

**DEPARTURE IS AN EXISTING  
CONSTITUTIONAL PERMISSIBLE SOLUTION  
(“ANY” DEPARTURE)**

**SUBMISSIONS TO THE  
CONSTITUTIONAL REVIEW COMMITTEE  
(PREPARED BY MATOME CHIDI  
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## **EXECUTIVE SUMMARY**

In these submissions, we show that there is no need to amend the Constitution, **section 25**, in order to give effect to the National Assembly's resolution on expropriation of land without compensation. We hereby largely respond to a call for members of the public to make submissions to the Constitutional Review Committee (hereinafter called Committee) on the subject of land expropriation without compensation.

The resolution was made because the current Law requires compensation. The case Law so states. The Constitution permits, on the other hand, a move away from the current legal position and for exclusion of compensation. This work discusses the how-part.

We need to correct a “**constitutional sin**.”<sup>1</sup> Commenting on an old regulation passed prior to the democratic dispensation, the Constitutional Court stated that “The Decree<sup>2</sup> – Like all legislation passed prior to 1994 – is undemocratic. **It was born in constitutional sin**. At the time, democracy was the privilege of the **white** minority...”

In a unanimous judgment, Van der Westhuizen J at **para 21, *Khohliso v S and Another [2014] ZACC 33***

The sin needs to be corrected. This work is on the correction of the sin. We should not retain the sin and its results. In a constitutional democracy, we correct the sin by acting reasonably and justifiably. As we correct the sin, we need to note that currently no expropriation can be effected without compensation. That is the current law. The N/A resolution seeks to correct the **Sin**. Without major transformation we cannot ‘heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights

***Minister of Finance and Other v Van Heerden*** (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004), para [137]

Our work is structured in the form of **Seven Parts (A-G)**. In some parts a table of content appears on the first page of those relevant parts. It is meant to and we wish it assist in the study of this work.

**Part A** (pages 5 to 29) is on the meaning of expropriation. In understanding what expropriation is, we deal with deprivation first.

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<sup>1</sup> The President, Matamela C. Ramaphosa calls it an original sin

<sup>2</sup> Decree 9 was issued by the President of the former Transkei

**Part B** (pages 30 to 32) on the other hand is based on **Part-A**. It is a very short part. The National Assembly's resolution of the **27/02/2018** was, referred to the Constitutional Review Committee for a review of **section 25**. The resolution does not empower the Committee to apply its mind to whether land reform without compensation could be achieved through other means than expropriation. In this part we show that Land Reform could be achieved under **sub-sections 25 (1) deprivation & (5)**, access to land, without paying a cent. We recommend what we think should happen. Though this is not a response to the Committee's call, it however contributes to the land reform process.

**Part C** (pages 33 to 45) deals with the nature of a society we sought to achieve as South Africans. The Preamble, read with the Bill of Rights, is the relevant portion of the Constitution.

Lastly, **Part-D** (pages 46 to 53), is about a judgment by the Constitutional Court. The judgment shows how the Court approaches issues of transformation. The court was very harsh to those opposed to transformation. It is relevant because it gives a picture of the direction the Court may take were some to seek to have any steps adopted, from this process taken to Court.

**Part E** (pages 54 to 95) is an actual response to the call by the Committee. This constitutes the main submission. It is the largest. Before going to the main work, **Part-A** (understanding what expropriation means) and **Part-B** (introduction of a program to achieve land reform not under expropriation), are very important. **Part C** and **D** help in that we demonstrate that read with other provisions in the Constitution and in consideration of an important and relevant judgment by the Constitutional Court, expropriation without compensation is constitutionally permissible.

Central to **Part-E** is that **departure**, in terms **section 25 (8)**, permits limitation of the right to compensation. In departing from the requirement of compensation, we show that we should seek to achieve a society based on human dignity (a central feature in the Constitution) and equality (inseparable from human dignity). In our work we refer to all relevant sections in the Constitution, some International and Regional (Continental) instruments, which instruments do not contradict what we seek to achieve. As we refer to International and Continental Law, we emphasis that the South African context is a unique one. We further reply on Constitutional Court Judgments in our interpretive exercise.

In both **Parts A** and **B** we make submissions of what should be done with each relevant topic, namely deprivation and expropriation. Under both deprivation and expropriation, required is the Law of general application (**Access to and Deprivation of Land Act and the New Expropriation Act**).

As for deprivation, it could be effected without departure. In so far as expropriation is concerned, we need not amend section **25 (2) (b)**. This is so because we should limit the right to compensation by excluding compensation. Departure could be processed by a forum and not Court, with the forum's determination reviewable. The same applies in so far as a program under deprivation and access to land.

So proposed for achieving the two, plus access, are legislations, with each statute meant to give effect to the two principles (deprivation and expropriation)<sup>3</sup>, plus access. Amendment is not necessary.<sup>4</sup> In both **sub-sections 1** (including non-arbitrary deprivation) and **2** (compensation) of **section 25, section 36 (1)** limitation clause, applies. The legislations proposed in **B** and **E** must therefore allow only reasonable and justifiable state deprivation and expropriation.

In **Part-F (page 96 - 96)**, we propose an Office of an adjudicator. The Office would make determinations of whether expropriations comply with the Law. This part should be dealt with deeper at the next stage of public hearings because it is about what should go into legislation. This process is a Bill consultations processes.

We have included **Part - G (97 - 129)**. This part is not really a case we are making to the Committee, but more of a response to complaints from some in society. We deal with food-security (please note at this stage we are saying that for a long time, our forebears produced food on their own).<sup>5</sup> We also touch land as security and general issues.

Individual concerns are of no significance concern within the land reforms context, see footnote 58. This is Law. If not settled Law, it is becoming satisfactorily developed.

The case made in the general body of this work is that there is no need to amend, though amendment is allowed. We propose two legislations, with the first regulating access to land and deprivation and the next regulating expropriation. If there is to be an amendment, such an amendment should be effected when the state already has powers to take land without paying for it.

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<sup>3</sup> Be advised that some taking of land may not even be deprivation, in which case, we propose it be under access to land program.

<sup>4</sup> Access and deprivation could be regulated by one legislation

<sup>5</sup> Mr. Makwela (who assisted me) lived the food-production experience (if not mellowed he would be saying that he is insulted. He does not state so because it is not necessary).

**PART A: MEANING OF EXPROPRIATION**

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**“... deprivation passes scrutiny...” if “... under section 25(1) (i.e. it does not infringe section 25(1) or, if it does, is a justified limitation) then the question arises as to whether it is an expropriation. If deprivation amounts to an expropriation then it must pass scrutiny under section 25(2) (a) and make provision for compensation under section 25(2) (b).”**

***First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002), para [59]**

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## **INTRODUCTION**

1. “Nkosi sikelel’ iAfrika”, the first line of the National anthem says. “Let us live and fight for freedom in South Africa our Land!” The spirit of the national anthem is evident in the Preamble to the Constitution. In preparing this response to the National Assembly’s resolution on expropriation of land without compensation, we were guided by the aspirations contained in the anthem and the Preamble. As is known the resolution was made on the **27/02/2018**. We compiled this work as South Africans, believing that all of us are affected by the land issue and believe strongly that the Transformation Project<sup>6</sup> belongs to South Africa.
2. It is better to have a discussion about a subject if we do understand its meaning. If not, we will be like a fellow who builds a house without a foundation. An understanding of the meaning of expropriation may serve as a map, guiding us in our interpretive journey.

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<sup>6</sup> It is not politicians’ project, though the South African society is highly political. The transformation project is bigger than all of us. In a reply, to “De Klerk hails 20 years of democracy” on the 29/04/2014, on line media 24, I said: “The principle of equality does not belong to anyone. The law of nature demands it. Logic demands it. The Constitution requires it. It does not belong to the African National Congress, (the “ruling party”)... “Those of us outside politics need to contribute to such discourses as well.” <https://www.news24.com/MyNews24/De-Klerk-hails-20-years-of-democracy-reply-20140429>. That statement is still relevant today. We contribute because of a long held conviction that we should so contribute. Note that the reason why we stated that the Transformation Project does not belong to the Ruling Party is because people think that to demand transformation is political. It is not. God demands it. Those who Church, each time they church, should pray for His guidance on how we could achieve transformation for equality purposes. Fairness demands equality. Politics serve only as a means to achieve it, in as much as other forms of activities are, in society. If however some still insist that it is political, then and in that case, politicking we do. This transformation project is to be a success were South Africans and persons in South Africa to make contributions from different corners of society. Change is in the best interest of our generations and generations to come and in bringing about change, it should not matter whether a person is from the PAC or Council for the Advancement of the South African Constitution [COSAC] (***the day they protect the constitution not only against executive conduct or misconduct, but when the executive and Parliament make efforts to improve people’s lives as well***).

3. For a meaning of expropriation, we should first consider what deprivation<sup>7</sup> means. A lot of times the two are used as though they mean one and the same thing. They do not. All conduct which amounts to expropriation would always be deprivation,<sup>8</sup> whilst on the contrary, not all conduct which amounts to deprivation amounts to expropriation. Deprivation may occur and not amount to expropriation.
4. As we shall show below some taking of land by the state may not be deprivation. However, any such conduct which if it amounts to deprivation, then the question would be whether it amounts to expropriation. Further, in addition to amounting to deprivation, if it further amounts to expropriation, only then is compensation payable (currently the law requires payment of compensation).<sup>9</sup> If it does not amount to expropriation, no compensation is payable.
5. Before going any further, please apply your mind to the following, from **FNB** case:
- “...If the deprivation amounts to an expropriation then it must pass scrutiny under section 25(2)(a) and make provision for compensation under section 25(2)(b)...”<sup>10</sup>**
6. It will help also to refer to ***Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another*** (CCT 110/08) [2009] ZACC 24; 2009 (6) SA 391 (CC) ; 2010 (1) BCLR 61 (CC) (27 August 2009), at paragraph 63,

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<sup>7</sup> As you will see, there is a discussion of a proposed program in instances where the taking of land is short of deprivation (does not even amount to deprivation)

<sup>8</sup> There are some exceptions which are best left for academics (we will however touch those)

<sup>9</sup> That is why there is a resolution to (expropriate without compensation and further for a Committee to consider whether to emend or not the Constitution in order to legalize the no-compensation expropriations)

<sup>10</sup> See para [59]. Further see ***Msiza v Director-General for the Department of Rural Development And Land Reform and Others*** (LCC133/2012) [2016] ZALCC 12; 2016 (5) SA 513 (LCC), paragraph 6

*Quoting Harksen v Lane NO and Others [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC)*

“The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law.” (footnote excluded)

and went further and stated:

The purpose of the distinction between expropriation and deprivation by regulatory measures is to enable the state to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation. (footnote excluded)

7. For expropriation, the state (public authority) must acquire rights in property for a public purpose. At a later stage we will show what the purpose is for expropriation. Public authority means an organ of state. Included would be your departments, municipalities and other organs of state.
8. We are helped further because we are advised that where the state could avoid incurring liability to owners of property affected in the course of land rights interference, the state should so avoid incurring costs. This given, the state should be advised that courts have already been inclined to an interpretation favorable to efforts by the state not to incur costs when interfering with land rights.
9. Deprivation is not necessarily expropriation. The provisions regulating deprivation and expropriation in the Constitution of the Republic of South Africa are, section 25:
  - (1) “No one may be **deprived** of property except in terms of law of general application, and no law may permit arbitrary **deprivation** of property”
  - (2) Property may be **expropriated** only in terms of law of general application:

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- a. for a public purpose or in the public interest; and
  - b. subject to compensation ...”

10. To deprive we invoke **section 25 (1)**. A meaning of deprivation will help. It is proper to explain why the meaning will help. Any insubstantial interference with the right of use, enjoyment and exploitation would not violate **section 25 (1)**.
11. For purposes of invoking **section 25 (1)**, the state may make law to avoid arbitrary deprivation. It is our respectful view that any deprivation should not be arbitrary. Ours is a constitutional Democracy. Therefore, though **section 25 (1)** does not prohibit deprivation of land, we submit that any taking of land, even if the conduct falls short<sup>11</sup> of deprivation should not be arbitrary. The external **limitation in 36 (1)**, applies.<sup>12</sup> In addition to not being arbitrary, it must also be done in terms of the Law of general application: a statute.
12. The current law requires compensation in the case of expropriation of property. The word property means anything which is property. Beyond the land question, we have already identified what else could be done to, in correcting a Constitutional Sin, achieve transformation. For the purposes of specificity, land is the focus in this body of work, though this work, interpreted broadly, could serve as a framework for other programs by the executive and the legislative arm of the state. Back to the compensation issue, this parliamentary process seeks to change that law. A consideration of the meaning of deprivation follows immediately below, before we consider the meaning of expropriation.

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<sup>11</sup> Section 25 (5)

<sup>12</sup> We are fortified in our view by the judgment in the matter of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC)* [58]: viewed from this perspective, section 25(1) deals with all “property” and all deprivations (including expropriations as to non-arbitrariness and the required Law). If the deprivation infringes (limits) section 25(1) and cannot be justified under section 36 that is the end of the matter. The provision is unconstitutional.

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**DEPRIVATION**

13. As pointed out immediately above, in order to deprive persons of land, we invoke **section 25 (1)**. The **Constitutional Court** has had occasions to deal with deprivation of property in terms of **section 25 (1)**. This was in the matter of ***South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others [2017] ZACC***, decided on the **24 July 2017**. The matter was a challenge to **section 25 (1)** of the Constitution. It is from an understanding of deprivation that we will have an understanding of expropriation.
14. The ***Diamond Producers'*** matter summarizes authorities on the subject of deprivation and its meaning. An infringement of **section 25 (1)** occurs when the following requirements are met:<sup>13</sup>
- 14.1. the thing in question must be property, land specifically in this context;
- 14.2. there must be a deprivation;
- 14.3. the deprivation must not be arbitrary<sup>14</sup>... The test was enunciated by this Court in the ***FNB*** matter as follows:
- “(a) ...
- (b) ...
- (c) If there has (been deprivation), is such deprivation consistent with the provisions of section 25(1)?
- (d) If not, is such deprivation justified under section 36 of the Constitution? <sup>15</sup>

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<sup>13</sup> Para [34]

<sup>14</sup> See footnote 38, referring with approval to the matter of (***FNB***): para 46).

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- (e) If it is, does it amount to expropriation for purpose of section 25(2)?
  - (f) If so, does the deprivation comply with the requirements of sections 25(2)(a) and (b)? ...”<sup>16</sup>

14.4. Clarity on the above appears later in the judgment in the said matter of *Diamond*, relying on the matter of ***FNB***. It is that:

- a. Whether there has been a deprivation depends on the extent of the interference with or limitation of:
  - i. use;
  - ii. enjoyment or
  - iii. exploitationof the property.
- b. substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.<sup>17</sup>

The Court when further and stated that “... if there is a deprivation of property, we would proceed to the arbitrariness analysis...”<sup>1819</sup>

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<sup>15</sup> Read this together with (c), the only other instance where section 25 (1) may not be met is when section 25 (5) has been invoked. However the content of section 25 (1), as to non-arbitrariness and required Law, must be met. I therefore do not agree with the leg of the enquiry on this aspect. If a matter were to serve before the Honourable Court, the Court may possibly reconsider this factor. We certainly cannot go to section 36 (1) if the provisions of section 25 (1) are not met at all for arbitrariness is not constitutionally permissible. Further constitutionally impermissible is deprivation in the absence of a Law of general application.

<sup>16</sup> The word “deprivation” used in this leg of the enquiry means expropriation

<sup>17</sup> ***Diamond Producers***: at 42, footnote 42, quoting with approval ***Mkontwana v Nelson Mandela Metropolitan Municipality*** [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 32)

<sup>18</sup> ***Diamond Producers***: [38]

<sup>19</sup> ***Diamond Producers***: [43] The Court in *Mkontwana* thus did not delineate the precise ambit of what constitutes “deprivation”, but noted that a substantial limitation, beyond the normal expected restrictions on property, would constitute deprivation.

15. The above given, for deprivation to occur there must be substantial interference. *To determine substantial interference* a court must give consideration to:

15.1. the extent to which the use and the enjoyment of land have been diminished;

15.2. an intrusion which goes beyond the normal restrictions on property use or enjoyment;<sup>20</sup>

**If the “... use and the enjoyment of land ...” have not diminished, then and in that case, there is no deprivation. If there is no deprivation,<sup>21</sup> then the conduct is not conduct in terms of section 25 (1). The conduct could be in terms of section 25 (5),<sup>22</sup> which is dealt with at para [24], below.**

16. The answer depends on the extent of the intrusion in the property or limitation of its use or enjoyment. The intrusion must have a legally relevant impact on the rights of the affected party;<sup>23</sup>

16.1. To prove the extent of the intrusion, there must be evidence that the intrusion could cause **harm** or **prejudice** to the person affected.<sup>24</sup> There must be interference with property that is significant enough to ‘have a legally relevant impact on the rights of the affected party before deprivation of property under **section 25** is established’.<sup>25</sup> The only reference to deprivation is in **sub-section 1** and therefore **section 25** refers to **section 25 (1)**.

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<sup>20</sup> *Diamond Producers’* para 44

<sup>21</sup> If conduct falls short of deprivation, there is no expropriation

<sup>22</sup> We have not applied our minds to sub-section 6.

<sup>23</sup> *Diamond Producers’* para [58]

<sup>24</sup> *Diamond Producers’* para [47]

<sup>25</sup> Footnotes 47: *Link Africa at para 167*.

16.2. Further enquires, to prove deprivation, are:

- a. what is it that the conduct takes away from those affected?
- b. that no physical taking of the property is required,<sup>26</sup>

17. The court held in **Reflect-All**, at para [48], that:

[48] Deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof. Whereas deprivation always takes place when property or rights therein are either taken away or significantly interfered with, the same is not necessarily true of expropriation...”

*There must be “... extinguishing a right previously<sup>27</sup> enjoyed...” Where there was no enjoyment of the right, such as unused<sup>28</sup> or abandoned land, taking of land would not amount to deprivation. It therefore means that unused land or abandoned land cannot be expropriated. Paragraph 24, below, clarifies this aspect further.*

### **Purpose of deprivation**

18. The purpose of deprivation should be to enable the state to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such use of the land. See **Reflect-All**.<sup>29</sup>

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<sup>26</sup> Though physical taking may be effected

<sup>27</sup> Previous means before interference

<sup>28</sup> Some land may not be abandoned in that it is taken care of, but without being used. Examples may be land where a fire-belt or fence is maintained sufficiently and regularly, but with the actual land not used. So it is the use of the land which is important, and not really whether land is abandoned. Abandoned land is a straight forward issue, obviously.

<sup>29</sup> Paragraph [6], above

Care must be had to the issue as to public good. Any land could be taken. **It does not matter to whom land belongs.** It is the Law. The good of the public is of import. Public good for example is when we build a dam on land or install a water facility in order to extract water from a land owner.<sup>30</sup> Public interest is when land is given to individuals, or such entities to which individuals are attached.

### ***Constitutional Court: no compensation***

19. At **paragraph 64** of the ***Reflect-All*** matter, the Court confirms that land could be deprived for a public good, without compensation. For deprivation, the state does not acquire land and may not have transferred to it land.<sup>31</sup> If not acquired, there is no expropriation.<sup>32</sup>

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<sup>30</sup> The Constitution does allow the Western Cape Province to extract water, free of charge, from a dam of ***Groenland Water Users Association*** (see **paragraph 197 (f) of this work**). A legislation should regulate how that should be achieved.

<sup>31</sup> The applicants argued that section 10(3) is inconsistent with the constitutional guarantee against uncompensated expropriation of property. I do not agree. Although it is trite that the Constitution and its attendant reform legislation must be interpreted purposively, **courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the state**. It must be emphasized that section 10(3) does not transfer rights to the state. ***What it does is this: it deprives the land owner of rights to exploit the affected part of the land within the road reserve and thus protects part of the planning process which has economic value and is in the long run in the public interest.***<sup>68</sup> Remarkably, while the applicants accepted the distinction drawn by this Court in *Harksen*,<sup>69</sup> they nevertheless contended that section 10(3), read with sections 8 and 9 of the Infrastructure Act, enables the state to “acquire” land for the construction of public roads. As I have said, the state has not acquired the applicants’ land as envisaged in sections 25(2) and 25(3) of the Constitution. For that reason, no compensation need be paid

<sup>32</sup> A development of legislation would provide certainty. It is not that deprivation cannot be effected currently. It has happened in the ***Reflect-All*** matter. Any other state organ could have laws to this effect. For purposes of certainty however, we need one legislation which will serve as a general Law. Unfortunately there is no clarity at this stage. As indicated, it does not matter to whom land belongs. If anyone wants to invest/develop land, they should not be burdened by uncertainty and therefore it is best that we provide the necessary certainty.

20. At para [48], the Court held, in *Reflect-All* matter, that:

“... Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation.”<sup>33</sup>

21. Land is therefore deprived when deprivation relates to sacrifices that holders of private property rights may have to make without compensation.

22. It will help to make a summary of our understanding of the meaning of deprivation. Property is deprived when the following occur:

22.1. no compensation;

22.2. the intrusion could cause harm or prejudice to the person affected

22.3. it is not necessary for the land to be taken physically e.g. installation of water and/or sewage pipes under underneath the soil;

22.4. the state does not acquire the land, meaning that there is no transfer;

22.5. extinguishing a right enjoyed (if installed water pipes, the owner may not use the surface of the land as they wish because in using it as they wish, they may endanger water works);

22.6. when property or rights therein are either taken away or significantly interfered with;

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<sup>33</sup> When the matter was decided in 2013, there was no application of mind to departure and in the absence of a legislation allowing departure, compensation must be paid. This is settled law. The N/A Motion recognised the settled Law, but seeks to have it changed.

- 22.7. the ground for disturbance/interference is for public good;
- 22.8. the land is not transferable to nor rights thereof to be enjoyed by an individual,
- 22.9. the person to whom property belongs is not an issue (the state may take or interfere with my land which I did not obtain due to racial discrimination or did not inherit land from persons who obtained it due to racial discrimination).

