always require compensation. The proposal made was to include a proviso: “Provided that a court or such tribunal or forum may determine that no compensation is payable to the owner of land in the event of expropriation of land in the public interest for

the purposes of subsection 4(a).” The proposer cautioned against the executive deciding on no compensation being payable, and suggested that it should be the courts that makes this decision.

- S25(3):
 - A proposal was made for a consequential amendment to the introductory sentence of this subsection: “Where compensation is payable” could be added to start of section 25(3).
 - The general view is that the current formula set out in this subsection results in a “just and equitable value”, and that such value could be as little as zero by applying the factors set out in paragraphs (a) – (e).
 - It was proposed that to assist in the calculation of compensation the word “value” could be included after the words “current use” in paragraph (a).
 - In respect of paragraph (c), a proposal was made that market value should not be applicable to unused or vacant land and that rental from such land should be deemed to belong to national government.
 - A proposal was made that paragraph (d) should include indirect state investment and subsidies in the acquisition and beneficial capital improvement. A concern was however expressed that it is already difficult to calculate the effect of direct state subsidies and state loans.
 - There was also a suggestion that the Committee could consider the words “time and manner of payment”. Of expropriation was de-linked from compensation, compensation could be paid at a stage after expropriation and not as part of expropriation.

- S25(4): A proposal was made that paragraph (b) could include a sentence that read “except as a last resort, property to be expropriated in the public interest, but must be confined to unused or vacant land, excluding man-made improvements.”.

- S25(5):
 - A suggestion was made to include the following sentence after the words “equitable basis”: “with due regard to the economic and social circumstances of the intended beneficiaries”. This would assist in ensuring that expropriation does not benefit the elite but rather enable the landless to benefit.
 - Another proposal was to provide in subsection (5) for the “gradual replacement of all income taxes and VAT with land rents”.
- S25(8): It was proposed that to make what was implicit, explicit, section 25(8) could be amended so that the underlined portion is inserted: “No provision of this section, including the payment of compensation, may impeded the state from taking legislative and other measures to achieve land, water and related reform, in order to redress...”

10. Recommendation

The ad hoc committee recommends that the National Assembly:

- a) Takes note of the approved programme of the committee;
- b) Acknowledges that the task of amending section 25 of the Constitution cannot be concluded during this parliamentary term;
and
- c) Resolves that the 6th Parliament concludes the matter.

11. Acknowledgements

The ad hoc committee welcomes and appreciates the input presented and acknowledges the contribution by all Support Staff.

(Please note that copies of the annexures can be obtained from the National Assembly Table).