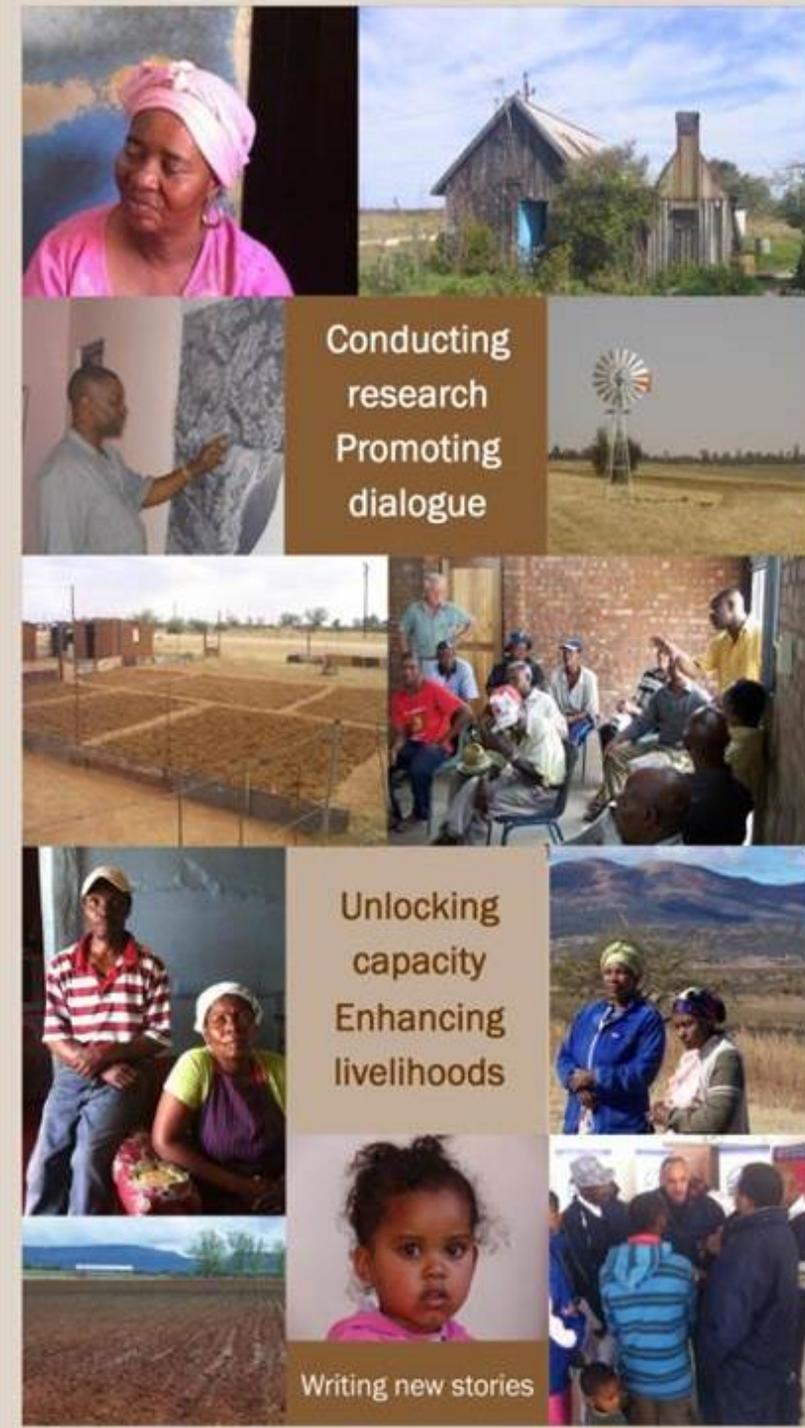


# Submission to Constitutional Review Committee

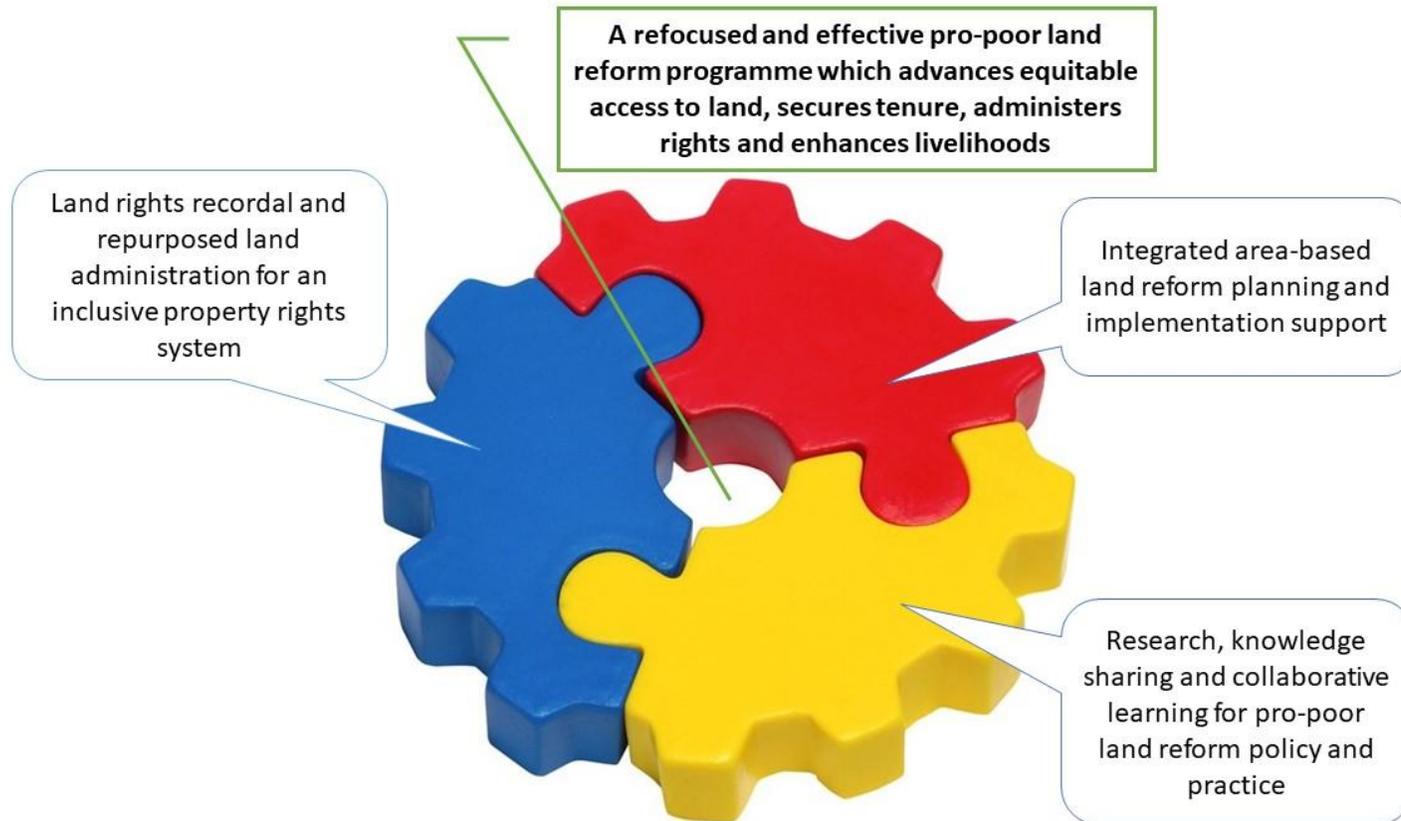
PHUHLISANI NPC  
4<sup>th</sup> September 2018

Dr Rick de Satgé



# About Phuhlisani NPC

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Phuhlisani is a non-profit company  
We have a long history of working in different land reform settings:

- Restitution community claims
- TRANCRAA
- Farm workers and dwellers
- Mining affected communities

## Focus areas

- Land reform implementation support
- Land rights recordal
- Applied research and evaluation

# Starting points: Talking about 'land'



The property rights of an estimated 60% of South Africans remain off register

*“Most discussions about land reform are not actually about land, or about reform. They are displaced discussions about national identity, colonialism, and reparation. And this displacement is in turn symptomatic of the lack of resolution about those issues”.*  
(Du Toit 2013)

*Land is not just about agriculture. It is about freedom, identity and complex intersections between belonging, dignity, property, wealth, security, culture and customary practices.*  
(Gasa, 2018)

The conversation about land surfaces the **deep rooted inequalities** which characterise our society.

Land remains a potent metaphor for **dispossession** - a signifier that **South Africa does not yet belong to all who live it.**

Phuhlisani NPC supports approaches which will:

- sustainably advance **equitable access to land** in rural and urban areas
- **enhance livelihoods**
- ensure **tenure security** and **recorded rights** for all.
- enable a practical, affordable and **integrated property rights system** as the platform to afford all citizens with secure and legally enforceable tenure rights

To achieve this we must understand and address the **systemic problems** contributing to the poor performance of the land reform programme to date.