**22.9.A.** As decided in the *Reflect-All* matter, **section 10.3 Gauteng Transport Infrastructure Act 8 of 2001**, appears to allow deprivation of land without compensation.

South Africans who oppose the motion do know and some of them have experienced deprivation of their right to land. Title deeds record relevant Municipality's right of access to portions of land owned by anyone. Municipalities use the right to attend to such works as may be necessary from time to time. When a Municipality exercises the right of access and attends to works, this in some instances may amount to deprivation.<sup>34</sup> It is so because the owner cannot use the relevant portion of land as he or she pleases. The owners should not interfere with water pipes and systems, the owners do not have to interfere with sewage and manhole systems. Any ground work by the owner should not interfere with such systems. For public purposes, the right of use of land by an owner

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<sup>34</sup> The sewage pipes and manholes are generally located where persons' back border side of stands interface (back opposite neighbors' stands interfacing). Depending on works to be attended to, in some instances a hall/stop non-sense, may have to be demolished for a municipality to attend to its works and thereafter be rehabilitated. During the period when the hall/stop non-sense is demolished, for example: *non-sense may not be stopped*. An owner may for instance not be able to swim as they generally would for their privacy may be invaded. This system is beneficial to the opponents of the motion herein concerned. They are advised to remind themselves of the system and note that there is already a deprivation system operational. In this case, there is no physical taking of property. Pipes and manholes remain on an owner's property, without the state owning the relevant portion of land (as indicated deprivation does not require physical taking of property and the state does not acquire the land). Deprivation is therefore practiced in some instances, without compensation. What we need to do is to develop Law, moving from many instances of deprivation, for certainty purposes. The state should not pay for installation of a satellite infrastructure for a community

is limited. This we state in order to show that the current legal system, to some extent, permits limitation of the *right of use* of land for public good.

### ***Recommendations***

**23.** With an understanding of what deprivation is, we recommend the following:

23.1. the relevant departments initiate legislative processes regulating deprivation;<sup>35</sup> or

23.2. the Committee may defer this issue for post **30/08/018** (The Committee annually reports by the end of each calendar year),<sup>36</sup>

23.3. if deferred, that deferral be contained in the report to be submitted on or before the **30/08/2018**;<sup>37</sup>

The above explains why we should have what we propose to be “**Access to and Deprivation of Land Act**”. Under the proposed Act, deprivation becomes the first program. The second program should be what we propose immediately below. It is what we call “access to land” program.

### **24. ACCESS TO LAND**

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<sup>35</sup> Our Government is so inaccessible it is shocking. The Committee open to the public, we hope that government would access some of the contributions and make use of them.

<sup>36</sup> The Committee may also consider whether it is necessary to defer, or that the relevant Department should commission a study of the sub-section, and if it is satisfied with an interpretation aligned with ours or similar interpretation, that it initiates processes to legislate. The only thing required is to have a correct interpretation of the section, section 25 (1). It is proper that we indicate that the Committee may bring to the two Houses’ attention what the Committee takes to be the position and make recommendations. We believe that there should not be water and land crisis, in some instances, were the section to be applied.

<sup>37</sup> If deemed necessary, the first report may deal with this issue, which requires no consultative processes. It only requires an interpretation of the Law.

24.1. **Section 25 (5)**, in our view, allows access to land neither under the deprivation nor expropriation. The section could be read with **section 25 (1)**, which **sub-section (1)** appears to have a hidden meaning.

24.2. The hidden meaning is that any taking of land by the state which falls short of the requirements of deprivation is not deprivation. To determine whether conduct amounts to deprivation, we should enquire whether there has been substantial interference.

24.3. If the interference falls short of substantial interference, it would not be deprivation. If it amounts to substantial interference, other requirements should be met before it could amount to deprivation. Those requirements appear above. They also appear immediately below, in the negative.

24.4. If the intrusion:

- a. does not interfere with the right of use and enjoyment of land;
- b. does not significantly interfere with land or right in same;
- c. does not extinguish a right previously enjoyed;
- d. is not for purposes of public good (it is for citizens: sec 25 (5));
- e. being for citizens may be acquired by the state for transfer to citizens or be transferred to citizens straight, as facilitated by the state;
- f. does not prejudice the person relevant;

the conduct falls short of deprivation.

24.5. Any taking of land which does not amount to deprivation, would automatically have excluded compensation. There is no authority for this position. We rely on our analysis of section

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**25 (1) and (5)**, the preceding subparagraphs and on the meaning of deprivation and expropriation. This concept operates in respect of conduct which falls short of deprivation and conduct which is not deprivation.

24.6. **Subsection (1)** could be read together with **sub-section (5)**. **Sub-section (5)** obliges the state to ensure that its citizens have access to land on an equitable basis. It states:

“The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable **citizens** to gain access to land on an equitable basis.” Our emphasis!

24.7. To gain access to land does not mean that one should own land. Ownership is not very important. Think of many rural villages where people occupy land on permission of Traditional Leadership. The same applies to urban areas where people stay without title deeds. Government, in some instances, occupies leased land. Access alone, may, depending on circumstances, be sufficient. Immediately needed is access, with ownership transferred progressively.

24.8. If there is ownership, well good! Indeed there are instances where ownership could be transferred to **land-recipients**. Under this concept, no rights of ownership should **necessarily** be used, enjoyed or exploited.<sup>38</sup> Under the program we could derive some benefit without any other right of ownership, except the benefit. For instance we could extract water from a borehole system installed on a property owned by an individual for citizens and those who find themselves in South Africa. This differs with public good because under the program water facilities may be installed, as an example, in **farm A**, to benefit a user of **farm B**, this in the public interest.

24.9. If land is not used, it cannot be said to be deprived. If not deprived, there cannot be expropriation for expropriation does not exist without deprivation. At the risk of being repetitive,

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<sup>38</sup> The law is not developed in this area. That is to the extent we could ascertain. We take this from this: deprivation means substantial interference with the right of use, enjoyment and exploitation of property.

deprivation occurs when there are, **amongst others**, interference with or limitation of use; enjoyment or exploitation and an interference which is substantial.<sup>39</sup> Once deprivation is proved, the next enquiry is whether it amounts to expropriation. This goes to show that there cannot be expropriation without deprivation.

24.10. In the event of taking of land that is not used, regardless of the size, there is no expropriation in such circumstances. No expropriation, no compensation.<sup>40</sup> Under the access to land program, land not used with the hope that it would increase in value could be expropriated without compensation.<sup>41</sup> It may be an abandoned land or land which is looked after, but not used.

24.11. Access to land, in addition to deprivation, could be utilized under **sub-section (5)**, read with the provisions of **sub-section (1)**, with the latter applicable in so far as arbitrariness and law of general application is relevant. At any rate **section 36 (1)** is always applicable and requires any limitation of a right to be in terms of Law of general application and not be unreasonable and not unjustifiable.

24.12. Like the **Makwanyane** matter, the **Grootboom**<sup>42</sup> case is a very important judgment in our jurisprudence. The judgment is relevant to **section 25 (5)**. The Constitutional Court states:

“...The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those

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<sup>39</sup> See **paragraphs 24 (3) & (4)**

<sup>40</sup> Para: 4 & 24.5

<sup>41</sup> Speculation

<sup>42</sup> **Government of the Republic of South Africa and Others v Grootboom and Others** (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

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unable to support themselves and their dependants.<sup>43</sup> The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.”<sup>44</sup>

24.13. The Parliamentary resolution lifts the burden on the state in so far as availability of resources is concerned in respect of **section 25 (5)**. The resolution may be extended to include **section 25 (5)**. The sub-section obliges the state to foster conditions for citizens to access. The sub-section could be included in the legislation to be worked on. By so doing the State shall have contributed to fostering conditions as required. The state should therefore act.

24.14. If no action on the part of the state, there may be a stage when citizens may be advised to demand the right to be given land, under any relevant program. The program under **section 25 (5)** creates an obligation to the state to enable citizens to:

- a. gain access to land, and
- b. on an equitable basis

Those in need of land have a right to demand that they be given land. If no action and people litigate, the state’s defence may be that there is no sufficient land. Such a defence may not hold if the state failed to act in **2018/19** by promulgating a statute.

24.15. Those in need of land may include even persons not from amongst the previously excluded, for as long as they prove the need. However a meaning could be determined what **equitable basis**<sup>45</sup> means for it may exclude some persons.

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<sup>43</sup> Correctly the Court, at **paragraph 94**, notes that all these are subject to availability of resources. The money saved by not paying compensation could contribute in this area.

<sup>43</sup> Para 93

<sup>44</sup> The enquiry is not on the issue and we shall not take it further.

<sup>45</sup> Subsection 4 (a) and sub-section 8

24.16. The above said, **section 25 (5)** is not limited to land<sup>46</sup>, water and related reforms,<sup>47</sup> and equitable access to natural resources.<sup>48</sup> **It is meant to give citizens access to land.** The purpose of access is not defined. Parliament may define the purpose.

24.17. We will revert to **sub-section (5)** after a discussion of **sub-section (8)**. We will show that **sub-section 8** could be utilized to give effect to **sub-section (5)**. If you think it necessary at this stage, be referred to paragraph 181-182, below.

## **24.A. RECOMMENDATIONS**

The above given, we recommend that the legislation proposed: **Access to and Deprivation of Land Act**<sup>49</sup> should regulate any conduct which does not amount to deprivation. This would be under the access to land program.

There are, however, statutes which were passed under section 25 (5). One of those legislations is the **Land Reform (Labour Tenants) Act**. The **Restitution Act** is under **section 25 (7)** and is relevant to the **1913<sup>50</sup> Act** and therefore irrelevant for purposes of **sections 25 (1) and (5)**. We have not come across any material which gives effect to **section 25 (5)**, for purposes other than for residential purposes. As indicated at **para 24.16**, Parliament may, in a legislative scheme, define the purpose.

## **25. EXPROPRIATION**

25.1. From the above you would agree that deprivation occurs when there is substantial interference with use, enjoyment and exploitation of land. Conduct which amounts to deprivation does not necessarily amount to expropriation. This we take from the judgments above-discussed. A

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<sup>46</sup> Sub-section 8

<sup>48</sup> Subsection 4 (a)

<sup>49</sup> How the Act is approached could always be decided, considering the **Provision of Land and Assistance Act 126 OF 1993, amended in 1998.**

<sup>50</sup> Note that this could be departed from

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discussion above on the meaning of deprivation helps in our understanding of the meaning of expropriation. Discussions below will further shed some light.

25.2. In *Msiza v Director-General for the Department of Rural Development And Land Reform and Others* (LCC133/2012) [2016] ZALCC 12; 2016 (5) SA 513 (LCC) (5 July 2016), at **para [8]**, the Land Claims Court refers to a matter of *Harksen* on what constitutes expropriation. The *Harksen* matter is a Constitutional Court matter. The Land Claims Court states:

[8] Expropriation is not defined in the Constitution. In *Harksen v Lane* NO **[1997] ZACC 12 ; 1998 (1) SA 300** (CC) it was defined as “the compulsory acquisition of rights in property by a public authority.”<sup>51</sup> The term “compulsory” means “compelled by law”. In *Phoebus Apollo Aviation CC v Minister of Safety and Security* **[2002] ZACC 26; 2003 (2) SA 34** (CC) at par **[4]** it was held that expropriation is “the compulsory taking over of property by the State to obtain a public benefit at private expense”.

25.3. We consulted the *Harksen* judgment and found the following as a salient aspect of the matter, which is that expropriation:

“involves acquisition of rights in property by a public authority.”<sup>51</sup>

25.4. Back to the *Msiza* matter, the meaning of expropriation is apparent. Expropriation is said to be, in summary:

- a. the person from whose name property is transferred should resist the transfer;<sup>52</sup>
- b. a decision must be made by a Court, forum or tribunal to force the person in (a) to relinquish the affected land to a

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<sup>51</sup> Para 30

<sup>52</sup> *Msiza*: para 9.1

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specific private individual, subject to just and equitable compensation;<sup>53</sup>

- c. acquisition of land must be by the State, and<sup>54</sup>
- d. in turn given to a private beneficiary;
- e. transfer must be compulsory;<sup>55</sup>
- f. the land would be **acquired**<sup>56</sup> by the State for the private beneficiary and a determination would lead to an acquisition of land by the State for the beneficiary;
- g. the benefit is conferred to a private individual, but it is done so in the public interest to fulfil redistributive justice,<sup>57</sup> which lies at the cornerstone of **section 25** of the Constitution<sup>58</sup>

25.5. Just as a summary, we only arrive at a meaning of expropriation if from an enquiry the following is established:

- a. all elements of deprivation are established, except as for the receiver of land and ownership issues;<sup>59</sup>

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<sup>53</sup> if by individual, it would be chaotic. Note that the Law, when the decision was made, required compensation and that even now the current law requires that when expropriation, compensation should be paid. The motion by the N/A is not Law.

<sup>54</sup> **Msiza**: para 9.2

<sup>55</sup> **Msiza**: para 9.1

<sup>56</sup> The land must be acquired by the State, as further clarified in *Agri South Africa v Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013), para 58 and 59

<sup>57</sup> It is not done for restoration, which means that a land-receipt does not have to prove hers or her forebears' connection to the land.

<sup>58</sup> **Msiza**: para 15- on the public interest, the Court holds: "... the purpose of expropriation transcends the immediate concerns of an individual – it is for the benefit of the public at large. There is a clear public interest in addressing the legacy of landlessness which comes with colonial occupation and apartheid..."

<sup>59</sup> See differences between the two at paragraph **25.26**. It might be confusing when we say that expropriation involves deprivation, but on the other hand expropriation involves acquisition

- b. land is acquired<sup>60</sup> by the state (physically taken by the state);<sup>61</sup>
- c. the “owner” loses ownership and all rights there of;
- d. the ultimate land-recipient is a private individual, in other words land is expropriated for the benefit of a private beneficiaries
- e. expropriated in the public interest;
- f. expropriated for redistribution purposes;
- g. there is resistance to the process;
- h. a forum determines the acquisition,
- i. compensation<sup>62</sup> is paid
- j. decision made by a Court

25.6. The difference between deprivation and expropriation should be tabulated as follows:

<b>ITERMS</b>	<b>EXPROPRIATION</b>	<b>DEPRIVATION</b>
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by the state and deprivation requires no acquisition. Not relevant for this work is a development of an argument to the effect that expropriation requires some basics of deprivation, for example, with deprivation, resistance is not a requirement and with expropriation, it is a requirement and with expropriation a forum must determine it and in deprivation, no forum is required.

<sup>60</sup> Land transferred to the state

<sup>61</sup> Land not physically taken may include access to land in order to install, as an example, pipes or such scientific device for the benefit of the public. This would not amount to physical taking of land. After installation, the only other time there is interference could be for maintenance purposes. This is deprivation.

<sup>62</sup> Currently compensation is required and in the case of deprivation compensation is not required.

a	land is acquired by the state, to be passed to others, private persons	Land not necessary acquired by the state and if acquired does not pass to others
b	the “owner” loses ownership and all rights there of;	No loss of ownership is required, though some right of use may be limited
c	the ultimate land-recipient is a private individual	Public
d	public interest;	For public purpose/public good
e	Redistribution purposes	For the public to derive a benefit from land
f	there is resistance to the process;	Resistance not required, though no one is prohibited from challenging deprivation
g	Court determines the acquisition	No Court, unless challenged at review
h	compensation is paid	No compensation

25.7. Under the expropriation program, the state is not to acquire land for itself. So all opposition on the basis that the state will expropriate land and keep it for itself will not find legal support. If the state, on the other hand, intends to keep land for itself, South Africans can only challenge such at the right time.<sup>63</sup> There you have it: nationalization for public good. Well

<sup>63</sup> For instance challenging a proposed or passed legislative framework giving government powers to keep land for itself or instances where land is to be expropriated, with no evidence of the land-recipient or expropriated land which does not pass to the land-recipient.

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we will not take further the nationalization issue for it is not our focus.

## 26. CONCLUSION

- a. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.<sup>64</sup> This constitutional provision permits deprivation of property. It does not provide absolute protection of the right to property. What it calls for is that deprivation must be done in terms of a Law applicable to all and that deprivation must be planned, certain and be regulated (“All” means all and/or persons of some categories).
- b. **The Constitution requires compensation<sup>65</sup> when expropriating property.** Expropriation provision, section 25 (2), should be read with deprivation provisions, section 25 (1) in that both of them do not prohibit the taking of land/access to land by the state. With the current legal system, specifically **section 25 (2) (b)**, compensation is compulsory in the event of expropriation. Without any legislative measures, compensation

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<sup>64</sup> **Section 25 (1)** of the Constitution states

<sup>65</sup> **Professor Cyril Mbatha, in his work, “Land expropriation without compensation cannot be justifiable” says what the title of his work states. See <https://www.biznews.com/thought-leaders/2018/03/01/land-expropriation-without-compensation-unisa/>.** We stumbled upon some article by Ms. Phephelaphi Dube, Director, Centre for Constitutional Rights, dated 30 March 2017, published on [www.politicsweb.co.za](http://www.politicsweb.co.za) : <http://www.politicsweb.co.za/opinion/can-the-constitution-allow-expropriation-without-c>. She says an interpretation which says compensation could be excluded does not find any legal support. For her view she relies an academic called **Van der Walt**, whom she says wrote in **Constitutional Property Law**. Ms. Dube’s Centre by the way is a center of the Former Deputy President, FW De Klerk’s Foundation. Further research, in addition to what we hear in the media, may reveal others whose opinion are the same as that of Ms. Dube. At **page 206 of the High Level Panel on the Assessment of Key legislation and the Acceleration of fundamental change**, it is reported that former Justices of the Constitutional Court confirm the right to compensation. It is recorded that Justice **Albie Sachs** and the former **Deputy Chief Justice, Dikgang Moseneke: Expropriation without compensation is not possible without a change to the Constitution,**” this is what the **Institute for Poverty, Land and Agrarian Studies, University of the Western Cape** *also* said in **September 2016**, Deputy Minister of Public Works, **Jeremy Cronin**, on the **31/03/2016 (Justice Factor on TV)**, debating land expropriation, emphasized this point (though on the date he was debating the Expropriation Bill).

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will remain a requirement. Legislative measures doing away with compensation is permissible in terms of **section 25 (8)**.

- c. The Constitution permits expropriation of land without compensation, subject to legislative measures being taken. **VAN DER WESTHUIZEN J**, in the matter of **National Credit Regulator v Opperman and Others** (CCT 34/12) [2012] ZACC 29; 2013 (2) BCLR 170 (CC); 2013 (2) SA 1 (CC), stated that the Constitutional Court decided, in the **FNB** matter, that the said Court was of “... the view that the text of section 36 does not suggest that any right is excluded from limitation under its provisions.”<sup>66</sup> (our emphasis) The Court further held that:

“... Section 25(8) of the Constitution also expressly states that any departure from the provisions of section 25 has to be “in accordance with the provisions of section 36(1).”<sup>67</sup>

- d. From the above, no right is absolute, any right can be limited. Compensation is one of those rights which can be limited.**

- e. The view we take of the interpretation of **section 25 (8)** is based on that section. The **FNB** matter recognised a possibility of expropriation without compensation,<sup>68</sup> the **Agri SA**<sup>69</sup> matter emphasises the **FNB** matter and the **National Credit**

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<sup>66</sup> **National Credit Regulator, at para 74**

<sup>67</sup> **National Credit Regulator** is the case so far which attempted to deal with **section 25 (8)**. It provides some support to an interpretation that compensation could be excluded by reason of departure.

<sup>68</sup> **Strangely, the High Level Panel states that section 25 (8), is a limitation clause. This, the report states, without any elaboration. Even in its recommendations, the report is silent on section 25 (8), though the drafter of the report describes the section as a limitation clause. The limitation is in the form of departure, in our view.** Other opinion makers may agree with us. Whatever the opinions are, section 25 (8) has never been tested in a Court of Law, see footnote: [70]

<sup>69</sup> **Agri South Africa v Minister for Minerals and Energy** (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013), **para 99 (Our emphasis)**

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**Regulator** matter provides further guidance.<sup>70</sup> None of the cases is authority. There is no authority, **except** guidance by the three cases in this paragraph and **section 25 (8)**.<sup>71</sup>

- f. The above said we need to indicate that all decided cases have stated, in the past and will state in future, unless departure is invoked that compensation must be paid in cases of expropriation. Any material (including case law) to date would so state. We agree that without departure, compensation must be paid, (unless the Constitution is amended, excluding compensation).
- g. You may read 70 cases and 23 opinions. The answer would be that there must be compensation. That is the current law. This work is an exercise supporting, as it does, a view that departure is constitutionally permissible.<sup>72</sup> We interpret **section 25** and focus on the future. You could only expect that no-compensation will be said to be constitutional after the departure legislation. Our jurisprudence would, following departure, be developed according to the-in-future law. Same will also apply if there is an amendment.

The meaning of expropriation understood, at the end of **Part-B**, we propose that we need a “**New Expropriation Act.**” Immediately below we briefly discuss, in three pages, what we believe should be done in so far as deprivation is concerned.

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<sup>70</sup> at 74, the Court mentions, without any discussions, departure. Well, departure was not an issue on the day. At paragraphs para (75-76) some guidance on expropriation is provided.

<sup>71</sup> Kindly note that as on the **19/02/2018** we published an article on the word-press: [expropriationof.wordpress.com](http://expropriationof.wordpress.com), supporting the view that departure could be applied.

<sup>72</sup> To be constitutionally enforceable, in addition to being permissible, a Law of general application is required.

**PART-B: SUBMISSIONS-SECTION 25 (1) & (5) REFORM**

<b>DESCRIPTION</b>	<b>PARA-GRAPHS</b>	<b>PAGE</b>
<i>Inadequacy of N/A resolution</i>	<b>27- 32</b>	30 - 31
<b>Recommendations</b>	<b>33 - 33</b>	32 - 32

***Inadequacy of N/A resolution***

27. It appears that the NA, when resolving on the **27/02/2018**, may not have had in mind **section 25 (1) & (5)** and what the sections could mean. **Section 25 (1)** provides for **deprivation**, than for **expropriation**. It is **sub-section (2)**, read with **sub-section (3)** to which the NA's focus was directed at when the resolution was passed. It may sound academic. Well it is not. As you may have noted from the above, deprivation and expropriation are not the same.

28. We submit, in this work, that unused land could be taken by the state without compensation under **section 25 (5)**. In our work, **LAND: DEPARTURE & EXPROPRIATION, UPDATED: 28/02/2018**,<sup>73</sup> we did not come out very clear on the meaning of deprivation.

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<sup>73</sup> For those who may have read that work. This is our work which originates from our work dated the **30/12/2017**, updated on the **28/02/2018**, prior to the **17/03/2018** Black Management Forum sc and Black Lawyers Association sc University of Limpopo Presentation

29. The resolution of the **27/02/2018** having been referred to the Constitutional Review Committee, we deem it proper for Parliament to consider land reform under **section 25 (1)**, which is deprivation. This is in addition to **section (2)**, which is expropriation. For this to happen the Review Committee may consider this work and report to the two houses, in its 1<sup>st</sup> report, prior to the **30/08/2018**, and in its report request the House to extend its mandate to include an additional issue under **section 25 (1)**, we propose.
30. In the alternative to the above, the Committee could, given its original powers to consider any proposed review of the Constitution each year, invoke its powers and report to the two houses in its final report to be submitted to Assembly not later than the **30/08/2018**. The Committee should take this as, as we propose, a proposal.
31. **In addition to expropriation of land without compensation and deprivation**, some land could be taken in terms of **section 25 (5)**, read with **25 (1)**. This should be under an access to land program.<sup>74</sup> In our jurisprudence we do not have this concept, except for human settlement purposes (Grootboom matter). **Section 25 (5)**, does not, however, limit itself to human settlement purposes only.
32. Access to land should allow unused land to be transferred into the state for people's benefit. This may be by means of **Access to and Deprivation of Land Act**. In terms of the Act, an **unused, un-enjoyed and unexploited Land** is transferred into the State. This may be a portion of **unused, un-enjoyed and unexploited** land or if a whole farm is not **used, un-enjoyed and unexploited** the whole farm. Used land could be acquired if there would not be substantial interference. Any unused land, whether taken care of or looked after or abandoned should be subjected to the legislation.

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<sup>74</sup> See matter of *paragraph 24* and *Grootboom* (see *para 42*)

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### **33. Recommendations:**

We hereby submit that the Committee:

- 33.1. should report to the N/A, as soon as reasonably possibly prior to the **30/08/2018**, and in its report indicate that reforms could be achieved under **sub-section 25 (1) & (5)**, in addition to **section 25 (2)**, expropriation;
- 33.2. should seek to, in its report, request an amendment of its mandate in order to process a review relevant to reforms not under **section 25 (2)**;
- 33.3. alternatively, the Committee may invoke its original mandate to annually consider reviews of the Constitution;
- 33.4. recommend for development of legislation for access and deprivation of land, specifically unused, unenjoyed and unexploited land and used land as long as the interference is not substantial;
- 33.5. recommend for the development of a legislation to be called **Access to and Deprivation of Land Act**,
- 33.6. See **para 23**, above. At **para 23**, we were limited to deprivation (as we were finalization this work, the two approachable simultaneously. Due to time limits we could not crystalize the recommendations as we would have wished)

We do all of the above in order to achieve a specific type of society. The society sought to be built is contained in our Constitution. Let us apply our mind to the following, a Constitutional issue.

33.A. We attended to this work whilst at the same time required to pay attention our practice and all other responsibilities. As such we had a working document over a period of about three months. As we were finalizing this body of work, we went back to section 25 of the Constitution. In excluding compensation, section **25 (6)** could also be subjected to the departure principle. The existing legislation could be amended.

**PART C: NATURE OF SOCIETY SOUGHT TO BE ACHIEVED**

<b>DESCRIPTION</b>	<b>PARA-GRAPHS</b>	<b>PAGE</b>
Preamble	34 - 53	33 - 39
Democratic values	54 – 54	40 - 40
Social justice	55 – 59	40 - 42
Fundamental human rights	60 - 69	43 – 45

***Preamble***

34. The Constitution shows what kind of society we sought to achieve when we adopted the Constitution. It states:

We, the people of South Africa:

“adopt this Constitution as the supreme law of the Republic so as to- ... Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...”

35. As per the Constitution, we intended to move away from the European-Only Parks, from a culture of mistrust, hatred, and inequality to one of inclusivity, to one of trust, of love and of equality. That is the first step to healing. Without such an intention, there is no basis for healing. With landlessness, there cannot be healing. The previously excluded have never accepted landlessness. The wound is too deep. Serious steps need to be taken to heal the wound.

36. The first thing we committed to, as South Africans, was to heal the divisions of the past. The second thing was to establish a society based on:

36.1. democratic values;

36.2. social justice,

36.3. Fundamental Human Rights.

Therefore before we build society, we should first heal or heal as we built society.

37. The Preamble to our Constitution (RSA) sets out what we seek to achieve. It makes clear the vision we had when we adopted the Constitution in **1996**. It expresses what we wish to achieve, as was said in the Certification judgment.<sup>75</sup> This was a Court hearing-process for the Constitutional Court to be satisfied that the 1996 Constitution is one which South Africans wished for. The Court assessed whether the Constitution contains the wishes of South Africans. The Court was satisfied by the time the Constitution was adopted. What we sought to achieve has not changed to date. We still have the same objectives.

38. Properly considered, the Preamble plays a crucial role in an interpretative exercise in order to achieve expropriation of land without compensation. The Preamble is a well-thought-through and deeply embrative<sup>76</sup> portion of the Constitution.

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<sup>75</sup> (Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)), in which the Court gave weight to the content of a preamble, see paragraphs *City of Tshwane Metropolitan Municipality v Afriforum and Another (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016)*, paragraphs 5, 10 and 205, See *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others (CCT 77/08) [2009] ZACC 11; 2010 (2) SA 181 (CC) ;2009 (10) BCLR 978 (CC) (7 May 2009)*, at paragraphs 32, 40 and 38 the Court confirmed the approach in the Certification judgment.

<sup>76</sup> Though there may be an issue with “God seen Suid-Afrika”.

39. The Preamble envisages the redress of the injustices of the past. The injustices are recognised in the Constitution. Well Afri-forum holds a view: no injustices exist. They expressed their view in a matter of street naming in Pretoria, a portion of Tshwane:<sup>77</sup>

“... In its founding affidavit Afriforum repeatedly refers to the Municipality’s attempts at correcting “*so-called* ‘historical injustices of the past’”.

40. The majority Judgment disagreed, in strong terms, with Afri-Forum.<sup>78</sup>

“... It states “So-called! This embodies the kind of insensitivity that poisons our society. There *were* historical injustices. Apartheid was all too real...”

“... It is difficult to recognise the rights and entitlements of those who deny the historical injustices of our past and who dub them “so-called” historical injustices...”

41. The Court says that the Afri-Forum’s conduct is poisonous. The poison, in the context of the land debate is evidenced from conduct of those who avoid realities of the previously excluded, avoid what the Constitution provides for and in the running of a campaign to investors and the international community that the previously included are to be removed from their land. That is poisonous. It seeks to perpetuate a Constitutional Sin. Well that poison will not last long. We will soon deal with the Constitutional sin.

42. Why deny that a day consists of 24 hours would never be of soundness.<sup>79</sup> Only a person “protecting” the interests of the previously included would act as Afri-Forum did. Naturally they would deny that there is anything to be remedied, since there are no injustices of the past. The previously excluded should

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<sup>77</sup> Afri-Forum matter: para [120], (Full citation- at para 72, below)

<sup>78</sup> At paragraph [121]

<sup>79</sup> This is the same as denying the injustices caused by the past.

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remain as they are, landless, without saying so, the protectors of the previously included are be understood to be saying.<sup>80</sup> That battle should be expected, but those fighting must be defeated.<sup>81</sup>

43. All those who fail to recognize the injustices of the past violate the Constitution and make a mockery of what we set ourselves out to achieve.<sup>82</sup> Not to recognize the injustices of the past does not only amount to, but is pure violation of the Supreme Law. We cannot just recognize injustices of the past, without seeking to heal them.
44. We must heal the wounds caused by the past. The wound should not be left open for ever. Dr. A, the legislation to depart, or possibly amendment to the Constitution is the answer. The procedure and the medication might not be what the previously included like, though it is to their best interest. The Law, as interpreted by the highest Court in the Land, allows us not to be sympathetic (**see para 80, below**). We will only be sympathetic for economic reasons, than legal reasons. Even as we are sympathetic, our greatest effort should be to make those who disagree see light. Once we have exhausted a debate (to show them and not to ascertain whether doable), we should act. They will follow. They will join us. Those who go, let them go. They do not belong to South Africa, which Belongs to all who live in it.<sup>83</sup>

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<sup>80</sup> In March 2018, Mr. Ernst Roets of Afri-Forum was heard opposing redistribution, but says Afri-Forum supports restitution. This is an opposition to expropriation. He was interviewed by Mr. Vuyo Mvoko on ENCA. He was interviewed together with Mr. A Makgato, of the PAC. We say so because restitution is very limited (proof is required of dispossession and this is in terms of sub-section 7). Why other sub-sections in the Constitution should not be applied would not be legally sound.

<sup>81</sup> Imagine if they were or their persons were to be in government. They do not recognise the injustices of the past. They are however not our focus in this work and not much, except here and there, needs said about them.

<sup>82</sup> No one should be heard violating the Constitution by failing to uphold it as a Supreme Law.

<sup>83</sup> We state in the Preamble that this Country belongs to all of us

45. Healed, we will attain the objectives we set ourselves out, which are directed towards (a) societal needs, (b) the type of the government we want, (c) the need for equality amongst our people, (d) improving our people's lives and opening up opportunities, (e) building a united Country, which is democratic and able to contribute to, as part of the global village, the world affairs, in a productive manner.
46. The binding effect of the Constitution is expressed in the middle of the Preamble and we stated that we "... adopt this Constitution as the supreme law of the Republic...". We are bound by the Constitution. The binding effect requires a balanced approach to the text, context and purpose of the Constitution. It is so in that how we achieve the objectives we set-out to achieve requires, as would be the case in any business, change of tact and direction if what we have been doing does not work effectively.<sup>84</sup> That given, the new direction identified would play a crucial role in transforming society. That transformation is one which **section 25** was designed to facilitate. (See **Agri-SA, para: 63**)
47. The direction above appears to make the Law regulating departure from **section 25** or an amendment to the Constitution. The former could be achieved in terms of **section 25 (8)**. The former, in our respectful view, is preferable and legally sound that the latter.
48. "We, the people of South Africa, believe that South Africa belongs to all who live in it, united in our diversity." The statement is not a factual statement, but represents a wish. It might be read, with contextual and purposive interpretation, as saying:

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<sup>84</sup>All we had before is not working productively. Even the mob-approach of land claims is not working. Communities obtain land. With no common approach to land, some do not use land productively. There are so many factors relevant. Think of acquired land in Rural Areas: the skilled and educated would have migrated to urban areas. The educated, mostly teachers, health professionals and persons working in rural areas may not be sufficiently skilled to work the land. So where land is to be used for agricultural purposes, a new order should not compel land-receipts to work with persons who are not even interested in farming. That is change of direction.

- we know we are not united, but we believe we will be united;
- we know to whom land belongs, but we believe that there shall be land reform, which would be meant at bringing about and indeed so bring about equality.

If therefore South Africa belongs to all of us, what is this South Africa? Territorially, South Africa is all pieces of land known to be South Africa. So there cannot be South Africa if there is no Land. Within our territory we have mountains, rivers, trees, deserts, farms, prisons, hospitals; we have developed parks, stadiums and sports-grounds, Beer Halls, museums, towns, rural, semi-rural and urban areas. We are made less of South Africans by reason of limited and for some, lack of access to the said land and land-attached resources, above-mentioned.

49. If we do not act for ourselves, then it should be for our ancestors. Our forbearers are turning in their graves. Many so state when they talk about what society does not expect from our leaders. It might be what was said to be “perceived”<sup>85</sup> corruption, which is now acknowledged as corruption.<sup>86</sup> Anything which we do not expect from our leaders is causing our heroes and heroines not to rest well in their graves and cause them to keep turning in their graves.
50. Our forbearers are also turning in their graves because we have not honored them.<sup>87</sup> They built this country<sup>88</sup> and fought for

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<sup>85</sup> 2017

<sup>86</sup> 2018

<sup>87</sup> Those targeting our leaders drop “the-turning-in-graves-argument” when arguments are directed at them.

<sup>88</sup> South Africa was built from a moderated slavery system. Our parents built, with their labour: Cities, Prisons and all facilities. They worked for those who called themselves baas and forced our parents to call them as such. As respect for those who called themselves baas, we left them to remain with what the Law recognizes as their land. Take note that in effecting forceful removals, there was no building of the Country. It was destruction of many and many communities. The previously included built their estates by reason of being in possession of the land. Some own shares, schooled and skilled their children and exposed them to better lives because, as a basis of their success, they had and still have land. Having remained with the land, it is now time to share it. After all sharing is African, Botho.

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freedom: many did not see democracy and died long time ago. Some saw democracy, but died before we could be freed from the sophisticated chains, which chains are invisible by reason of the fact of the movements we enjoy. Our forebears died chained by reason of landlessness.

51. The chain which ties and enslaves us to a permanent state of rental affairs is very punishing. What contributes to the state of rental affairs is lack of Land. If we had land we could build our own Offices, shops and markets. Unfortunately potential is limited by the income sharing-scheme,<sup>89</sup> which recognized only one direction of flow of money, from a consumer (us: tenants) and to a payee (the private receiver of revenue: “landlord”).

51.A. These guys are indeed “landlords”. They are “lords” of the land. They wield power. They are seriously in business. We remain excluded.

52. Our forebears<sup>90</sup> are asking: is this our people’s land? Is there indeed freedom in our Land? Do our people have land? The answer is in the action we take. Otherwise we shall perpetually not honor our forebears and would continue to fail the constitutional project of transformation.<sup>91</sup> We will perpetuate a Constitutional Sin and be guilty at some stage for our conduct, perpetuating a poisonous Constitutional Sin.

53. Unfortunately, as it stands, we are not equal to those who own the land. Our children are born into conditions which we live in. They grow into those conditions. Some, amongst us, are seen to be, in the eye of society, advanced, economically, though it may not be so.<sup>92</sup> We still do not have land. The principles below discussed appear in the Preamble.

The above given, we move to other principles which also appear in the preamble.

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Having agreed that we are all South Africans, humanity, in the forms of sharing, is a value we would agree to.

<sup>89</sup> We run businesses and part of our proceeds is shared with land “owners”.

<sup>90</sup> Of the previously excluded

<sup>91</sup> Humanity and Public Policy

<sup>92</sup> Some of our siblings are not as fortunate

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### ***Democratic values***

54. Democratic values are not difficult in a topic of this nature to deal with. We should simply be democratic in the legislative process. Parliament's process contributes to the achievement of a democratic society. Human dignity, equality and social justice require some detailed discussions. We so discuss them immediately below.

### ***Social justice***

55. The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment.<sup>93</sup> If South Africa could indeed be a society which achieves social justice (see Van Heerden, para (s) **25 & 137**, in the Executive Summary:), we will all have opportunities. This is so because, social justice:

“... is based on treating all people equally with dignity and respect, the advancement of human rights and access to opportunities and justice for all regardless of social or economic status.<sup>94</sup> In the South African context, the concept of social justice is best described by the term "*ubuntu*.”<sup>95</sup>

56. We have an obligation as society, working with government,<sup>96</sup> to achieve the principle of social justice, which is a constitutional

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<sup>93</sup> ***Government of the Republic of South Africa and Others v Grootboom and Others*** (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), para [1]

<sup>94</sup> ***National Union of Metal Workers of South Africa and Another v Wainwright N.O and Others*** (JR 1060/10) [2015] ZALCJHB 48; (2015) 36 ILJ 2097 (LC) (24 February 2015), [42]

<sup>95</sup> Para [43]

<sup>96</sup> To work with the state there is no requirement that one should be in Politics, though some, within and outside the governing party, seem to think so. Why such a view we could only speculate, which at this stage is not necessary. Even with such thought (or perception as some may say), on the land issue, like many aspects of transformation: there is no basis for playing political games. In our discussions with Black Management Forum, Limpopo

imperative.<sup>97</sup> If we achieve social justice, inequality in society would not be based on lack of, but failure to, utilize opportunities.

57. In interpreting what is social justice, a contextual interpretation is required. International Instruments assist in this regard. The ***International Forum for Social Development, a Forum of the United National*** produced a document called “Social Justice in an Open World, The Role of the United Nations” On page 12, the Forum holds, on the application of social justice:

“The application of social justice requires a geographical, sociological, political and cultural framework within which relations between individuals and groups can be understood, assessed, and characterized as just or unjust ... The country typically represents the context in which various aspects of social justice, such as the distribution of income in a population, are observed and measured...”<sup>98</sup>

58. Before the UN instrument, the Constitutional Court had held in the same way as the UN document would state after six years. In the matter of ***Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*** (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079 ; 2001 (1) SA 545 (CC) (25 August 2000):

“... the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights.”<sup>99</sup>

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representatives, as at the time of finalizing this, we were advising that there be a progressive realization of transformation, utilizing section 25. That cannot certainly be done without sections 9 and 10.

<sup>97</sup>Para [38] “The principle of social justice is a constitutional imperative (footnote omitted, but quotes the Preamble)”

<sup>98</sup> Para 1.2

<sup>99</sup> Para 21, and in 2004, the Constitutional Court, reaffirmed the position in ***Minister of Finance and Other v Van Heerden*** (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004), **see para 25**. See **Agri-SA, para 62**

59. Given our history and the injustices resultant from the racial discriminatory laws, we hold that there must be transformation and we agree with the Constitutional Court that:

“Without major<sup>100</sup> transformation we cannot ‘heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.’<sup>101</sup>”

**59. A.** To achieve social justice, we need to improve people’s lives. There is nothing in law which prohibit the government from encouraging and/or working on public private partnerships for the benefit of persons who may not be able to use land productively in so far as farming, game, forestry, fishery and others are concerned. Under the program, conducted under the “improving persons’ live”, as stated in the Preamble, the state does what South Africans agreed to, to improve people’s lives.

**59. B.** Under the “Unleash Potential”, the state does what the title of the program states, unleash potential. The Preamble requires the state to free potential. It is simple: this guy has potential. The potential is locked by reason of landlessness. To free potential, land is given to this guy and necessary support is given thereafter.

### ***Fundamental human right***

60. The fundamental Human Rights are contained in the Bill of Rights. Central to the Bill of Rights is Human dignity. Naturally these rights are enjoyed when a person is alive. Immediately below we support our view that human dignity is central to the Bill of Rights.

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<sup>100</sup> It must be noticeable change

<sup>101</sup> ***Minister of Finance and Other v Van Heerden*** (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004), **at para 137**



65. The right to dignity is not the same as human dignity. The limitation clause envisages limitation of human rights, including the right to dignity, in a manner which contributes to a society based on human dignity. One is a right, the other is a value. The right can be limited, but as we limit the right, we are obliged to contribute to the achievement of a society based on human dignity.<sup>106</sup> Individuals must at the same time, however, enjoy the right to dignity. The two may therefore not easily be separated.
66. When a right in the Bill of Rights is to be limited, the limitation should:
- a. be reasonable and justifiable;
  - b. must be in an open and democratic society, and
    - a. in a **SOCIETY** based on human dignity, equality and freedom...”
67. The emphasis here is on the **society** we want. It is a society based on human dignity. It is not an individual based society. What this means is that we exist as a society. That society should be one which is based on human dignity. To build such society, we should be guided by sound words in a matter of ***Msiza***, at paragraph 15:
- “... the purpose of expropriation transcends the immediate concerns of an individual – it is for the benefit of the public at large. There is a clear public interest in addressing the legacy of landlessness which comes with colonial occupation and apartheid...”
68. You read here our value as Africans. An individual’s rights are not weightier than the interests of society. An individual is seen as part of society. It is the collective enjoyment of the right to dignity, when we assess whether we have achieved a society we sought to achieve, which tells us whether our society is based

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<sup>106</sup> As required by section 36 (1)

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on human dignity.<sup>107</sup> In any enquiry to determine whether there should be expropriation, the balance of convenience should be in favour of societal interests, provided those interests are reasonable and justifiable.

69. We take it that the society envisaged is one which seeks the enjoyment by many,<sup>108</sup> of the right to dignity. It is not one in which the few enjoy the right to dignity. Having stayed in shacks and “emzini wezinsizwa” type of hostels and many in our country having stayed in huts, four roomed houses and inhabitable houses, some only sleeping-in<sup>109</sup> places, it is not difficult to show that when we expropriate land, say it is determined that we violate the “owner’s” right to dignity, that in the process we might be contributing to building a society which section 36 (1) envisages.

Through change, we could achieve human dignity. That change is now. Whether you call it radical or broad based or not it does not matter to many who would benefit from the program. What matters is that change must be effected. You may be interested to find out how Courts in the past decided on issues relevant to transformation. Immediately below, we discuss the Afri-Forum matter.

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<sup>107</sup> Prof E. Mphahlele and Dr. R Khoza say so. Prof and J. Makgato advocate for Botho as a value upon which our society should be based.

<sup>108</sup> Human dignity does not mean dignity to the few. In the context of section 36 (1), it means dignity enjoyed by all, in a perfect world. However, ours is not a perfect world. Still it is not envisaged that dignity should be enjoyed by the few, it is not the rich who should enjoy it, it is not the middle-class who should enjoy it, but it is the majority.

<sup>109</sup> No use enjoyed except sleeping

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**PART D: GENERERAL NEED FOR TRANSFROMATION**

This part is an extract from my **July 2017** writing.