# Our position on expropriation without compensation (EWOC)

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Legal opinion confirms that the Constitution places no impediment in the way of land expropriation and is flexible with regard to the calculation of compensation so long as it is “just and equitable”.

- Given this formulation compensation could range from zero to full market value depending on the circumstances of the case.
- In practice the analysis of the factors to be weighed up in the calculation of “just and equitable” compensation, remains insufficiently developed or understood.

Existing land reform laws make provision for expropriation These include:

- Section 12 of the Provision of Land and Assistance Act (No. 126 of 1993)
- Section 35(5) of the Restitution of Land Rights Act (No.22 of 1994)

- Section 26 of the Extension of Security of Tenure Act (No. 62 of 1997)
- Section 2(1) of the Interim Protection of Informal Land Rights Act (No. 31 of 1996)

However these provisions remain largely untested. This is because cases have not been brought before the courts to set precedents which could provide a baseline for the development of transparent policy and procedures.

Any constitutional amendment proposed by the CRC will still require expropriation to be implemented by way of a law of general application and in a manner which meets the requirements of just administrative action as required by the Promotion of Administrative Justice Act (No. 3 of 200).

# Our position on EWOC

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The **principal obstacle** preventing equitable access to land **does not lie with the Constitution**

- It is rather a general **lack of political will** to implement an **effective pro-poor land reform programme**
- and a failure to pass an updated Expropriation Act.

There is **no evidence to demonstrate that EWOC will make land reform cheaper or faster.**

- To the contrary **expropriation may slow down the pace of land acquisition and increase costs** as a consequence of drawn out and expensive litigation.

While expropriation must be available as part of the state land acquisition machinery, which could allow for zero compensation under certain circumstances this should be used expeditiously and not as a default position.

In our view the current enquiry into the need to amend the Constitution **diverts us from the need to confront the widely acknowledged policy and programme failures of land reform.**

This is unfortunate given that the challenges facing the land reform programme have been analysed in great detail and with exhaustive public input by the *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (HLP).

Despite the volume of evidence and concrete proposals presented, the HLP report seems to have been overshadowed by the expropriation debate which in our view offers no sustainable solutions to the complex problems addressed by the panel.

# Our position on EWOC

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## CALCULATING COMPENSATION

The compensation calculation will vary from case to case and a combination of factors will determine the level of compensation awarded where land is expropriated in the public interest.

- This may result in levels of compensation at below market value.
- It is important to note that there is no requirement that such compensation be paid in cash – it could take the form of government bonds.
- Overall a tiny minority of expropriation cases are likely to be concluded with a zero compensation order.

## UNINTENDED CONSEQUENCES: EXTINGUISHING OFF REGISTER RIGHTS

It is critically important to recognise that alongside the registered owner, there are often others with **unregistered rights in the land which is subject to expropriation or acquisition for land reform.**

Before acquisition it is important to identify those with off-register rights who are also eligible for compensation or comparable redress:

- Farm dwellers, communal land rights holders, informal settlement dwellers.

In cases where the land of rural communities is *de facto* expropriated for mining purposes, the value of ‘just and equitable’ compensation needs to be given real content. This suggests the need to calculate compensation packages appropriate to these settings which also add a premium to properly compensate people for the multiple hardships and social consequences associated with the loss of their land.

# Realising the transformative power of Section 25

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To date the land reform programme has failed to realise the transformative power of the rights contained in Section 25 of the constitution.

In our view these rights will not be amplified by amending the Constitution to enable expropriation without compensation. Our problems do not lie here.

- Section 25 can only have a transformative effect if South Africans take a long, hard and honest look at the multiple factors resulting in the poor performance of land reform programme.
- We have to systematically address our failure to prioritise land reform, develop coherent policy, redress land dispossession, and advance equitable access to rural and urban land backed by appropriate support services in order to reverse deep seated spatial/economic inequality and tenure insecurity which constrains the majority of South African citizens.

# Rural land reform



# Land reform status quo

By 2016/17 4,7 million ha had been acquired through redistribution and 3,4 million ha through restitution totalling 8,13 million ha or 9.9% of commercial farmland.

Official estimates suggest that over 400 000 households have benefitted from land reform (approximately 130 000 households are said to have benefitted through redistribution and 300 000 households through restitution).

However, recent research (Aliber 2018) suggests that there has been a massive shrinkage in the number of beneficiaries.