70. The South African media ignored a very important judgment. The judgment could possibly have guided this beautiful country's people to realize that change could be effected in many sectors of society.

71. The reason for not giving the judgment prominence could be because the judgment was not against government, alternatively that it was not against those governing.<sup>110</sup> It may also be that the message calls on all of us to retrospect and introspect. The message says that we need to be aggressive on transformation, without mercy and sympathy to those resistant to change. The message says to those resistant to change, gate-keepers of transformation, as some may call them, that they need to stop with their gate-keeping attitudes and conduct. It says to those seeking transformation that at some stage they need to be tough in their decisions and actions.

72. The judgment was in the matter of ***City of Tshwane Metropolitan Municipality v Afriforum and Another [2016] ZACC 19 (Tshwane v Afri-Forum)***.<sup>111</sup> We focus on some

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<sup>110</sup> The Nkandla judgment was surely a very important judgment. It highlighted what not to do when a person is a number one citizen, what ministers, department officials and parliamentarians should not do. The Judgment is further important for leaders may come to realize that there is what is called fringe benefits tax and that therefore when a leader receives accommodation benefit, free or cheap, a portion of the benefit is taxable. The judgment sought to have protected millions of Rand. So it is a very important judgment.

<sup>111</sup> The Afri-Forum judgment on street naming is extremely important. It highlights the readiness of the Constitutional Court to interpret any effort in society to bring about transformation in a purposive and contextual manner. If the judgment is utilized, South Africans would become alive to the fact that with transformation, billions of Rand, which circulated only amongst the previously included, may now come to the previously excluded. You could imagine what would be the effect if the Banking and Mining sectors were to act as the Law requires in so far as BBBEE is concerned. You could imagine what could be achieved if we were to rely on the judgment and be bold enough and state facts as they are, facts: that many in the private sector violate the Law. Lack of compliance by the Private

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aspects of the judgment. Our focus is the message sent to South Africans, that there is greatest need for change and that as we bring about transformation, we need not be apologetic, as the Black Management Forum (BMF) would say.

73. As we look ahead and go forward, we will always be reminded of where we come from. Our history, as a Country, should always be taken into account, in the steps that and in the direction we take. Part of what we need to do is to acknowledge where we come from. An acknowledgment on and of its own will never be sufficient; it is the action we take which becomes of import.

74. Back to the judgment, the majority judgment was written by the Chief Justice, Mogoeng Mogoeng. The matter concerned the renaming of streets in Pretoria.<sup>112</sup> In a concurring judgment, **Justice Jafta**, says:

“I am ... troubled by the statement in the second judgment which implies that a cultural tradition<sup>113</sup> founded in history rooted in oppression may find recognition in the Constitution...” (*Para 164*)

“... And it cannot be gainsaid that the oppression we are talking about here was based on race and therefore was racist to the core. Its central and yet false pillar was that the white race was superior to other races...” The Justice continues at para 164.

75. At paragraph 165, **Justice Jafta** answers, after stating that he is troubled by Justices Cameron and Froneman statement:

“... How can that unquestionably transformative Constitution (RSA Constitution) be expected to recognize cultural traditions rooted in the racist past? The answer must be, if there is such expectation, that it is misplaced. The fact that the oppressive racist history exists at the level of fact does not mean that it deserves any recognition in the Constitution...”

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sector with the Principles in the BEE Act and policies is a violation of the Law. The judgment herein is against any transformation-frustrating conduct, we add: including non-compliance with BBBEE and such other legislations as may be relevant.

<sup>112</sup> Pretoria is an area in Tshwane

<sup>113</sup> Traditions of the previously included

76. At paragraph 2 of the judgment, the eight Justices state, with Justice Jafta agreeing, writing about colonialism's, racism's and apartheid's basis and effect:

“... African people in particular and black people in general, were **intellectually inferior, lazy and lesser beings in every respect of consequence...** Virtually all recognition and honour was thus respectively given to and bestowed upon white history and their heroes and heroines. **The system was all about the entrenchment of white supremacy and privilege and black inferiority and disadvantage.** No wonder the United Nations resolved that that system was a crime against humanity.” Our emphasis.

77. Justice Japta's comments represent the view of many in society. Transformation being inevitable, what we need is to act and bring about same. For as long as any action meets the constitutional muster, no opposition, even before Courts, would succeed.

78. At **paragraph 4**, the eight Justices, with Justice Jafta agreeing with them, state that:

“... colonialism or apartheid is a system so stubborn that its divisive and harmful effects continue to plague us and retard our progress as a nation more than two decades into our hard-earned constitutional democracy...”

79. The effect of the Court's comments at paragraph 4 of the judgment is that some of the Justices, possibly inclusive of other Judges in other Higher Courts, are alive to the fact that there are, in our society, gate-keepers to transformation. One believes that most of the Judges, if confronted with similar matters, may make similar comments (you might have noted that High Court seem to approach transformation matters not in the same manner as the CC). The basis of this belief is that the Judges:

79.1. are mostly of matured age and some are beyond sixty years;

- 79.2. grew up within the un-Godly oppressive system that that system was, that they need not be taught/reminded how the system was and its effects on our society today;
- 79.3. that though they may have been fortunate to have become Judges, some of their siblings were not as fortunate to have broken the chains of the oppressive system and therefore remain trapped in the unforgiving abyss of poverty, with all its negative manifestation;
- 79.4. that though some of the Justices' children may have been fortunate to have been born into families able to educate them, their cousins, born of Justices' siblings, were and are not that fortunate,
- 79.5. that today many children are still born in situations extreme limiting capacity to liberate themselves from poverty and that those children's state of poverty may still be a reality even 30 years to come. That when they have grown into adulthood, having been born and raised in conditions of poverty, many pass their poverty to their children;
- 79.6. that children of poor parents inherit nothing, except poverty.
80. The words of the eight Justices, plus **Justice Jafta**, call for decisive action, very decisive. The Chief Justice says, writing a judgment for the Court:
- “... The injustices of the past are not to be **pampered** or approached with great care or understanding or **sympathy** ...”
81. We highlight the word **“sympathy”** and **“pampered”**, which are not options if injustices of the past are to be tackled, successfully. The opposite of sympathy is “merciless” and unsympathetic, amongst other meanings. If we are not to be sympathetic we will have no feelings of pity and sorrow for

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those resistant to transformation. We will not approach any transformational issue with great care.

82. On the other hand the opposite of pampering can be drawn from the meaning of the word “pamper”, which amongst others, means to give someone special treatment, making a person as comfortable as possible and giving them whatever they want, as the dictionary defines. The opposite of pampering is no special treatment, not making a person as comfortable as they may like and not giving them whatever they want.
83. One agrees with the Chief Justice. If one may add: continued steps and new approach should be urgently taken, adopted and acted upon to give effect to the national project of bringing about equality. This may have to be done without sympathy. At no stage do we ever pamper those who think that there should not be equality in society. Though we should care and understand, we should not do so with great understanding or great care.
84. The above is so because our constitutional vision “... heralds an obligation to actively participate not in the perpetuation but, in the eradication of the injustices of the past...” (para 14). This should fortify our drive for transformation. Eradication of injustices may have to be done without sympathy to those who continue to oppose efforts to eradicate injustice. We may be all failing the Constitution in our lack of action.
85. Our people will be tired, at some stage, should we not manage the transformation process as we ought to.

“Our shared values that underpin our constitutional vision cannot be achieved when one race almost always has its way or a near-absolute monopoly of respect and honour. That is a recipe for the illegitimate retention of exclusive privilege, undeserved domination of the past and future hostilities...” (Para 9).

“It is impermissible to ever adopt an attitude that seems to suggest that some of our people can afford to endure the pain and torture induced

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and symbolized by instruments of the colonial and apartheid legacy, probably because they have endured them long enough to find them tolerable, if not somewhat acceptable.” (Para 15).<sup>114</sup>

86. With no choice but to tolerate conditions of poverty, a poor education system, landlessness and many more, we are seen as having accepted the situation we are in. It is not our situation, but one imposed by a legal system meant to and produced this situation. We have not accepted this situation, we only expected government to act, a wrong approach I must add. Fortunately the tolerance is dying. Even Judges are frustrated by slow pace of transformation. It is not permissible to ever adopt an attitude that seems to suggest that some of our people can afford to endure the pain and torture induced the colonial and apartheid laws and legacy.

87. The illegitimate retention of exclusive privilege should not be allowed. Future hostilities may result from landlessness. We seek to say, as we so say, to opponents of transformation, that:

“... No measure of sophistry, contortion, or strategy ought to be allowed to entrench any form of racial domination or exclusivity to privilege, honour and opportunities...” (Para 9).

88. The Court furthermore stated that nothing should be tolerated which perpetuates discriminatory practices of the past.

“... Nothing that objectively encourages or seeks to perpetuate the stereotypes, prejudice or discriminatory practices of the past is to be

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<sup>114</sup> Around 2003, one read a book: “I write What I like”. Biko told a story of a person who was at a constructions site. Mr. A, the employee, was insulted by an employer in a manner which was projected as a joke. Mr. A responded with laughter to the “joke”. Biko then asked why insults, to which the employer said something to the effect that this one is used to insults. Biko said that Mr. A appeared to be senior in age to the employer. The exclusionary system had made the poor elder to tolerate what today persons our age cannot tolerate. In his own private space, the elder would express great disapproval for he never agreed with the employer. At the time of preparing this work, we did not have access to the Book. You could guess who Mr. A and the employer represent. We relate this read-story in order to show that there are things which our people seem to accept, when in actual fact they do not accept. Landlessness is one of the issues the previously excluded are seen to have accepted. The only difference between the Biko-story and our times is that at this time, people should be governing.

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tolerated...” ... The “... national project demands that we reject everything that sustained, entrenched and still promotes racial discrimination.”<sup>115</sup>

The national project refers to the objectives we seek to achieve and society we seek to build.

89. That the preceding paragraph directs us to action to discourage landlessness is without question. To discourage any effects of the racial past, we need positive action. The Rule of Law requires us to base our action on Law that applies to society/categories of persons and which is constitutional. That said, we ought to enact Laws which discourage lack of opportunities and those which encourage opportunities. Social Justice requires this.

90. In conclusion, at **para [8]**, the Court held:

“...We also need to take steps to breathe life into the underlying philosophy and constitutional vision we have crafted for our collective good and for the good of posterity ...” “... ***We all have the duty to transform our society.***” “... The effects of the system of racial, ethnic and tribal stratification of the past must thus be destroyed and buried permanently...”

91. This should be the time when we no longer behave like victims, but behave like people who are governing. When we live the slogan "people shall govern": we will govern, transform society and stop thinking that God punishes us by giving us less. We will honour God our Father and in honoring Him, we will create systems to give God's children opportunities, good food, good health, good education and all good things, we will bring joy to God's children, we will treat them good those who resisted transformation for they are God's children, even after frustrating us. “We” does not mean those in government, but people directly as this process allows or through our representatives, as they, through any system, take people’s concerns and wishes into consideration and act on them

The voice of the Court represents the excluded’s<sup>116</sup> voice. We should not perpetually raise a hand to be included in our own country. No

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<sup>115</sup> Afri-Forum, [16]

<sup>116</sup> Excluded from land

threat from anyone should deter us to go forward. If we do not solve this land issue now, it would be because of the legislative arm of the state. If we amend, well we could do that. However let us apply our mind to departure, a limitation clause as appears in the High Level Panel report (see 205).<sup>117</sup>

**91.A.**A summary of the above is that we need:

- a. to move from the premise that the central and yet false pillar of the ugly systems before 1994 was that the previously included were superior to other races;
- b. to acknowledge the injustices of the past;
- c. to recognize the effects of past racial laws;
- d. to recognize that that the oppressive racist history exists at the level of fact does not mean that it deserves any recognition in the Constitution (which applies to protection of land obtained due to racial laws);
- e. not perpetuate the injustices of the past and need to eradicate such
- f. when we act do so without mercy and sympathy to those resistant to change (well Parliament has been considerate);
- g. cause the state to, when it act, be tough in its decisions and actions, even when it is considerate;
- h. cause the state to, when it act, take steps to breathe life into the underlying philosophy and constitutional vision we have crafted for our collective good and for the good of posterity ...”
- I. to, given our duty to ***transform our society***, destroy and bury permanently, the poisonous Constitutional Sin.

The paragraph immediately above is the view of the Constitutional Court. Well, we feel the same as South Africans. We need to destroy land inequality. Action please.

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<sup>117</sup> Though the report does not deal with the issue other than stating that it is a limitation clause.

**PART E: DEPARTURE I.T.O SECTION 25 (8)**

<b>DESCRIPTION</b>	<b>PARA-GRAPHS</b>	<b>PAGES</b>
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Options from which to recommend	186 - 187	94 - 94
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## **INTRODUCTION**

92. Being a settled legal position that land could be expropriated, the question is what happens to the constitutionally-permitted compensation. The view in South Africa is that expropriation of land without compensation is not allowed. Public debates and writings by lawyers, analysts and politicians agree with this position. This position should be changed. Yes the Constitution requires compensation when expropriating land. The Constitution, specifically **section 25 (8)**,<sup>118</sup> however, allows the limitation of the right to compensation and therefore allows expropriation without compensation. The ball is however in the State's Court. What the drafters<sup>119</sup> of the Constitution did was to leave space for the State to regulate how to expropriate land without compensation.
93. The how-part of the limitation should be regulated by a Legislation, which should be developed to give effect to section **25 (8)**. This Law should regulate how the State should go about expropriating land without compensation.<sup>120</sup> The State President, MC Ramaphosa led the Constitutional Assembly. He led the BEE process and now he presides over an executive which should process the proposed legislation, prior to the parliamentary processes.
94. In this work we show that the Constitution, in its current form, allows for expropriation of land without compensation. It is

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<sup>118</sup> **You may pause and consult the section before you proceed further.**

<sup>119</sup> And the State President led the process to adopt the Constitution, in his capacity as Chairperson of the Constitutional Assembly

<sup>120</sup> Page 80 of "Diagnostic Report on Land Reform in South Africa Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa, **September 2016**. See [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/Commissioned\\_Report\\_land/Diagnostic\\_Report\\_on\\_Land\\_Reform\\_in\\_South\\_Africa.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Diagnostic_Report_on_Land_Reform_in_South_Africa.pdf) .

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therefore proper to consider, whilst there is a view for amendment of the Constitution, other available options, which could be implemented as soon as reasonable from the year **2018** or **2019**.

95. Immediate implementation could be commenced with and continued together with the amendment sought to be effected, if there is a feeling that there should be an amendment.<sup>121</sup> In this work we therefore propose that there could be immediate expropriation<sup>122</sup> within the context of section 25 in its current form, whilst we work on the amendment. As you study this work, be hereby advised that that we seek to demonstrate that legally and as per the Constitution, we could contribute to the resolution of the land issue soonest.
96. The immediate implementation of section 25 is proposed because to amend the Constitution may take a longer time, which time appears to be in short supply. The envisaged consultative process and the entire process to legislate, possible litigation to challenge the amendments and other factors may present delaying challenges. Whilst we may have a delayed amendment of the Constitution, as may possibly be the case, we could be implementing what we have, **section 25 (8)**, departure.
97. Before we go into the meaning of **section 25 (8)**, let us consider key two provisions closely relevant to our work, compensation and public interest.

### **WORK COVERED**

98. Below we put forward a number of possible interpretations of compensation provisions in **section 25**. They are that:

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<sup>121</sup> We doubt that an amendment will find support. We agree with opponents to the motion only in so far as they have been heard arguing that there should not be an amendment. We obviously differ as to the reasons for opposition to amendment.

<sup>122</sup> Subject to passing of a statute

- 98.1. the departure provision in **sub-section 8** be given effect to. **Sub-section 8** allows the state to develop legislation necessary to depart from **section 25**. As is clear, **section 25** also deals with compensation. From a reading of sub-section 8, the whole **section 25**, except for **sub-section 1**, could be departed from and in the event of departure; **sub-sections 2** and **3** could also be departed from. **Sub-sections 2** and **3** regulate compensation;
- 98.2. the departure herein concerned is regulated internally and is subject to **section 36 (1)**, the latter being an external limitation. As a Country we have not utilized **sub-section 8** departure thus far. We could apply it now (strict measures could be developed to allow for departure from section 25). However work needs to be done to develop the necessary legislation,
- 98.3. we also make a number of other proposals.
99. This work does not cover the proposed amendment. We only mention it. Our take is that, in addition to an amendment, there are solutions<sup>123</sup> in the Constitution. Those solutions are summarized immediately below. Depending on how we approach the matter, solutions could be full and permanent solutions.

### ***ESSENTIAL PROPOSAL***

100. We propose that work be done to allow departure from compensation requirement as appears in **section 25 (2)**. Departure can only be in terms of **sec 25 (8)**.

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<sup>123</sup> Those who may have read our earlier work would note that we said they were part solutions

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**VERBATIM: SECTION 25 OF THE CONSTITUTION**

101. **Section 25** of the Constitution states, verbatim, that:

- 1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- 2) Property may be expropriated only in terms of law of general application:
  - a. for a public purpose or in the public interest; and
  - b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- 3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including
  - a. the current use of the property;
  - b. the history of the acquisition and use of the property;
  - c. the market value of the property;
  - d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - e. the purpose of the expropriation.
4. For the purposes of this section
  - a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
  - b. property is not limited to land.

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5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
  - 6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
  - 7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
  8. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
  9. Parliament must enact the legislation referred to in subsection (6).
102. **Section 25 (8)** subjects departure to **section 36 (1)**. In the event of meeting the requirements of **section 36 (1)**, then there is no bar to departing from **section 25 (2)**.

### **PURPOSE OF SECTION 25**

103. Before we interpret specific sub-sections of section 25 and the section itself, we should attempt to understand what the purpose is, of section 25. In *First National Bank* matter, the Constitutional Court stated:

“the purpose of section 25 is not merely to protect private property but also to advance the public interest in relation to property”. See paragraph 64.

104. The section does not concern itself therefore only with private property. Public interest is an important aspect as well. In

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depriving or expropriating property, we would be driven by public interest. In limiting the right to compensation, we should not violate the Constitution. For this work, property is limited to land.

### ***Section 25 (1)***

105. Any expropriation, deprivation and taking/utilization of land should meet the requirements of **Section 25 (1)**. The section states that “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”. This sub-section does not prohibit deprivation. It requires that deprivation should be in terms of the [law applicable to society, a known law (law of general application)]. The sub-section further requires that law on deprivation, if any, should be for valid reasons and be implemented in a well-planned manner (no law may permit arbitrary deprivation). As appears below, the Constitutional Court has given meaning to arbitrariness.

106. We sought to, for the purposes of this work, understand what arbitrariness means. The dictionary meaning of arbitrariness is that, which is:

“based on random choice or personal whim rather than any reason or system or based on chance rather than being planned or based on any reason.”

107. Beyond the dictionary, the Constitutional Court, in the **FNB** matter, has given meaning to arbitrariness in **section 25**. The Court has defined how to determine arbitrariness. See **paragraphs 99 and 100**. To meet the test of nonarbitrariness, it is not difficult. For the purposes of this work, we shall not deal with arbitrariness.

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**PUBLIC INTEREST & COMPENSATION**

108. **Sub-section 2 of section 25** regulates expropriation only. It requires expropriation of land to be compensated<sup>124</sup> for and that it should be for public interest. The Expropriation Bill, referred back to Parliament by the Former President J. Zuma, after its passing by Parliament, seeks to achieve expropriation, with compensation.<sup>125</sup> **Sub-section 2 of section 25** of the constitution states that:

“Property may be expropriated only in terms of law of general application: (a) for a public purpose or in the public interest; and (b) subject to compensation ...”

109. **Sub-section 4** states for the purposes of this section:

“...public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources”, as defined by sub-section 4. The word **“includes”** means not limited to.

The word **“include”** means not limited to. In 2019 if not years to come we will make further submissions regarding what public interest may further mean. Some of the necessary aspects we have. For purposes of specificity, it is sufficient at this this stage to focus on land.

110. From the above we may be tempted to interpret the meaning of public interest as two-fold, namely **(a)** it is for land reform and **(b)** for reforms to bring about equitable access to all South Africa's natural resources. Indeed the two-fold meaning, in its expressed terms, is evident.

111. What is however not expressly stated is the meaning of public interest other than land reform and reforms to bring about

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<sup>124</sup> as a must

<sup>125</sup> The New Expropriation Ac could be drawn from the Expropriation Bill. Possibly working with the BMF, Limpopo, we are likely to make submissions on the content of the proposed Law.

equitable access to all South Africa's natural resources. We submit that there is a **third meaning**. That the meaning of the sub-section is three-fold appears from the word "includes". The drafters of the Constitution a further interpretation of public interest to us. They did so by using the word "include", before specifying the two-fold meaning.

112. Our work is focused on the **1<sup>st</sup>** and the **3<sup>rd</sup>** meanings. The 2<sup>nd</sup> one, bringing about natural resources, we did not pay much attention to.<sup>126</sup> We will revert on these two meanings below. As for reforms to bring about equitable access to all South Africa's natural resources, a separate and thorough work is required to focus on this aspect.<sup>127</sup> To a limited extent, this natural resources aspect finds its way into the **1<sup>st</sup>** and **3<sup>rd</sup>** meanings.

113. We understand public interest also to mean, in addition to what is specified in the Constitution, in so far as expropriation is concerned, any other purpose which is in the public interest. Amongst such issues of public interest purposes could be and not limited to:

113.1. efforts meant for economic inclusivity achieved by expropriation of land for economic activities (social justice demands this);

113.2. efforts meant to unlock and promote potential of any nature requiring use of land;

113.3. efforts meant to access natural resources for spiritual purposes and when connection to the land is proved and/or need is proved;

113.4. any other effort meant to bring about equality, with sufficient proof of intended use of the land (this may

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<sup>126</sup> Our approach is that land could be subjected to transformation for access to natural resources purpose.

<sup>127</sup> This general body of work may serve as a guide, possibly together with other contributions.

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even be interference with use and enjoyment of the right to land on temporary basis or from time to time).

114. What is of challenge in the section is the compensation part. Sub-sections 2 and 3 require expropriation not to be without compensation. Further conditions of expropriation are that:
- 114.1. compensation should be monetary;
  - 114.2. the amount of compensation should be agreed to by those affected or decided or approved by a court,
  - 114.3. the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
115. It appears that we may have to apply our minds to whether there should not be a created institution to deal with issues of compensation. This is in the event we agree to have an amendment process. The body could be created if some sort of compensation is retained (we remain alive to N/A motion).
116. The Constitution may be amended, with necessary legislation promulgated thereafter to create a body. The legislation may be modelled along, for instance, your liquor Board, whose decisions are reviewable.
117. In this work we need not and shall not deal with the issue as to the factors to be considered for compensation purposes. We only touch the compensation issue because there may be **exceptions (if any)** to the **rule (general rule)** that land shall be expropriated without compensation. At **footnote 153** I mention one of the exceptions.
118. Our focus is to contribute to a debate whether or not there could be expropriation without compensation, which does not violate and is not inconsistent with the Constitution.

119. A considered view as to the meaning of sub-section 8 seems to offer a resolution of what is to our country a pressing issue of land. Immediately below we deal with the sub-section and related sections.

### **SECTION 25 (1), (2) & (8)**

120. **Section 25 (8)** states that:

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

121. “No provision of this section”, means “any”<sup>128</sup> provision in **section 25**. No such provision may stop the State from developing a statute. “this section” means **section 25**. Any departure the state to regulate the ousting of any provision in **section 25**.<sup>129</sup> We need to, as we so do, quote the relevant provisions of **section 25**:

- 1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- 2) Property may be expropriated only in terms of law of general application:
  - a. ...
  - b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- ...
9. Parliament must enact the legislation referred to in subsection (6).

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<sup>128</sup> It may appear to mean any and all of the provisions

<sup>129</sup> Except sub-section (1) and (8), which must always be complied with.

122. Let us break-down **sub-section 8**. It states and we understand that to mean:

<b>ITEMS</b>	<b>SECTION</b>	<b>MEANING</b>
122.1.	No provision of this section	a. It empowers in the negative, b. This section means <b>section 25</b> .
122.2	may impede the state from taking legislative and other measures	a. This is an empowering provision, giving power to the state to make Law and regulations; b. Read with <b>122.1</b> , it does not direct nor does it positively empower the State to enact a Statute, but grants the State a discretion to make Law. This is different from sub-section 9, which directs the State to enact legislation.
122.3.	to achieve land, water and related reform	a. We should seek to achieve: <ul style="list-style-type: none"> <li>i. land,</li> <li>ii. water, and</li> <li>iii. related reforms.</li> </ul> b. Land and land related reform may seem to mean one and the same. That is not so. c. Land reform for the purposes of this section means for South Africans to have land. It means transformation/reform: <ul style="list-style-type: none"> <li>i) not required to be linked to any activity on land,</li> <li>ii) however it would not be reasonable to take land for no purpose and therefor there should be some activity for example:                             <ul style="list-style-type: none"> <li>a.a. for residential purposes,</li> </ul> </li> </ul>

		<p>including perhaps for subsistence farming;</p> <p>b.b. for sports facilities development;</p> <p>c.c. dikgoro – where histories of each communities are recorded, displayed and narrated;</p> <p>d.d. Parks, schools, business and public facilities,</p> <p>e.e. Any activity having as its base or main base, land</p> <p>d. Land related reform/transformation means the achievement of transformation in:</p> <p><b><i>ij</i></b> <b><i>Tourism:</i></b> this industry requires land and water. It requires natural resources such as mountains, trees, rivers, animals, wild life, buildings and others.</p> <p><b><i>ii</i></b> Agriculture;</p> <p><b><i>iii</i></b> Property Sector,</p> <p><b><i>iv</i></b> Forestry;</p> <p><b><i>v</i></b> Open Mining (Sand and Mud/Letsopa), and</p> <p><b><i>vi</i></b> Any industry having as its base or main base, land.</p>
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		e. Note that the sub-section allows water and water-related reform. <sup>130</sup>
122.4.	in order to redress the results of past racial discrimination	<ul style="list-style-type: none"> <li>a. This recognizes the past racial discrimination;</li> <li>b. Recognition that we still experience the effect of the past;</li> <li>c. To correct the conditions brought by the past,</li> <li>d. To correct the results of the past: only bringing about equality would achieve that purpose.</li> </ul>
122.5.	provided that any departure from the provisions of this section is in accordance with the provisions of <a href="#">section 36(1)</a>	<ul style="list-style-type: none"> <li><b>a. Allows departure;</b></li> <li><b>b.</b> Departure could be “any” departure;</li> <li><b>c. Departure is departure from any provision, including section 25 (2) (b), compensation right;</b></li> <li><b>d.</b> This allows the State to promulgate a Law which ousts compensation,</li> <li><b>e.</b> The condition: departure must meet the requirement of section 36 (1)</li> </ul>

123. Having stated that we shall revert to the issue as to reforms to bring about equitable access to all South Africa’s natural resources, we so revert. As indicated above, to a limited extent, this natural resources aspect finds its way into the **1<sup>st</sup>** and **3<sup>rd</sup>**

<sup>130</sup> For swimming purposes for instance, for development of water reservation and related projects, fisheries

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meanings (land reform and the third meaning which includes any effort which may be constitutional/ pass constitutional muster).

124. LAND RELATED REFORM covers all other reforms related to Land. This can be read together with the **3<sup>rd</sup> meaning** as appears at **paragraph 111**, above. In other words expropriation herein concerned is not targeted for land reform. Expropriation is targeted for **reforms related to land** and reforms to bring about equitable access to all South Africa's natural resources. Some of the examples could be:

**a. Tourism:**

it may be that there are tourist attractions in the form of natural resources (mountains, trees, rivers, animals, wild life, buildings and others on a specific piece of land). Access, in this context, is for access to the natural resources for tourism purposes;

**b. Agriculture:**

it may be that there are two neighboring farms. **Farm A** has sufficient water, plus some surplus. On the other hand **Farm B** has insufficient water for example for agricultural purposes. What we could do is that we could expropriate the entire farm, **farm A**, alternatively only a portion relevant for water access purposes. As we know water is a natural resource, so again you see the issue of access to natural resources being capable of being read together with land related reforms (note that water other than water under land-related-reforms, on its own is a stand-alone ground for expropriation purposes);

**c. Fishery:**

same as agriculture (we take that fishery could also fall under water related reforms<sup>131</sup>),

**d. Open Mining:**

needed for this are natural resources in the form of water related facilities. River banks (sand) serve this purpose. Land could be worked-on for water-related-reforms.

125. The above shows that public interest, as appears in **section 25 (4)** should be read together with **section 25 (8)**. In **section 25 (8)** attention should be directed at land-related reforms. In the process, you could bring closer water and water-related reforms to the extent necessary in the land reform efforts. We may bring the two closer because to be productive land requires water. In this paragraph and elsewhere, we seek to emphasize one point: that the **natural resources** aspect may find its way into the land reform and related reforms. We leave this issue for a discussion another time.

**DEPARTURE**

126. Central to **sub-section 8** is **DEPARTURE**. The sub-section states:

“any departure from the provisions of this section is in accordance with the provisions of [section 36\(1\)](#)”

127. The sub-section allows limitation of any right in **section 25**. The limitation could be through **departure**. To **depart** from **section 25**, a law of general application is required in terms of **section 25 (8)**. This requires a statute, an Act of Parliament. **Section 25 (8)** refers to **section 36 (1)** and states that departure must comply with the latter section. The drafters of the Constitution deemed it necessary to state a requirement of

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<sup>131</sup> If we are incorrect, we welcome corrections

compliance with **section 36 (1)**, though any limitation of any right in the Bill of Rights should always comply with **section 36 (1)**. Land could be expropriated from those possessing land taken from our people due to racial discriminatory laws and/or possessed as a result of or from the proceeds of past racial discrimination.<sup>132</sup> Who those should be we should leave for the next stage of our project: a project making inputs to the content, nature and shape of the Act. [though we elementarily discussed possible instances which may require compensation at para **150 A-D**, the program may contribute to that aspect].

128. What could go into the proposed Act are things which at this stage we could only imagine. At this point think about this: A woman born **1995** buys land in **2016**. She is a beneficiary of the racial discrimination order. She is included. She inherited the estate of her deceased mother, which included land and/or proceeds from land. Alternatively she received a donation from her parents who benefitted from the land racially discriminatory laws and policies of the past. She did not have to build a house<sup>133</sup> for her parents and herself before she purchased the portion of land in **2016**. If she did build for herself, it was not out of pressure, but in order to improve from what she had. She was educated because, utilizing land, her parents were able to secure funding for financing her education. He parents educated her from the proceeds of business built from land and funding secured as a result of attachment of land as security. As indicated we should leave the issue as to the person from whom we expropriate land for a later stage and we hereby leave it at this point.<sup>134</sup>

129. Back to **departure**, it is that simple. Only our commitment to the course will deliver the results. That commitment requires clarity of thought, a serious public awareness and a leading of

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<sup>132</sup> **Sub-section 8:** "... in order to redress the results of past racial discrimination ..."

<sup>133</sup> She does not have the previously excluded's tax (Black tax sa most would call it)

<sup>134</sup> However take notice that section 25 (5) & (8) allow for transformation-related actions. In addition to the proposed law, it may be necessary to amend the existing Expropriation Act in order to regulate expropriations in cases where, for public benefit, a person who did not obtain land as a result of racial discrimination may have their property expropriated.

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societal debate should be obvious. Were the commitment to be accompanied by action, we could achieve departure. There is already a Political Will not to pay compensation. Departure will deliver expropriation of land without compensation.

130. We will note that **sub-section 8** requires departure to be effected in terms of **section 36 (1)**. The salient requirements (see others in the next paragraph) contained in **section 36 (1)** are that any limitation must:
- a. be reasonable and justifiable;
  - b. be done openly and democratically,
  - c. contribute to the achievement of a society based:
    - i. on human dignity,
    - ii. equality (and freedoms)

It cannot be difficult to meet the above, but it will be very difficult if not impossible for anyone to oppose a well-thought-through legislation meant to achieve the above.

131. In addition to the above, when departing from the requirement of compensation, **section 36 (1)** states that the state takes into account all **relevant factors, including-**
- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.”

132. Taking into account relevant factors does not mean that each of the factors should be complied with. It means they should be considered and a balance be struck. There is no requirement to comply with any of the factors. The factors serve as a guide, an unavoidable guide it must be added. The word **“includes”** in **section 36 (1)** opens space for other factors to be added. When we make submissions on the proposed Act, we may propose that when expropriating land, all the factors listed in **section 36 (1)** be taken into account and make a list of other factors, under the word **“including”**. Those other factors could be:

- a. to improve a potential beneficiary’s life;<sup>135</sup>
- b. to unleash a land-recipient’s potential;<sup>136</sup>
- c. the achievement of the objectives in the Preamble to the Constitution;
- d. the link between “ownership” and racial discriminatory laws;
- e. whether a registered owner may have been empowered as a result of racial discriminatory laws to the extent of being able to purchase land;
- f. a balancing act between a right to dignity to be limited (of respondent), the granting of the right to dignity of a potential beneficiary, the achievement of equality and human dignity;
- g. any other relevant factor which, when considered, the spirit, purport and objects of the Bill of Rights could be promoted;<sup>137</sup>
- h. the spirit of the Afri-forum Judgment, see para 91.A, above

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<sup>135</sup> See Preamble to the Constitution

<sup>136</sup> See the Preamble to the Constitution

<sup>137</sup> See section 39 (2)

133. We hereby make elementary submissions aligned with **section 36 (1)**.<sup>138</sup>

- a. the limitation (through departure) should be reasonable and justifiable (this should be read with sec 25 (1). No one can be heard claiming that the limitation should be unreasonable, unjustifiable and arbitrary, despite the section allowing “any” departure. That therefore in departure there should be reasonableness, justifiability and non-arbitrariness is agreed;
- b. “... in an open and democratic society...” means participatory democracy. It talks to the ordinary parliamentary processes prior to a statute becoming law. This cannot be difficult. Only the noise from the land-haves should be expected and managed, which management would require South Africans to be conscientized about the content and meaning of section 25 (8);<sup>139</sup>
- c. regard must be had to a society based on human dignity, equality and freedom. Think about this: taking 100 hectares, which may be 25 % of the land from one person and redistributing such to others may not deprive anyone dignity. In fact it contributes to efforts to bring about equality. Surely there would not be violation of freedom in the example given above;
- d. factors to be taken into account are:
  - i. the nature of the right: the right to property, specifically the right Compensation, is what we are concerned with,
  - ii. the importance of the purpose of the limitation: the purpose of the limitation is-
    - a.a. to unlock potential to the land-recipient of deprivation (which potential the preamble provides for);<sup>140</sup>

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<sup>138</sup> The submissions are based on section 36 (1)

<sup>139</sup> Only at this stage would it be clearer how great, as regards Transformation, our Constitution is. Only at that stage would people realize that in the Constitution there is part Nationalization and that throughout we possibly may not have interpreted the Constitution correctly. Of import is regulating how affairs are to be conducted. No one should be allowed to wake up and simply take land.

<sup>140</sup> This appears in the Preamble to the Constitution,

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- b.b to contribute to efforts to create an equal society;
  - e. the nature and extent of the limitation: from case to case, but will be:
    - i. deprivation of land
    - ii. wholly or partially
  - f. the relation between the limitation and its purpose (to be defined from case to case); and
  - g. less restrictive means to achieve the purpose: if such are available, one case to the other would show.

134. The above is made based on **section 36 (1)**. As appears at **paragraph 132**, other factors could be included in the proposed Act. Our submissions to the Parliamentary Committee should talk to further factors. Naturally, the list may not be exhaustive.

### **Interpretive exercise**

135. When interpreting any provision in any document, and in this case, the Constitution, all other relevant provisions in the document should be considered.<sup>141</sup> The central provisions herein interpreted are **sub-section 2**<sup>142</sup> and **sub-section 8**. We have applied our minds to departure as permitted by **sub-section 8**. Read with **sub-section 2**, which is the right to compensation, the limitation of the right to compensation is not unconstitutional.

136. Obligated to consider other provisions in the Constitution in this interpretive exercise, we did consider other sections in the Constitution. We do so because no provision could be

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<sup>141</sup> FNB 49: The subsections which have specifically to be interpreted in the present case must not be construed in isolation, but in the context of the other provisions of section 25 and their historical context, and indeed in the context of the Constitution as a whole

<sup>142</sup> read with sub-section (3)

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interpreted in isolation from other provisions. Part C, above, assists in this regard.

137. The founding values of the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedom. Further founding value are supremacy of the Constitution and the rule of law. That is section one. May we add that legality, doing things according to the Law, is a part of the Rule of Law!
138. The Constitution further requires that the rule of law should be in line with the Constitution. The rule of law is a system in terms of which persons conduct their affairs according to the law. Though the rule of law is supreme, it is not as supreme as the Constitution. It is supreme to the extent that it is consistent with the Constitution. Once it is inconsistent with the Constitution, it loses its supremacy status.
139. The above becomes apparent from section 2, which states that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligation imposed by it (Constitution) must be fulfilled. A statute forms part of the rule of law. If a statute is inconsistent with the Constitution, it would be invalid by reason of its inconsistency with the Constitution. The Constitution was adopted as the supreme law of the Republic, the preamble states.
140. Sequel to the above, anything we do should not violate the values founding our society nor attack the supremacy of the Constitution. What is doable is a development of legislation which is consistent with and gives effect to section 25 of the Constitution.
141. The provisions relevant are:
- a. **Preamble:** a study of the preamble reveals that we, as South Africans, committed ourselves to God. As we know He wants His children to be equal and to share. The

- demand is higher one has more. Believing that we are equal, we committed to improving our people's lives and unleashing their potential (the need to open up economic opportunities to all South Africans was also stated in the **Agri-SA matter, para 60**);
- b. **section 1**: sets, as a value, a society based human dignity, equality and freedoms;
  - c. **section 7**: the section states that the Bill of Rights affirms the democratic values of human dignity, equality and freedom and further states that the rights in the Bill of Rights are subject to the limitations contained or referred to in **section 36**, or elsewhere in the Bill;
  - d. **section 9**: this is called the equality clause and provides for legislative and other measures to empower the previously excluded. It is not surprising that there is this section since we have invited God to be with us.
  - e. **section 10**: this is the right to human dignity. The right to dignity can only be enjoyed by human beings.<sup>143</sup> We believe that "...Human beings are entitled to be treated as worthy of respect and concern."<sup>144</sup> "... Juristic persons are not the bearers of human dignity..."<sup>145</sup> When expropriating land owned by a company, we may likely not violate a right to dignity. If there is any violation of human rights, it may happen in limited instances and mostly in one man or two women companies. This however does not mean that companies should not enjoy protection of their right to

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<sup>143</sup> We are aware of section 8 (4)

<sup>144</sup> *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 , the Constitutional Court states, at para 328

<sup>145</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079 ; 2001 (1) SA 545 (CC) (25 August 2000), para 18

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- property. What this means is that they cannot invoke the right to dignity in objecting to expropriation.<sup>146</sup>
- f. **section 33:** it is a section which requires state conduct which is lawful, reasonable and procedurally fair. Any interference with land and/or land rights must comply with this section.
- g. **section 36,** with emphasis on a society based on human dignity/ a society based approach. This section recognizes a need for a societal approach.
- h. **section 39:** states that when interpreting the Bill of Rights, Courts must promote human dignity, equality and freedoms.
142. Central to all the sections above is a society based on human dignity and equality. The Bill of rights does not envisage a Euro-centric society. We say this well aware that the Bill of Rights is thought to be of protection more to individual's rights. We believe that the Bill of Rights envisages an Afro-centric society.<sup>147</sup> It emphasis the achievement of a society based on human dignity. Ours is a Constitution which requires an achievement of a specific society. **It emphasis the achievement of society more than anything-else.** That society is one where many individuals, and not few, enjoy human rights. As may be clear, the enjoyment of human rights is achieved when a human being enjoys certain other rights. In this case the achievement of a society based on human dignity would be reached when the many in society have land and enjoy rights attached to land.

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<sup>146</sup> FNB: para 45

<sup>147</sup> The executive, if not Parliament, should come up with an initiative to investigate the sort (mosoroto) of society envisaged in the Constitution, the Bill of Rights, specifically. In a well-functioning society, we should be saying that society on its own should investigate. Unfortunately the process would likely be costly. Being costly, forces which and who are supposed to be progressive in society depend on the ruling party for direction, when those opposed to transformation fund programs which are "progressive" to them. The EFF, from time to time, does come in.

143. That human dignity is central to the limitation of rights in the Bill is settled law. ***“Human dignity is also a constitutional value that is of central significance in the limitations analysis”***.<sup>148</sup> The operating theme in all the paragraphs discussing human dignity is that human dignity is a value. Human right on the other hand is a right, which is to be enjoyed by individuals. **The difference is that when assessing a value based society, the majority should enjoy human dignity, but when enjoying a right, it is an individual who is central, than society. In that sense an individual’ enjoyed human right would compete with a society based on human dignity. HUMAN RIGHTS COMPETE WITH HUMAN DIGNITY. IT IS NOT THE OTHER WAY RIGHT. “... human dignity ... is of central significance in the limitations analysis.**
144. Moving away, for a minute, from human dignity, what is more central in the Bill of rights is the right to life. If any right enjoys the highest status,<sup>149</sup> it is the right to life. It may enjoy that status because all other rights in the Bill of Rights, the rights to dignity, equality, freedoms, and more, can only be enjoyed when one is alive. If therefore we could limit the right to life, why cannot we limit the right to compensation? The right to compensation is not an absolute right. No right in the Bill of Rights is. So you see now that it is not a complex subject. Lawyers should do their interpretive work and assist the Country. I raise my hand to do so. I am young and full of energy. The future is ours.
145. Examples of the limitation of the right to life were witnessed recently when the Police killed persons in the Eastern Cape during **March 2018**.<sup>150</sup> It was a limitation of the right to life.

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<sup>148</sup> *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000), paragraph 35

<sup>149</sup> Though not absolute

<sup>150</sup> If there are to be criminal proceedings, we do not know what the outcomes could be.

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The right to dignity may be limited when a person is assaulted (*when there is resistance in the form of assault*) in protection against an attempt to rape a child. We mention the right to life and dignity because the two enjoy the highest status in the Bill of Rights. If then these two rights can be limited, what of the right to compensation? The history of racial discrimination, based on a Constitutional Sin, makes it worse.

146. Dignity is both a value and a right. In what we do we should not violate the human dignity. We should not violate section 1, which includes as one of the founding values, human dignity. The right to dignity may not be violated if, for example, out of 200 hectares, we take 100, for example and give such land to a 50 house-holds for residential purposes.

147. In some instances the right to dignity of those without land provided for in section 10 is violated by inequality. These, amongst others, would be and are instances where people do not have toilets due to unavailability of land and many more.

148. The question then becomes whether by depriving or expropriating land: would the right to dignity be violated? The answer lies in each case. It would be a factual enquiry. We have applied our mind to few instances:

a. a need to install a water facility and extract water for some farmers, which leads to expropriation;

b. a subsistent farmer who does not have enough land to invest in and go commercial (the results of which would be no transformation in farming),

c. for residential purposes;

d. see para 113, above.

149. That expropriation does not amount to violation of dignity could be answered per each case. We need not answer that

question and will leave it for each case, except in the example as given above. Once we have proved grounds for expropriation, the challenge would seem to be compensation (if there is to be compensation) and the manner of compensation (if there is to be compensation).

150. Our take is that there have never been sound grounds to limit compensation to money. As we apply our minds to how the Constitution could be amended or not, we could also apply our minds to whether it would be all and any portion of land for which there is no compensation. If the conclusion is that some land should not be expropriated without compensation,<sup>151</sup> then and in that case, the land for which there should be compensation, could include, amongst other instances what we propose below. This may sound like a controversial position. It is not.