Those who retain active links with land purchased through redistribution and restitution may have shrunk to just 60 000 households.

Costs per estimated actual beneficiary have mounted significantly

	<b>Total expenditure</b> (R billion)	Per official beneficiary HH (R)	Per estimated actual beneficiary HH (R)
Redistribution	<b>56</b>	400 000	1 900 000
Restitution	<b>48</b>	160 000	1 600 000

A significant portion of land acquired through land reform has been transferred to land holding entities while the remainder is held by the state.

- By 2010 a total of 1 383 trusts had been established to hold land
- According to the DRDLR CPA registrar, there were 1 526 registered CPAs in 2017.

Together these entities have a property portfolio worth billions – yet 82% of CPAs were not compliant with the Act and many Trusts have collapsed.

# Land reform status quo

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The problems faced by land holding entities reflect state failure to adequately support and resource them.

This has meant that for the membership in the vast majority of these CPIs there is insufficient clarity on land rights and no system to record and certify household and family rights and legally recognise social tenures.

Consequently, there has been a reluctance to invest in the land.

Land tenure issues remain badly neglected.

- Currently just 3,7% of the DRDLR budget (itself only 0.4% of the national budget) is spent on land tenure and administration.

Some 17 million South Africans in former homelands lack security of tenure and there is no legislation to protect their rights, other than the Interim Protection of Informal Land Rights Act which remains largely unenforced.

Ongoing contestation over the role of chiefs in land administration has created spaces for land grabbing and elite capture - particularly with regard to mining deals in communal areas.

Farm workers and dwellers live on land owned by others. They have insecure tenure and no pathway to secure property.

Serious questions must be asked about the value of the return on public money invested in land reform to date.

- Its contribution in its current form to poverty reduction, securing rural livelihoods and rectifying spatial inequality are negligible.
- Expropriation without compensation offers no real answers here

We have to systematically address and overcome these and many other problems to make land reform work for the poor majority.



Urban land

# Identifying well located urban land and securing rights

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Between 1994 and 2014 the South African government provided more than 2.5 million houses and some 1.2 million serviced sites, but the housing backlog nevertheless increased over this same period from 1.5 million to 2.1 million units, while the number of informal settlements went up from 300 to 2 225.

Turok et al (2017) note that in the main metropolitan areas “the economy is much more concentrated geographically than the population, resulting in extensive unemployment and poverty for people living in the periphery, and imposing an imposing extra cost on their mobility”.

To date state investment in RDP housing has fueled the extension of an inefficient urban sprawl that pushes the urban poor to the periphery.

In identifying well located land for housing we need to learn from the experience of recent developments (e.g. N2 Gateway in Langa) to examine how access to land and housing are often shadowed by conflict

Securing well located land is not enough:

- Managing the social process, transparent rights recordal and allocation are key.

# Securing rights

The Constitutional Review Committee has also invited inputs to “propose the necessary constitutional amendments where applicable with regards to the kind of future land tenure regime needed”.



# The future land tenure regime

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## NO SECURE RIGHTS WITHOUT LAND RECORDAL AND ADMINISTRATION

The failure to build a land administration system to secure and manage the rights guaranteed by the Constitution and existing tenure laws has rendered the property rights of 60% of South Africans vulnerable.

There is an urgent need to change how land tenure and land administration are conceptualised in policy and law, and enabled by new land administration institutions.

## TOWARDS AN INTEGRATED PROPERTY RIGHTS SYSTEM

We need to conceptualise a continuum of land rights and provide legal security for all.

Investing in land administration systems and institutional capacity will improve the delivery of land reform programmes and enable an integrated property rights system in South Africa.

While this may not require constitutional amendment it could benefit from being a recommendation of the Constitutional Review Committee

# Conclusion

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We submit that the overwhelming national priority is to design and implement an effective pro-poor programme of land reform backed by a new emphasis on land rights recordal and administration across the rural and urban landscape.

In our view the current narrow focus on constitutional amendments to enable expropriation without compensation – which legal opinion confirms is already permissible – diverts us from finding solutions to complex problems.

While the expropriation discourse taps into deep and justified social discontent it is a simplification that offers no substantive vision for a South Africa that works for the many rather than the few.

- If the expropriation debate can guide us back to engage with and implement the recommendations of the HLP we have a chance to put rural and urban land reform on a new path with real potential for change.

In this respect the deliberations of the Constitutional Review Committee with regard to the need for a future tenure regime that records and protects the land rights of all South African citizens can make an invaluable contribution.

THANK YOU.