**150.A.** **Section 25 (8)** targets land resultant from past racial discriminatory Laws. To expropriate any land resultant from past racial discriminatory Laws is what section 25 (8) permits. This it does in order to correct a Constitutional Sin. At paragraph 195, below, we discuss, for instance the Investment Protection Act. This Act protects investors.

150.B In the Act which we shall propose we will deal with this issue sufficiently. At this stage, note that anyone who got land because of past racial laws or was able to acquire land because of opportunities presented by past racial laws may have their land expropriated.

150.C On the other hand, any person who is not in possession of land because of past racial laws, may be protected by **section 25 (8)**. The protection is not 100% protection because if what society seeks to achieve is to redress the results of past racial discrimination, the state should

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<sup>151</sup> Some may argue that when expropriating land, some development on land may be compensated for

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proceed, regardless whether the land “owner” got land because of past racial laws.

150.D. When we redress the results of the past, land should be taken from a person from amongst the previously included. The details of the legislation should regulate how things are to be done.

151. Back to monetary compensation, it really does not make sense for compensation to be limited to monetary compensation (if there are exceptions to the general rule). Take for example this scenario: ten hectares are expropriated from one Ms. A on the north side of her farm when on any other side of the farm the state has a farm. If 10 hectares from the state’s farm is delivered to Ms. A, would that not be compensation?

152. Well our take is that compensation<sup>152</sup> should not be limited to money, if in some instance compensation could be allowed. In those exceptional instances of compensation, the form of compensation should be left to circumstances prevailing in a particular case. It may be that 10 hectares are delivered as above shown, but may still be necessary to compensate monetarily because there are buildings<sup>153</sup> on the expropriated portion of the land.

153. Expropriation without compensation could and should be looked at within the context of **sub-section 8** of **section 25**. At the tail end of **section 25 (8)**, the section provides that:

“...any departure from the provisions of this section is in accordance with the provisions of section 36(1)”

154. **Section 25** allows expropriation without compensation. The requirement in the section is that:

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<sup>152</sup> If to some extent compensation is retained

<sup>153</sup> The land belong to a previously included, but with a previously excluded investor or an investor who, in anyway, cannot be said to have benefitted from the past racial laws.

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- a. the departure from the section (inclusive of **sub-sections 2** and **3**) must not be inconsistent with **sub-36 (1)**.
- b. expropriation should be in terms of a law of general application,
- c. any law permitting expropriation should not allow expropriation that is not reasonable and not justification.
155. **Section 25** allows departure from itself. This is what is called an internal limitation, with one leg of the limitation outside the section. In the **FNB** case, at **para 58** the ConCourt shows that limitation of **section 25** is subject to **sec 36 (1)**. The limitation is indeed in terms of both **sections 25** and **36**.
156. As we know, limitations disallow **100%** enjoyment of certain rights. The limited right here is the one of compensation. Such a right is constitutionally guaranteed, but not absolute:
- “... the protection of property as an individual right is not absolute but subject to societal considerations.”<sup>154</sup>
157. When consideration is taken of the purpose of the section, further proof that the section is not absolute is apparent. The purpose of the section:
- “... is not merely to protect private property but also to advance the public interest in relation to property...”<sup>155</sup>
158. Further proof that the section is not absolute is in **section 25 (1)**. The section is couched in the negative. It only protects against deprivation that is arbitrary and not in terms of the Law of general application. Linked with **subsection (1)**, **sub-section (2)** subjects expropriation to the requirement of compensation. None of the sub-sections prohibits deprivation, or expropriation of land.

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<sup>154</sup> FNB 49

<sup>155</sup> FBN 64

159. The right to compensation is possibly lesser in weight to the right to life. Though the right to life is more weighty than the right to compensation, unfortunately the right to life may also be limited, as for example killing a person who is about to kill you. There is therefore no basis to think that the right to compensation cannot be limited/ ousted.
160. If the right to life could be limited, could it be sound law not to limit the right to compensation? Surely not. A consideration of international law is appropriate.
161. International Law, in the form of Instruments from the **African Union**, the **United Nations** and **European Union** are relevant for consideration. We do so because the Constitution, **section 39**, states that for the “Courts” when interpreting the Bill of Rights:
- a. **must** promote the values that underlie an open and democratic society based on human dignity, equality and freedom (obligation);
  - b. **must** consider international law (obligation), and
  - c. **may** consider foreign law.
162. The Constitution obliges the Court to consider International Law. As for foreign Law, for instance the law of Kenya, Courts have a discretion to consider same. The discretion must be exercised judiciously. As we consider foreign and international law, we need to note what the Constitutional Court stated in the FNB matter:
- at [97]* “... Comparative law cannot, by simplistic transference, determine the proper approach to our property clause that has its own context, formulation and history. Yet the comparative perspective does demonstrate at least two important principles. The first is that there are appropriate circumstances where it is permissible for legislation, in the

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broader public interest, to deprive persons of property without payment of compensation.”

The South African context informs the judicious exercise of a discretion.

163. We have relied on the **FNB** matter concerning Foreign Law. In Summary, the following appear:

a. at paragraphs **72 - 75**, the Court refers to the United States Law on this subject. According to the Court, compensation is not required for deprivation or expropriation.

b. at paragraph 85 - 86, the Court refers to the Australian Law and finds that expropriation without compensation is allowed in some instances (non-compliance with the law could invite conduct herein relevant) and leaves the issue as to public interest to states forming part of the European Union;

c. 87-93, German: no specific guidance could be derived from the Court’s German study

d. 94 – 96, United Kingdom is relevant to section 36 (1). Quoting with approval a Smith Judgment, a Court of Appeal in the United Kingdom, is said to have stated that:

“... The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above...”

Therefore before a Forum is satisfied that conduct is reasonable, the more justification there should be if there is substantial interference. The flip side of the statement is ...!

e. From para (94-99), the approach set-out the relevant principle of separation of powers. Courts should not interfere lightly with policy-oriented decisions. The policy

position in our case is the Transformation Project. In our situation, the project is constitutional.

164. What we must do is to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. What we should do and ***not must do***, is to consider foreign Law. We do so well aware that to consider something is to take it into account. Above, at **paragraph 132**, we have shown what the meaning of taking into account is. Same meaning applies here. Even if the factors to be considered from the International Instruments were binding,<sup>156</sup> they are not in contrast with what we seek to achieve. Just to cite one example: **Article 17 (2) of the United Nations' Universal Declaration of Human Rights** States that:

“No one shall be arbitrarily deprived of his property.

The article is silent on compensation.

165. **Article 21** of the **African Charter on Human Rights and People's Rights** comes a little closer to dealing with compensation. The compensation envisaged would only arise if spoliation is proved. Spoliation is unlawful disturbance of peaceful possession of land or any item. Once expropriation is not arbitrary, then and in that case, there is no spoliation. If no spoliation, then no compensation.

166. The first Certification judgment made a survey of international Law and confirms that there is no absolute protection of the right to property. Be referred to **paragraphs 71-73**. The **Agri-SA** [98 - 99] matter is also of relevance. It shows that

a. expropriation without compensation, in Germany, is allowed. The position was confirmed by *European Court of*

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<sup>156</sup> Fortunately they are not binding. They have a guiding (persuasive) weight.

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*Human Rights (ECHR)* . The European Court’s approach is that:

- a “... in the unique context of German reunification, the lack of any compensation does not upset the ‘fair balance’ which has to be struck between the protection of property and the requirements of the general interest”
- b. “The parallels with the situation in our country are striking: property derived from a tainted past; the challenges of transformation; and the demands of justice. In its particular context the ECHR’s decision may be seen as refusing compensation even where there has, in our language, been expropriation. This Court recognised the possibility of expropriation without compensation in *FNB*,<sup>130</sup> and the same result that I have reached by a direct ‘compensation in kind’ approach may be reached by this more conventional route on a case by case basis under the MPRDA.”

167. In all of the above, consideration ought to be had to the uniqueness of the South African situation. If we consider Foreign Law (Law for instance of Canada and the International Law, consideration should be had to:

- a. how our forebears had their land dispossessed;
- b. soldiers of war were given land, some bicycles;
- c. how those who benefitted (beneficiaries of the past law) from the racial laws obtained land and built their wealth based on land;
- d. the fact that the excluded, even when they bought land, could not be registered as owners;
- e. the fact that the descendants of the beneficiaries inherited a rich legacy from their predecessors;
- f. whether any of the instruments above-mentioned was based on experiences similar to those in South Africa;

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- g. whether it is the South African state which must fund compensation, and if not whether the funding provided is sufficient to achieve the objectives of the reforms envisaged and
  - h. what the position is on the land scape in those other countries and if the countries have land reform challenges, to what extent are those challenges as compared with our challenges;
  - i. whether the landscape in and of the countries to which the instrument applies, if relevant, are similar to ours on racial terms;
  - j. whether there is landlessness, and if so the extent thereof;
  - k. if there is landlessness in the same manner as in South Africa, the extent of the prejudice and the wound caused by landlessness
  - l. whether anyone promised to fund, from outside the Country, compensation of land reform and what conditions are of such funding,<sup>157</sup>
  - m. how we achieved democracy and the avoidance of a civil war;<sup>158</sup>
  - n. whose parents/forebears are of African descend;
  - o. who, between the person whose forebears are of African origin and the person whose forebears are of European origin, with connection to their forebears' content in so far as language and others are concerned and who was included, should, in a Country in Africa, should have greater access to land;
  - p. the commitments we made in the Preamble to the Constitution and the binding effect of those commitments;

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<sup>157</sup> A conversation with an Official from the Land Claims Commission revealed to me that currently the international community provides funding to the land reform program. The official said he does not have an agreement between those providing funding and the state. With no reason to doubt the official, we will move from a position that his version is correct. Being taken to be correct, he said, the official that one of the conditions is that if the program fails, South Africa should pay back the debt. It is obvious that the funding is not sufficient and not sustainable.

<sup>158</sup> Leading to compromises, it is common understanding that at this stage there cannot be a civil war.

- q. whether left as is, we could sustain the unresolved land issue,
- r. the South African context, generally<sup>159</sup>
168. Mabilo<sup>160</sup> should not be compared with lehapu (watermelon). The South African situation on the land issue is resolved best when consideration is had to countries with similar experiences.
169. In the work we shall do, we need to note the words of the Justices of the Constitutional Court as recently as **2017**. The matter of ***City of Tshwane Metropolitan Municipality v Afriforum and Another [2016] ZACC 19***, refers. The words by the Chief Justice on the Constitutional vision are that it:
- “... heralds an obligation to actively participate not in the perpetuation but, in the eradication of the injustices of the past...” (para 14).
170. All the above we should do for we all have the duty to transform our society (para 8) of the Afri-Forum judgment.
171. The National Assembly gave South Africans an opportunity to participate in a process to transform our society. Those not

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<sup>159</sup> See **paragraph 57**, above. In the case of ***Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) the SCA*** held that:

“All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.” [Footnotes omitted.]

<sup>160</sup> A wild brown fruit

willing to participate or running misleading campaigns will be reminded, though we are not saying so now, of the following from the Afri-Forum Judgment:

“... No measure of sophistry, contortion, or strategy ought to be allowed to entrench any form of racial domination or exclusivity to privilege, honour and opportunities...” (Para 9)

“... The injustices of the past are not to be **pampered** or approached with great care or understanding or **sympathy** ...”

172. So anyone who thinks of taking the state to Court should, before they so do, remember that the Constitutional Court will remind them, possibly, of the above-statements. The above given, we are surely now more fortified in our belief that as South Africans we could develop the necessary legislation. Land should be expropriated without compensation.<sup>161</sup>

### ***Jurisprudence on possible compensation-exclusion***

173. The Constitution is the only authority on which we rely for our conclusion that the requirement as to compensation could be departed from. As to Court decisions, which assist in interpreting the Constitution, there is no case which is authoritative and in clear support of our interpretation.

174. Our take however is that as attorneys and Officers of the Court, we are entitled to, as we so do, interpret **section 25 (8)**. Though decided cases do help in interpretation, it does not however mean that without a decided case, we should not interpret **section 25 (8)**.

175. The existing jurisprudence, expert analysis and discussions by many in society, are limited to **section 25 (2) (b)**, read with **(3)**. The emphasis is that when expropriating, there must be compensation. That is true. The 1996 Constitution requires compensation. Courts have confirmed this legal position.

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<sup>161</sup> If there are exceptions, they must be narrowed by the legislations.

176. The legal position exists because the state has not applied seriously, **section 25 (1)**. This section has been applied, to a limited extent. It allows deprivation. As we have shown elsewhere this allows non-acquisition of land as well.
177. The legal position exists further because the state has not applied **section 25 (8)**. If we applied departure, the legal position would have been different. The state has not applied the two sub-sections because of many factors. Lawyers have also not provided assistance (applied properly, the Grootboom<sup>162</sup> judgment could have been used by us, Lawyers, to cause the state to take legislative measures in order to depart from the compensation requirement).
178. The legal position exists further because there has not been an amendment of **section 25 (2)**, on compensation.
179. The legal position noted, the Constitutional Court has shown its inclination of an interpretation in favour of non-compensation. This we showed at **paragraph 26 (e)**, above. In addition to the above paragraph, a summary of the Constitutional Court's decision in the matter of **Agri SA** is of help. Though the matter dealt with a Mining Legislation, central to the case was **section 25**. At any rate mining and land may not be separated. We summarize the judgment in the following manner:
- a. Interpretation of **section 25** points to a recognition of the need to open up economic opportunities to all South Africans;<sup>163</sup>

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<sup>162</sup> See para 24 [12], above.

<sup>163</sup> The approach to be adopted in interpreting section 25, ***with particular reference to expropriation***, is to have regard to the special role that this section has to play in facilitating the fulfilment of our country's nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all South Africans. This section thus sits at the heart of an inevitable tension between the interests of the wealthy and the previously disadvantaged. And that tension is likely to occupy South Africans for many years to come, in the process of undertaking the difficult task of seeking to achieve

- b. "...We must therefore interpret **section 25** with due regard to the gross inequality in relation to wealth and land distribution in this country..."<sup>164</sup>
- c. **Section 25**:<sup>165</sup>
- i. protects private property rights not at the expense of the state's social responsibilities;<sup>166</sup>
  - ii. does recognise our history, which history does not permit a near-absolute status to be given to individual property rights
  - iii. direct the state to ensure that all South Africans partake in the benefits flowing from our mineral and petroleum resources (in this case land and land resources);
  - iv. **section 25** is transformative;<sup>167</sup>
  - v. a contextual approach is required when interpreting section 25, taking into account landlessness, opening opportunities up to the previously excluded<sup>168, 169</sup>

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the equitable distribution of land and wealth to all, see para [60]. (Footnote excluded). Our emphasis. The tension envisaged has been expressed already.

<sup>164</sup> **Agri SA: para 61**

<sup>165</sup> This brings to the fore the obligation imposed by section 25 not to over-emphasise private property rights at the expense of the state's social responsibilities. It must always be remembered that our history does not permit a near-absolute status to be given to individual property rights to the detriment of the equally important duty of the state to ensure that all South Africans partake of the benefits flowing from our mineral and petroleum resources, para [62]

<sup>166</sup> See also para 64

<sup>167</sup> Para 63

<sup>168</sup> A careful study of our Law may reveal that more constitutionally progressive measures could be taken to bring about the desired transformation of the economy. Only willingness to be assisted could help. For transformation people from amongst the previously excluded should avail themselves

<sup>169</sup> para [57],

vi. in consideration of international and foreign laws, the situation in the country weighs heavier;<sup>170</sup>

vii. referring to the FNB matter, confirming that expropriation without compensation is possible;<sup>171</sup>

180. Out take is that even without the jurisprudence, slightly developed as it has been, **section 25 (8)** could be interpreted to mean exclusion of compensation.

***Other provisions which could be departed from***

181. The departure principle therefore allows us to do away with any obstacles to the achievement of land, water and related reforms. An identification of any obstacle in **section 25, sub-section 1-7**, is therefore necessary. One such obstacle is the **1913** principle.<sup>172</sup> The Constitution allows departure from this principle as well.

182. We have shown at para **24.17**, above, that departure could be applied to give effect to **sub-section (5)**. If there is any obstacle in **subsection (5)**, such may be removed through departure and should be done away with if there would be an achievement of land, water and related reforms.

***Existing departure***

183. The promotion of Administrative of Justice Act “PAJA”, at section 3 (4), contains the departure principle. The departure principle partly complies with the requirement of section 36 (1) of the Constitution. In the legislation we propose, we could draw from PAJA.<sup>173</sup>

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<sup>170</sup> Ib, at para 99

<sup>171</sup> Ib, at para 99

<sup>172</sup> We know that this opinion is not solicited.

<sup>173</sup> In PAJA it is an exception and in the proposed legislation it should be a general Rule if not the only Rule

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### ***Amendment***

184. We submit that we need not amend section **25 (2)** of the Constitution. At the same time if the outcomes of the public participation is that we should amend, **generally** that may not frustrate the principle of expropriation without compensation.

185. In support of no amendment, the grounds are:

- a. departure achieves the same results as amendment<sup>174</sup> (expropriation without compensation);
- b. departure is already Constitutional and has already passed the Constitutional muster and if applied, departure could be subjected **section 36 (1)**;
- c. departure achieves land and related reforms. It helps us achieve what we should achieve which is land reform and land related reform (the same could be achieved through amendment);
- d. departure is a one way process, only enactment of a statute, which may not be longer (amendment is a two-way process: amendment of the Constitution and enactment of legislation and may take longer);
- e. Our take is that the Constitution should be amended if there are no other means to achieve what we seek to achieve. In this case there is a departure option and since it achieves the same purpose as amendment, our proposal is that we opt for departure.

### ***Options from which to recommend***

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<sup>174</sup> Though this would be longer and in fact arms those opposed to the motion to have the grounds to frustrate the process.

186. There could be a two-parallel process. The first and immediately implementable is departure. The other is amendment of the section to repeal compensation. The latter is cumbersome and could be effected long from now. If therefore the Committee deems it necessary, in order to facilitate the acceleration of land reform, we could start with departure and at a later stage amend the Constitution (if amendment is challenged successfully, departure legislation would still be implementable).

187. If the public requires amendment and it is believed that **section 25 (8)**, though a solution, is however not sufficient, a protracted amendment of the Constitution without immediate fast-tracking (through departure) of the land reform would mean the following:

- a. that government would continue to spend money on programs the state could have avoided spending on;
- b. that it would take longer to effect serious land reform;
- c. that the time that may pass could, given possible litigation<sup>175</sup> and other issues, be longer.

### ***Recommendations***

188. We hereby make the following, namely:

- a. No amendment: that **section 25 (2)** and all the provisions relevant to compensation, be left as are;
- b. that the right to compensation be ousted in terms of section **25 (8)**, subject to the principles being met as appear immediately below,

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<sup>175</sup> Freedom Front Plus indicated on the 05/03/2018, that it considers litigating

c. relevant departments be advised to commence with a legislative process even before Parliament processes the report from the Committee. The process is necessary because whether Parliament amends the Constitution or applies the departure principle, a statute would still be compulsory in order to give effect to whatever amendments.

d. The principles applied for ousting of **section 25 (2)** are limitations:

*Internal limitation*<sup>176-</sup>

i. Departure, provided that it is for land and related reforms,

*External Limitation*<sup>177</sup>

ii. in terms of **section 36 (1)**, central being a society based on human dignity.

e. an amendment of **section 25 (2)** and all provisions relevant to compensation, if it is deemed necessary;

189. If there could be any confusion, we seek to clarify same. Legislation could be made to give effect to the departure principle. If departure legislation is preferable, the Committee could recommend to the two houses that this be considered by the Houses. In the same recommendation, the Committee could recommend the amendment of **section 25 (2)** if such is deemed to be necessary.

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<sup>176</sup> **Section 25 (8)**

<sup>177</sup> **Section 36 (1)**, as required by **section 25 (8)**. Take notice that any limitation of any right in the Bill of Rights must always be done in terms of **section 36 (1)**.

## **PART F: AJUDICATOR**

190. At a stage of making submissions relevant to the content of the legislation (any legislation) we shall make submissions to the effect that any taking of land should be determined by an adjudicator, whoever we may call. Either the Act or regulations may regulate how the process unfolds.

191. Of import at this stage is that whatever is to be done, we, as required by **section 36 (1)**, must contribute to the building of a society based on human dignity. The emphasis should be on society.<sup>178</sup> The balancing approach would guide in such an inquiry.<sup>179</sup>

At **paragraph 143**, we showed how the Constitutional Court approaches matters involving an interpretation of limitation of rights. Human dignity is central. Section 36 (1) calls for a society based on human dignity. The Adjudicator would play an important role in matters which serve before them.

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<sup>178</sup> We will submit, at that time, that before determining factors as appear section 36 (1), the Adjudicator should direct her attention to human dignity, in an inquiry:

- 1.1. determine whether conduct:
  - a. contributes to a value-based society;
  - b. the values of society must be human dignity and equality,
  - c. meets the other requirements, factors contained in of section 36 (1) and those included in the Act, which find their way into the Act through the word “including” as contained in section 36 (1).

<sup>179</sup> This would possibly be an inquiry:

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***PART – G (no table of content)***

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**[“CONCERNS” FROM SOME SECTORS]**

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*There is no table of content for this part of our work*

**192. INTRODUCTION**

192.1. Sequel to the N/A’s resolution, there have been some concerns from some segments of society. Concerns include those which came to our attention through the media. Those concerns, as expressed by the **Banking Association South Africa** (BASA) are that a no-compensation approach would lead to:<sup>180</sup>

192.1.1. Food insecurity, and

192.1.2. serious systemic problems in the banking industry.

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- 1.1. Whether the right to dignity is violated is a factual enquiry from one case to the other. It does not mean, however, that we cannot consider the possibility of violation. Below we deal with such issues as may possibly not be violation.
  - 1.2. If we expropriate 1000 hectares from a person who possesses 20000 hectares, and we want to move people from an informal settlement to the land, do we violate the right to dignity? It may be that the right to human dignity is violated. To determine whether same is violated, we could establish an institution to adjudicate over such issues. Legislation should elaborate as to the adjudicative processes.
  - 1.3. Issues for consideration could be that the purpose of expropriation is shown, that the person from whom it may be expropriated may, through objection, show why his or her right to dignity is violated. All competing rights and values should guide a determination by an Adjudicator. In work proposing the shape of legislation, we propose, in more detail, how the adjudicative process could be effected. We need go deeper on such at this stage.

<sup>180</sup> <http://www.banking.org.za/news-media/publications/presentation-submissions/a-land-reform-model-that-everyone-can-get-behind>. Others raise similar concerns

- 192.2. We have not come across any other concern we deem appropriate to respond to. We shall therefore limit our response to the above two.
- 192.3. The alleged effect of the above two concerns is that, as BASA is reported to have stated, discouragement in farm technology and innovation investment (we take it both locally and international). This is disinvestment, which would lead to loss of benefits from agreements like African Growth and Opportunities Act, as BASA argues.
- 192.4. BASA argues that with less investment in technology and innovation, there would be less food production. With less food production there would be food insecurity, the effect of which would be that more food may be imported. Costs of food would then go up, costly for the poor.
- 192.5. The concerns summarized, you will see that the structure of this work is as follows (a) land use, (b) food-security, (c) increasing investment, and land as security and general.

### 193. **LAND USE**

- 193.1. To understand the first aspect, we need to consider the meaning of Agriculture. The dictionary meaning of Agriculture is:

“science of cultivating land,”<sup>181</sup> the cultivation and breeding of animals, plants and fungi for food, fiber, biofuel, medicinal plants and other products used to sustain and enhance life.<sup>182</sup>

- 193.2. Agriculture therefor consists of crop and animal farming.<sup>183</sup>

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<sup>181</sup> Cambridge Advance Learners’ Dictionary, 3<sup>rd</sup> edition, see also

<sup>182</sup> <https://en.wikipedia.org/wiki/Agriculture>

<sup>183</sup> Cultivation means prepare and use (land) for crops or gardening

193.3. A discussion of an elevation of agricultural production is aimed at a higher production level of agricultural food, ploughed food. Agricultural production should not be made to be difficult. Some people are happy producing tomatoes, for instance, from three tomatoes' trees. The production is for their house-holds. Some breed their own goats and other animals. For some such farming is for subsistence and some to supplement what they have. Furthermore for some it is for fresh food-consumption.

193.3.A. To achieve the above, what is required is bigger stands than is generally the case currently. A portion of the stand would then be used for this purpose. This is very practicable. To be successful, a campaign may be necessary since our people have been made to be used to buying each item they consume. We come-back to the bigger stand issue later on.

193.3.A. Beyond the above, some produce:

- a. Maize meal;
- b. Vegetables;
- c. Milk;
- d. Fruits;
- e. Meat and
- f. Products from all of the above.

Some go beyond subsistence, but never reach a state of commercial farming.

193.4. We mention maize because it is one product which is easy to plough and is consumed in many rural areas. Amongst the previously excluded it is also consumed by many in urban areas on a daily basis. This reality has also been recognised by a government program called ***Integrated Development Finance Policy Framework, approved in 2015*** of the Department of Agriculture, Forestry and

Fisheries<sup>184</sup> (*Integrated Finance Policy*). To produce more, there should be a market. The market does exist. We import some food because there is a market for such imported food. People eat every day.

193.5. **Beyond agriculture**, land is used for many purposes. It is used for residential purposes, including perhaps for back yard subsistence farming. **See paragraph 122.3 and 124, above.**

193.6. Land is also used for construction. Think about the building called Parliament, land played this role:

a. the structure is built on the land, built from sand, cement,<sup>185</sup> soil, bricks, trees (roofing material and furnisher). Tiles are made from material produced from land in the form of glass,<sup>186</sup> concrete and stone (granite for instance), amongst others.<sup>187</sup>

### **NO LAND, NO CONSTRUCTION**

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<sup>184</sup> Page viii

<sup>185</sup> Made from clay and limestone others (see: [https://www.google.co.za/search?ei=eny4WqPFJq8UbdYgvAO&q=cement+made+from&oq=cement+made+from&gs\\_l=psy-ab.3..013j0i22i30k117.2337.7538.0.8047.16.14.0.1.1.0.291.1491.2-6.6.0...0...1c.1.64.psy-ab..9.7.1497...35i39k1j0i67k1j0i131k1.0.PiPFUU4hEVw](https://www.google.co.za/search?ei=eny4WqPFJq8UbdYgvAO&q=cement+made+from&oq=cement+made+from&gs_l=psy-ab.3..013j0i22i30k117.2337.7538.0.8047.16.14.0.1.1.0.291.1491.2-6.6.0...0...1c.1.64.psy-ab..9.7.1497...35i39k1j0i67k1j0i131k1.0.PiPFUU4hEVw) and [https://www.google.co.za/search?ei=bn24WpaDG8OSU8GwutAM&q=limestone&oq=limestone&gs\\_l=psy-ab.3..0i67k114j0i20i263k1j0i5.105517.105517.0.106466.1.1.0.0.0.0.511.511.5-1.1.0...0...1c.2.64.psy-ab..0.1.510...0.pAx\\_TYKlro8](https://www.google.co.za/search?ei=bn24WpaDG8OSU8GwutAM&q=limestone&oq=limestone&gs_l=psy-ab.3..0i67k114j0i20i263k1j0i5.105517.105517.0.106466.1.1.0.0.0.0.511.511.5-1.1.0...0...1c.2.64.psy-ab..0.1.510...0.pAx_TYKlro8) )

<sup>186</sup> The main raw material **used** to make **glass** is sand. To make clear **glass**, a special sand called silica sand is **used** ... **Glass** production also needs limestone, go to [https://www.google.co.za/search?ei=7X64WpfxB8WuUcClisgJ&q=glass+is+made+from&oq=glass+made+from&gs\\_l=psy-ab.1.1.0i7i30k1110.60918.61817.0.64324.5.5.0.0.0.0.254.492.2-2.2.0...0...1c.1.64.psy-ab..3.2.486...0.TrN\\_S3v2ZsM](https://www.google.co.za/search?ei=7X64WpfxB8WuUcClisgJ&q=glass+is+made+from&oq=glass+made+from&gs_l=psy-ab.1.1.0i7i30k1110.60918.61817.0.64324.5.5.0.0.0.0.254.492.2-2.2.0...0...1c.1.64.psy-ab..3.2.486...0.TrN_S3v2ZsM)

<sup>187</sup> [https://www.google.co.za/search?ei=4X64WubCF8yxUbzrmrgG&q=tiles+made+from&oq=tile+s+made+from&gs\\_l=psy-ab.3..017j0i30k113.2256.9298.0.10691.12.12.0.0.0.0.388.1931.2-5j2.7.0...0...1c.1.64.psy-ab..5.7.1924...0i10k1j0i13k1j0i13i30k1j0i22i30k1.0.-TcFMWnifDc](https://www.google.co.za/search?ei=4X64WubCF8yxUbzrmrgG&q=tiles+made+from&oq=tile+s+made+from&gs_l=psy-ab.3..017j0i30k113.2256.9298.0.10691.12.12.0.0.0.0.388.1931.2-5j2.7.0...0...1c.1.64.psy-ab..5.7.1924...0i10k1j0i13k1j0i13i30k1j0i22i30k1.0.-TcFMWnifDc)

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*Anyone who thinks that there could be construction without land should raise their hand. He would have to explain from where water is drawn. Here in Polokwane and I believe in many towns, the pattern is the same. For any construction, we depend on bricks-producing companies and sand/soil-mining companies. We rely on these companies for government, residential and business buildings. The soil, sand and water are excavated, mined and extracted from farms. Note therefore that we also want to be involved in this billions-of-rand business supporting construction.*

Back to Parliament, the garden within the Parliamentary precinct is conducted and trees are grown from the soil, the walk-throughs and roads are constructed on land. There is barely any item which does not relate to land.

b. Furnisher and papers used in Parliament are from forestry;

c. the food eaten in Parliament is from the soil

193.7.A. We have not forgotten water. The best facility which stores water is soil and stones underneath the surface of earth. Soil is land. The **Groenland Water Users** had sufficient water than Cape Town City because the land they occupy is utilized for their access to water. The previously included are in charge of productive land, with water.

193.7. If there is no land, then no cement and sand business. Cement business made **Mr. Aliko Dangote**, reportedly Africa's richest person, to be as wealthy as he is reported to be. With no land, we are excluded from many business opportunities. Being without land, there is no mining for us.

193.8. With the above, we are trying to emphasize one point: that land is central to the economy. In addition to construction, residence and mining land is used for office spaces, industries, leisure sports, children-playing spaces and more. If you want to exclude anyone from the economy, deny them land. The first thing we do when we open business is to look for an office space. In some professions, **Landline**<sup>188</sup> is required. So for the excluded to take part in the economy, he/she must be prepared, in some professions and industry, to share his/her income with the “land-lord”.<sup>189</sup>

193.8.A. South African should not be shy to say that we need land not only for food. We need land for the same purposes as others use it for. Why not for game? Why not for the best air? The above is within the realm of land-related reforms. Think about this: group of African-Religious-Oriented, say they need land for their practice, why should they not access it?

As we discuss land, we should note that land is not limited to agriculture. Land is life, in as much as water is.

## 194. **FOOD SECURITY**

### **Meaning**

194.1. Food security means “the state of having reliable access to a sufficient quantity of affordable, nutritious food.”<sup>190</sup> To reach a state of food security, there must be:

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<sup>188</sup> That infrastructure might be improved at same stage and be completely wireless.

<sup>189</sup> Land is so important that a person could make money from business activities even when they are not involved in the business of an occupant tenant.

<sup>190</sup> [https://www.google.co.za/search?ei=T7K4WvfrM8OmU-DUjcgP&q=food+security+definition&oq=food+security&gs\\_l=psy-ab.1.1.35i39k112j0i67k112j0i67k1j0i4.199640.204307.0.206533.6.6.0.0.0.556.1451.4-2j1.3.0....0...1c.1.64.psy-ab..3.3.1450...0i10k1.0.PSQnyIGGUba](https://www.google.co.za/search?ei=T7K4WvfrM8OmU-DUjcgP&q=food+security+definition&oq=food+security&gs_l=psy-ab.1.1.35i39k112j0i67k112j0i67k1j0i4.199640.204307.0.206533.6.6.0.0.0.556.1451.4-2j1.3.0....0...1c.1.64.psy-ab..3.3.1450...0i10k1.0.PSQnyIGGUba)

- a. Sufficient food;
- b. the food must be nutritious,

The above given, food-security is very much an agricultural issue. The Constitution states that “Everyone has a right of access to sufficient food and water.”<sup>191</sup> The argument advanced is that the motion would threaten food security. The argument suggests that there is sufficient and nutritious food for persons in South Africa. It suggests that there is no need to interfere with this satisfactory state of affairs.

If we ask persons in South Africa, whether South Africans or not, some may not agree, the more reason for getting more South Africans into the field.

### **Food as daily commodities**

**194.2.** There are only two things which human beings consume every day. Those are: food and water. We constantly buy food. Other things which we use daily are clothes (we do not buy them daily) and for fuel, we do not buy daily and the majority do not even have vehicles.

### **The previously excluded’s<sup>192</sup> history**

**194.3.** The above given, the country therefore needs production of food and means of storage, with means of storage needed for use and in the event of draught. Long before the settlers arrived, food was produced and stored. Systems existed. Storage systems were used and continued for a long time to be used before the refrigeration devises and tinned means of storage were invented and/or introduced to our forebears.

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<sup>191</sup> Section 27 (1)

<sup>192</sup> Those excluded from land-ownership

- 194.4. Once food was produced, nature was used for storage purposes. Pork and some types of food which did not require warm temperatures were consumed more in winter. So our forebears knew how to produce food and secure same for immediate-to-long term purposes. The concept of food security is therefore not new. Our forebears possessed knowledge systems, still possess same and some of the knowledge systems they should pass to us.
- 194.5. *Ga gona lebitla la tlala* (An old sepedi idiom which means that "... there is no place where a person was buried after dying from and because of hunger"). They did not know anyone who died of hunger. *Pele re tseelwa lefase ka dikgoka, re be re lema, re iphepa, go sena lebitla la tlala ...*" (before our land was taken by force, we were farming, producing food and feeding ourselves, with no one dying of hunger. Land is wealth), said Ms. Joyce Matshoge, MEC of Agriculture and Rural Development, Limpopo, as she then was.<sup>193</sup>
- 194.6. She said further that "Temo ke setso sa rena. Temo ke bohwa bja rena (***Agriculture is our culture. Agriculture is our heritage***).
- 194.7. Some of the food storage practices were your sisiu<sup>194</sup>/some call it seshego<sup>195</sup> and sefala.<sup>196</sup> You may think of lenge.<sup>197</sup> There is no history of food insecurity issues prior the settlers arriving. If the excluded's forebears produced food then and were able to store it, can the excluded, now, not do so when technology from all corners of the world exists?

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<sup>193</sup> at an address at Dikgale Traditional for Heritage and Cultural Day, <http://limpopoonline.co.za/?p=4396>. May her spirit continue to rest in peace.

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<sup>194</sup> Maize storage system: cattle kraal system. Maize was stored for the immediate to long term

<sup>195</sup> Not a Township

<sup>196</sup> Again maize storage system: a wall built next to an out-part of the hut to store maize

<sup>197</sup> This was butter produced from milk.

- 194.8. To date most communities have cattle subsistence farmers. They part-finance, those who are able to, their children's higher education with proceeds of sale of their live-stock. Some feed their house-holds with some of the food they produce.
- 194.9. The home-breed cattle are usually slaughtered to cater for persons at funerals and other gatherings. This despite land limitations. In order to industrialize, it was best to take land from our forebears so that they begin to rely on "farmers" for food. Once used to relying on farmers, they depend on industry so that they maintain their food "consumer" status. That history we know and shall not forget.
- 194.10. We should not forget that in addition to human-ploughed-food, there are so many wild animals, vegetable and other plants to which we do not have access. That access we want. So when we talk about land, we also include food from nature, God-given food.

### ***Reason for opposition***

- 194.11.** *Lehumo le tswa tshemong*, words of wisdom, a Sepedi Idiom. Land is wealth or wealth is from land. See **paragraphs 194.5 & 194.6**, above. I do not see how persons from other languages may have a different approach to Bapedi, or Batlokwa. To hold otherwise would amount to and be sophistry and contortion. The purpose of the strategy would be to perpetuate our exclusion.
- 194.12.** A further reason for opposition is for an entrenchment of forms of racial domination or exclusivity to privilege, honour and opportunities.<sup>198</sup> The parliamentary process should result in the correction of the Constitutional Sin

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<sup>198</sup> Afri-Forum: para [9]

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and ultimate elimination, on the land issue, of domination by the previously included over the previously excluded.

**194.13.** As the previously excluded, we should resist comments which appear to be advice and in our interest when they (comments) are not advice and certainly not in our interest. An argument on and based on food security does not have, as its basis, our interests. If those advancing the argument were concerned about us,<sup>199</sup> they could possibly have proposed how they could work with us to “ensure” that food security is not “threatened” because of our involvement in agriculture.

194.14. Those in opposition to the N/A’s resolution, amongst those we have identified, are:

- a. Agri SA;
- b. Banking Association SA;
- c. Afri-Forum;
- d. Afri-Business;
- e. Solidarity;
- f. Transvaal Agricultural Union of SA (TAU-SA);
- g. Centre For Constitutional Rights, a Unit of FW De Klerk Foundation;
- h. Free Market Foundation;
- i. Democratic Alliance,
- j. Freedom Front Plus.

194.15. Just to digress a little, at this stage we have not heard a voice from the Council for the Advancement of the South African Constitution [CASAC] on the issue as to compensation. The only view we came across was a statement, reported in the media and attributable to CASAC, which states that the:

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<sup>199</sup> the previously excluded

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“... Constitution already provides for expropriation of land under certain conditions.”<sup>200</sup>

a statement which cannot be disputed. Expropriation is a settled matter. The focus is compensation.

194.16. If you question why we look for CASAC’s position, the reason is what appear to be their mission and what the organization apparently exists for. The organization says it exists for and its mission is:

➤ the protection and advancement of the Constitution,<sup>201</sup>

➤ “The greatest threat to our Constitution is a complacent citizenry”

This Parliamentary process invites CASAC, allegedly existent for the protection of the Constitution. This process is meant for the advancement of the Constitution.

194.17. Back to those opposed to the resolution, none of them represents the interests of the previously excluded. BASA must cause its members to comply with BBBEE before they could claim to speak for the poor. It may be shocking to some that **BASA** seem to think that we could believe them. Really! **Agri-SA** and **Afri-Forum** should have learnt from judgments in which they directly took part in. With a listening eye, they should be advising the country that transformation is inevitable.

194.18. So as the previously excluded, correctly, we are on our own, as Biko would say. However, alone as we are, we should, together with the previously included, if they want to, try to find each other and unite in diversity, as we

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<sup>200</sup> <https://www.news24.com/Analysis/ancs-land-expropriation-decision-an-admission-of-its-own-failures-analysts-20171220>

<sup>201</sup> “As the supreme law of the land, the Constitution provides a framework for the social and economic transformation of South Africa, and for a deliberative, participatory and inclusive democracy. This framework, together with its underlying values and founding principles, needs to be protected and advanced”

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committed in the Preamble to the Constitution. In Church, you need land to conduct your Affairs, in football and any physical sports, for children to play and grow healthy, we and they need land. We need to remember that being on our own we should work hard to achieve the obtaining of land.

194.19. At this stage those opposing the motion have not proposed how, given their perceived food insecurity threat, assuming that indeed there could be food insecurity, could they work with us together to avert food “insecurity”? We will come back to this issue later on.

**194.20.** Because the previously included are not concerned about the previously excluded, the former suggest that they are the ones who should produce food for us. Well, we resist such an insinuation. We want to produce food for ourselves. In the process we are not saying those producing currently should not produce. Let there be more people producing food.

194.21. A threat to food security, as perceived, would not translate to reality. The reality is that with more food producers, there would be less business for those who are currently in charge. This being the case, it is understandable why there is resistance. This is opposition to competition or saturation of a market.

194.22. These are the reasons for resistance which base our position:

a. **expressed:** a wrong diagnosis based on the existing land reform program where more than 100 persons, for instance from each claimant house-hold, have land restored to them;<sup>202</sup>

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<sup>202</sup> business is easy started by one person or few, with the same school of thought or complementary ideologies. What happens in the current system is that persons who are not business-minded receive land and the next thing they do not know what to do. They get land

b. **not expressed:** the previously excluded are intellectually “... inferior, lazy and lesser beings in every respect of consequence...”<sup>203</sup> and some things we need not state (some having been said by a North Gauteng High Court Judge and overnight accommodation owners and estate agents);<sup>204</sup>

c. **not expressed:** above all else is that only some racial groups possess monopoly of Agricultural expertise and prowess,<sup>205</sup>

194.23. During the ugly system, women were assumed to be and were treated as children. For a woman to do some transactions, a man had to be there and transact on a woman’s behalf. This happened when, in all societies, the law recognised women as natural guardians of their children. Women, other than being recognised as such, were and are still the backbone of our society. Very few could say they are not raised by women.

194.24. The constitutional democracy brought about programs to emancipate women. Today women do what they did in the past or could have done, but for funny or bizarre laws. They have done nothing to prove to anyone that they are capable. They simply do what God has given them. As men we are the ones proved otherwise because we believed and in some respect still believe that they are not capable. This

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not because they have a plan over it, but because it is land from which they were removed and/or ancestral land. The current land claims should be finalized, but with improved ways of running claimed farms. Applying departure to regulate land claims relating to land disposed prior 1913, new claims under the Restitution should be allowed at some stage. The model, under the redistributive program, is to be one in terms of which those intending to farm, make a case of how they are to farm and then get land based on their proposals. Well, we will show in the presentation to the Committee on Constitutional Reviews, that land is not only for farming. We are only stating this in the context of a discussion on food-security.

<sup>203</sup> *Tshwane v Afri-Forum, para [2]*

<sup>204</sup> A myth exists that if you give land to the previously excluded, they damage land.

<sup>205</sup> *Tshwane v Afri-Forum, para [2]* : the system was all about the entrenchment of white supremacy and privilege and black inferiority and disadvantage

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is relevant because when we (previously excluded) get land and work it, as we are capable, and shall farm, the previously included would be surprised for they shall first have to convince themselves that we will demonstrate excellence.

194.25. Food security argument is advanced so that those making money from agriculture have their businesses “protected”. The opposition reminds me of the Chief Justice Mogoeng Mogoeng’s words: an old Act of Parliament, the Minerals Act, served “... the protection of the privileges of their ...” the previously included. However if the previously included were to work together with the rest of society, their businesses would grow even further.<sup>206</sup>

194.26. It is possible that the included genuinely believe that we cannot work together. My former principal, Mr. Mahapa, says that when a person genuinely believes something to be correct, they should not be blamed. What may be blamed is how they were socialized. Well in some instance, as I would say to him and he agrees, some know the correct position, but ignore it in order to achieve their objectives. Back to working together, believing that we are lazy and inferior, it is possible that some of the previously excluded genuinely believe that there is no space to work together. Well that is socialization for you.

194.27. Back to food security, some of the examples relevant to show the threat to business are:

***Just think about it this way:***

a.if I plough Monawa (it is a vegetable I know to be ploughed in Limpopo [do not know about other

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<sup>206</sup> Well, we are not requesting anyone to come and work with us or for us to be given space on their table. Time has run out for us to always extend our-hand. Only the elder membership of society would do that. We are not there.

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provinces]), would I go and buy spinach? No would be the answer!<sup>207</sup> What would then happen to the spinach producers? Well they can still sell to those who do not farm and also export.

- b. if from my Monawa experience, many others follow me and plough same and others and in addition to home-consumption also supply schools<sup>208</sup> would spinach farms get any business from my community? If yes, it would be limited. Would this not be a threat to a business person? It would, you will agree.
- c. with land, water<sup>209</sup> and related facilities, could we have milk-producing businesses? Where we fall short, could we approach perhaps countries which do not threaten disinvestment? Yes. Surely the state cannot be limited in its decision making authority by countries pretending to act as though they could be bullies.<sup>210</sup>
- d. Could investors assist us with milk-production technologies? Yes, they could. If they assist and have small scale businesses in many arrears in the country, would this not be a threat to big milk-producing companies? It would be a threat, you will agree with us.

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<sup>207</sup> The 2017/18 rain has been a greatest blessing and a good reminder

<sup>208</sup> This is doable: our parents were eating these vegetables and many lived longer, without attending at hospitals and without being attended to by doctors. It is organic food. Organic food is not only what the middle class and the reach eat. The poor, with land, could eat easy-to-grow, organic food. For health purposes, proper research could be conducted for identification of the extent of nutrients in what the previously excluded are used to growing.

<sup>209</sup> The Minister of Land and Rural Development needs not worry, there is a solution in section 25 (8). What she needs is to decide to act. That action is in initiating a legislative process. It is only best that even as we deprive, there should be certainty. We are saying the minister should relax because of an article in City Press's publication of the **18/03/2018**.

<sup>210</sup> Some use dog strategy. It bucks in order to threaten you, makes a lot of noise to scare anyone who cares considering and fears it. If you run, you will know it better. If you stand and stare at it, you will see its tale, unless it is pit bull.

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Could we process milk and produce your yogurt and others? We could, you will agree.

e. The milk-producing business example given, could the new producers penetrate the market? Yes, majority of people consume milk and its products on a daily basis. Babies consume milk every day. The school-feedings scheme could be one such other relevant example of an existing market.

f. Could we invest as South Africans? Yes. What we need to do is to ensure that there is real economic transformation beyond the land issue. BASA comes in here. The private sector, including BASA, should stop circulating money mainly amongst the previously included. This will ensure that when there is an issue with which some are not agreed, that they simply disinvest. If we have real transformation and money is also circulated amongst the previously excluded, I do not see threats of disinvestments. Even if there are threats, we will proceed to and invest.

194.28. You could think of any example. A tomato for instance is simple to produce. An onion would be another example as well. You could imagine a person, with 10 hectares. With such we could grow marotse.<sup>211</sup> It is simple to grow. It feeds chickens, goats and pigs. Dithaka (watermelon seed) used at hotels. We also produce Thophi (sweet porridge like) consumed by humans.

194.29. With tomatoes, unions and others reaped from home, we will no longer buy each item we consume. This contributes to saving money for other areas of need.

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<sup>211</sup> A non-sweet watermelon look-alike

**194.30.** Land reform could therefore be used for purposes of food security amongst others.<sup>212</sup> The more people we have for food production, the more there is food security. So we need the previously excluded to be involved in big numbers. They can be involved in:

- a. commercial farming;
- b. semi-commercial farming;
- c. subsistence farming,
- d. semi-subsistence farming

194.31. It is not sustainable for a country to rely on a specific set of persons for our daily living. It is worse when those relied on could leave the country anytime. We should not be fearful when they threaten to go to australia. Let them go.<sup>213</sup> As the Constitutional Court said, we should not pamper any one when it comes to transformation, we add, including australia-aspirants. It would not be the first time people leave because of change. Who will call them baas there, they will see. Go well, go ... Good luck!

194.32. So competition being the real issue, amongst the previously included who remain and those who think about how they could integrate themselves into a real new South Africa, we could work together. Having remained soon they will learn of the wave of change that is coming and which is inevitable. It is still coming, that wave. Some guide may help. The following are relevant factors:

- a. when we were politically freed from that ugly system, there was, as it happens in any new and early phase of

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<sup>212</sup> **Integrated Finance Policy** is a useful policy framework and may be enhanced to achieve what is desirable. We may apply our minds to group-oriented approach and conduct research whether such works or not.

<sup>213</sup> The anger in communities is shocking. On the **17/03/2018** I made a presentation at a BMF/BLA Student Chapters event. The response by students revealed to me that young people do not care slightest about the previously included. They use very strong language.

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political emancipation, an excitement that there will be unity and that we will be a rainbow nation;

b. fast forward into **2017**, for **2018**, reality is revisiting home and we woke up to realize that:

i. we need to act on land, which is an extremely important natural resource,

ii. that a person's original language is the best tool of learning and development and

iii. that soon African languages would have to be given increased space for learning;<sup>214</sup>

d. the Economic Freedom Fighters is a big factor. Its leadership is not made of old people. With no state power, and no responsibility to lead society, they are likely to cause the elders to make decisions they could not have made had it not been for them (EFF);

e. the emergence of President Ramaphosa has prompted many people who felt left out, the professionals, clever "...” and the fence seated to get involved in the affairs of the country;<sup>215</sup>

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<sup>214</sup> We learnt maths in Sepedi, in technologically advanced Asian countries they learn in their languages, so is Germany and others. Affiliated, without belonging to the Common Wealth Nations, the master was able to give us false hope that we are equal with it and made to believe that their language is a language of the sophisticated. As young people of today, we see it as it is, though elders are still trapped in their up-bringing.

<sup>215</sup> It is further so because the exiled seemed to belief they could find solutions on their own. Under President Zuma's administration, differing views were labeled in many ways. Under the current Presidency, we will see what happens, so far, so good. The involvement, in societal affairs by professionals and others means that some of the voices not heard may be heard and further that the energy directed at the Ruling Party or its leadership previously may be directed at change-orientated efforts [constructive criticism of government is always welcome]. We have

- f. the mouth-expressed intention by the state, though still to be acted on, to get South Africans involved, may allow space for many South Africans whose contribution was not previously appreciated and in the event of them getting space to contribute and their input taken seriously, programs emerging of how to bring about changes in society;
  - g. The Black Management Forum, which we approached to work with on the meaning of section 25, expressed the intention to work with us (if it happens, it would happen during the 2<sup>nd</sup> stage: proposed content of the legislation and broader section 25 transformation work and general transformational issue);
  - h. The bottled-up anger is not helping amongst the previously excluded. On the other hand there is resistance to transformation. People are angry for lack of opportunities. They are angry at both the previously included and the government. There are indications that the state seems intent on acting to bring about opportunities (land and free education are some examples). Hopefully there would soon be other interventions made for change in other sectors of society. Should the state act, as appears to be an intention, anger may be directed at the previously included due to their possible resistance.
- 194.33. The above given, the previously included, who do not go to australia, are advised to apply their minds to the changes which are coming. Interested, we could work together. If not interested, change will come which you may not have

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called for BASA to offer some solution on the table. That is so because criticizing without putting proposed solutions does not help.

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influence over. This looks to be interesting conjuncture (given the mining debate taking place) for our lovely Country.

## **195. INCREASING INVESTMENT**

### **Investment Act**

195.1. To protect the interests of the investment community, the **Protection of Investment Act, no 22, 2015** was enacted by Parliament. The Act states that it protects investments in accordance with and subject to the Constitution and in a manner which balances the public interest ... the rights and obligations of investors<sup>216</sup>. It confirms the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.<sup>217</sup>

195.2. The Act is aligned with the Constitution. Its provisions confirm some of the rights as appear in the Bill of Rights. Some of the sections in the Act are:

(10) “Investors have the right to property in terms of section 25 of the Constitution”

(12.1) which, in summary subjects investments to state’s power to bring about transformation and take such action as may be constitutionally permissible<sup>218</sup>

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<sup>216</sup> Section 4 (a)

<sup>217</sup> Section 4 (c)

<sup>218</sup> Notwithstanding anything to the contrary in this Act, the government or any organ of state may, in accordance with the Constitution and applicable legislation, take measures, which may include— (a) redressing historical, social and economic inequalities and injustices; (b) upholding the values and principles espoused in section 195 of the Constitution; (c) upholding the rights guaranteed in the Constitution; (d) promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; (e) fostering economic development, industrialisation and beneficiation; (f) achieving the progressive realisation of socio-economic rights; or (g) protecting the environment and the conservation and sustainable use of natural resources.

195.3. Though the Act has been existent since 2015, the state has never been irresponsible. The state shall not be responsible and if for a minute because such, those who have invested know what the law provides for. Any and all land-conduct must and shall be compliant with the Act. If not compliant with the Act, it must still pass constitutional muster.

195.4. Investment, as we know, is an injection of resources into an economy. The state has resources. It should invest some of its resources for post-land-allocation program.

***State's obligation to spend when unavoidable***

195.5. That the state has money is clear from the annual budget allocated by Treasury to Land Reform and Rural Department for compensation and other aspects of land reform.<sup>219</sup> Before going deeper into where additional money could be sourced from, let me refer to **section 195** of the Constitution.

195.6. Some people say the State should finance expropriation by paying compensation. It may be irresponsible of the State to do so when the Constitution allows it to develop Law in order to depart from the right of an "owner" to be compensated.

195.7. To make Law as proposed above,<sup>220</sup> regard should be had to a society based on Botho<sup>221</sup> as a value. Public services, including allocation<sup>222</sup> of land after expropriating it, should be effected economically and efficiently in order to give citizens the best possible value for money.<sup>223</sup> In respect of land, money should be utilized to give citizens the best

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<sup>219</sup> Whatever the source is.

<sup>220</sup> On a part discussing expropriation without compensation

<sup>221</sup> Human dignity, which also embraces equality, we believe is a value which should be respected not only within persons defined as Africans.

<sup>222</sup> This is administrative in nature

<sup>223</sup>Batho-Pele-

<http://www.dpsa.gov.za/documents/Abridged%20BP%20programme%20July2014.pdf>

possible value for land. The best **possible** value for land is when money is utilized for improving expropriated land and not to benefit the few.

195.8. The Public Administration envisaged in our Constitution could be achieved when the state officials observe the *Batho Pele* Principle.<sup>224</sup> Public Service, as envisaged above, for example, is required by section 195(1) of the Constitution. Payment of compensation<sup>225</sup> by government is an aspect of public service. It is public administration. The money paid for compensation is allocated by the Department of Treasury, under the public service. Being public administration, section 195 requires government to be economic and efficient.

195.9. If you doubt this even at this point, kindly note that the payment of compensation must also comply with the Public Finance Management Act.<sup>226</sup> Any department, Public Works, Rural Development and Land Reform, Education, Water and Sanitation, Human Settlement or Provincial Government, must comply with the Act.

195.10. Being a section central to Public Administration, we need to quote section 195 of the Constitution, which reads thus:<sup>227</sup>

‘Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

..

(b) Efficient, economic and effective use of resources must be promoted;

(c) Public administration must be development-oriented;

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<sup>224</sup> A government program placing service and clients (members of the public) at the center of government services

<sup>225</sup> The state would pay in terms of the Law and it would be a department, a state organ

<sup>226</sup> Municipality: MFMA

<sup>227</sup> Be referred to footnote 3 in the SABC Judgment

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- (d) Services must be provided impartially, fairly, equitably and without bias;<sup>228</sup>
  - (e) People's needs<sup>229</sup> must be responded to, and the public must be encouraged to participate in policy-making;
  - ...
  - (i) Public administration must be broadly representative of the South African People, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.'

195.11. The requirement of the promotion of efficient, economic and effective use of resources means that given the State's limited resources to achieve land, water and related reforms,<sup>230</sup> the State should use the Law to achieve the reforms. It is more justifiable given the history of land in the country. It is more justifiable for doing away with the poisonous Constitutional Sin.

195.12. In fact the State has been spending money on compensation which could have been expended elsewhere, including improving expropriated land. So the State should be advised to commence with necessary processes to develop a statute regulating departure.<sup>231</sup> The statute should prevent arbitrary and capricious expropriation of land. As pointed out at **paragraph 188 (c)**, the process is necessary because even if the Constitution is amended, a statute would still be compulsory for us give affected to whatever amendments.

195.13. Take a case of the Democratic Alliance (DA) for instance. The DA possibly had section 175 in mind when it instituted

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<sup>228</sup> Taking into account sections in the Constitution which favour redress of the injustices of the past

<sup>229</sup> People means we, All South Africans and not the few

<sup>230</sup> Section 25 (8) of the Constitution

<sup>231</sup> Section 25 (8) of the Constitution

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review proceedings at the North Gauteng High Court under case no: **21405/18** against the President of the Republic of South Africa. The main relief sought is to have set-aside the State's decision to pay costs of litigation arising from legal battles relating to charges which have recently been reinstated against the former President, GJ Zuma, in **March 2018**.

195.14. The DA makes its main case at para (s) (45-50). The main basis of the case is made at paragraph (51). The state, in a previous, unrelated, but relevant for the DA case, indicated that it does not pay legal costs for any conduct not linked with the functions of the state and especially if the matter involved "corruption". We will await the outcomes of the matter.

195.15. Important in the DA's application is an attempt by the DA to recover costs paid by the state.<sup>232</sup> The reason, as we understand the case, is that the state should be economic and efficient in its use of public resources.<sup>233</sup> It would appear that in order to ensure that the state spends money economically and is efficient in its use of resources, that the state had indicated in that for official's conduct not linked with the performance of functions of the state, the state does not cover legal costs.

A. In the context of the Parliament's resolution, the state should make law to avoid paying money when such payment could be avoided. The principle is that the state should spend money when it is necessary to do so.

195.16. If we invoke section 25 (8) [departure] or amend the Constitution, we will no longer spend money to get land. The budget for compensation and for land-receipts should be put aside and be used for investment. This should be a

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<sup>232</sup> Para 64 & 65 of the founding affidavit and prayer 3 of the notice of motion

<sup>233</sup> Though this is not expressly stated. At para 56 the DA refers to the PFMA in support of its case

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part-source of investment. Other willing Countries could also invest.

195.17. Once investors, who use threats, if any, realize that we could invest and not fail, they would want to be part of the success and would not disinvest.

195.18. The other form of increasing investment is equitable circulation of money in the economy. Some of our people do not have the australian-option and with empowerment, they could invest in agriculture.

195.19. Agricultural production could be elevated in many ways. Some of the practical examples are, in relation to food-production:

a.driving a program for human settlements land-recipients<sup>234</sup> to be allocated land with sufficient space for subsistence farming;

b.the allocation above be divided into two portions, one residential, the other for plantation;

c.in the event of non-use of the plantation portion of land, the plantation portion be allocated to such other person who may be interested in farming;

d.soil scientists (geologists) and other experts should advice communities of what to plant;

e.if for instance in a specific community,<sup>235</sup> people are advised to farm tomatoes, then and in that case, that community would be encouraged to produce same or related produce;

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<sup>234</sup> Those interested

<sup>235</sup> You may find that the plantation sides in a community, combined, constitute about 50 hectares. The produce should be commensurate with the hectares

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- f. create produce markets<sup>236</sup> in each area having such a program;
  - g. the budget used for compensation, be directed to this very program;
  - h. in some instances, persons who need land for large productions, semi-commercial or commercial, should receive support;
  - i. to test the program is not difficult in that in most established and old rural communities, there is sufficient background space for subsistence farming. There are communities where there is sufficient underground water, with existing borehole installed by the old public works department and in some instances, families.<sup>237</sup> Such families could be approached, with sufficient support, to test the program;
  - j. If the program succeeds and we graduate to the next phase, **section 25 (8)** is available for water purposes. After all some of the farmers block river water<sup>238</sup> and for those reasons we could invoke the Water Act to cause such water to be released so that more people in communities have access to water. The Water Act and the Departure legislations could be applied together.

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<sup>236</sup>This be inclusive markets which are designed to accommodate subsistence farmers. A research of how the current markets work would reveal that they are meant to exclude small and subsistence farmers.

<sup>237</sup> The public works department should possibly have communal boreholes in many communities

<sup>238</sup> An offence: section 151 under the Water Act. Shocking as may be the farmers are known: they employ people from areas not far from their farms, some of the employees are old enough to know that the rivers which they, in the past, relied on, no longer function as they used to because they have been interfered with by these farmers. You would wonder where is the Intelligence Services is. We are looking for land, when some: for years on benefitted from our natural resource, blocked our access thereto and because it is nice and decorated crime, nothing happens.

195.20. In the past, mills<sup>239</sup> (called chillos: maize and related feed processing sites) were used in many rural areas. These were maize-meal producing facilities. In some areas, those structures still exist.<sup>240</sup> House-holds ploughed maize reaped same and would take such to those facilities for processing. If you take 20 kg, you would pay with about 5 kg of maize, in kind. We could go back to this system and produce:

- a. Maize meal;
- b. Samp,
- c. Maize rise (also commonly known as mielierys).

195.21. In addition to the above, we could further focus on feed for chicken, pigs, goat and sheep. In the past elders were using mill-stones to produce maize meal. This continued long until after the introduction of mill-facilities, as mentioned in the preceding paragraph. The remnants of maize meal, samp and maize rise production processed would be used as feed for pigs, goats, sheep and others.

195.22. In all communities<sup>241</sup> there are farmers, tried and tested. Under a **Tried and Tested Small Farmers Support** program, our government should identify tried and tested small farmers and give them support,<sup>242</sup> such as may be necessary, from one case to the other.

195.23. In all of the above, we could also learn from countries which have success models and work with them for assistance. Those who do not want to go to australia and are healed from many years of social misdirection, can come and work with us in the program.<sup>243</sup>

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<sup>239</sup> Fully equipped, with machine, this was under the ugly system prior 1994.

<sup>240</sup> With no equipment due to non-use.

<sup>241</sup> Particularly rural areas

<sup>242</sup> No giving of money

<sup>243</sup> If they think it necessary

- a.a.** Our proposal is therefore that the market creation program be aligned with a known system where individual households produced maize meal for their own consumption. Through any of the programs proposed, people may feed themselves and also feed others within their communities.
- a.b.** The above is in addition to semi-commercial and commercial farming. We must penetrate government feeding schools' market. We need to claim a share from a food production point of view. We must produce food and see whether big retail businesses could still exclude us.

With health and environmental advice and supervision, we could recycle wasted food to create feed for animal breeding. There is plenty of it which goes to waste.

## **196. LAND AS LOAN SECURITY**

- 196.1. To have land, you have security for financial assistance. If you decide and proceed to apply for funding, you get funding due to land, in addition to all other things.
- 196.2. Not to have land, you have no security and no funding. As is known, the land relevant herein is one registered at Deeds Office. Any land not so registered does not attract funding from those funding.
- 196.3. What this means is that one racial group, because of racial laws of the past, has a greater advantage than others. Should we not resolve this? Should our government bear the costs of resolving this issue? Should the Banking Association of South Africa not propose an expropriation method, free-from-compensation?
- 196.4. The Banking Association agrees that there should be change. It argues that such change should not exclude compensation in the event of expropriation. Compensation

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in this case means payment to a person who is the “registered owner.”

196.5. Our take is that compensation should be separated from security. Were this to be done, the Association should be concerned with its security. We hope that this is as simple as we think it is. It is simple for the following grounds:

a. the reason why this guy attached security is because he obtained money from the Bank. Why should he further be paid, when he has already received money and used it for his benefit and others never had such an opportunity;

b. as for the Banks, what if the State pays<sup>244</sup> same? Could there still be concerns?

196.6. The Association is likely to persist with the argument because the real reason for the argument is that big farmers must produce food for the rest of the nation. The fear is that once we get land, not enough business will do well. This does not affect agriculture only. It affects:

a. **Logistics business (transport)**, where food is transported to industrial areas for processing, to wholesale businesses and retailers;

b. Industrial processing food businesses, wholesale and retail business would also be affected,

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<sup>244</sup> This is not our position, it is only asked as a hypothetical question. However, the Association could tell the Country whether they could still object if the State were to pay. We hope to engage government on this issue. We believe that with proper planning, the State may be able to pay. In making payment, the money does not have to come from government, as the source. Being an open and democratic country, if what we have in mind is agreeable, the state will, as it is requested to, engage on an open and democratic process to cause the concept to be workable. We leave it at this point and wish to indicate, as we should, that it is an issue we could solve. By the way it is not the whole 180 billion which may have to be paid, but some portion thereof. So we should not be scared by the figure, as if all portions of land for which security applies is to be taken. Who said the state cannot target loan-free land? Well the legislative process beyond the meaning of section 25 is a relevant stage of the details relevant to how, practically, this issue could be dealt with.

c. devises and equipment production business (this is so because many may likely not use machines, in the context of subsistence farming).

196.7. Nature not allowing vacuum, a new market will emerge. That should be our market. A research of who owns shopping malls may reveal that some are afraid that if we succeed and obtain land, some of their tenants, food-selling stores, may close shop and they lose rental-based-income.

196.8. The four businesses **Logistics**, Industrial processing food businesses, wholesale<sup>245</sup> and retail businesses<sup>246</sup> may possibly constitute the biggest business areas dependent on agriculture. Take shopping complexes in many parts of the country. The fastest business is food-selling business.

196.9. If we are to have **5%**<sup>247</sup> of the previously excluded producing food, commercially, will that not lead to food-security? It is and is also an emancipation of those enslaved by dependence on the current food producers.

196.10. If **20%** of the previously excluded could produce food, at a sustainable-subsistence level, will that not contribute to food-security? It would contribute to food security. What it would do is that it would threaten established food-producing businesses, which businesses are sought to be protected.

196.11. Even if **25%** do subsistence farming, it would greatly contribute to more food.

196.12. All said; any situation could be regulated. If the state does not pay in respect of the security, the Law could clarify such. This Forum and discussions in the nearer future

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<sup>245</sup> Selling food

<sup>246</sup> Selling food

<sup>247</sup> The number should be bigger

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could talk to that issue. In the meantime, the Banking Association should put on the table a workable proposal, given that the State will likely not pay for security. All of us are bound to attempt to find solutions.

### **197. GENERAL**

- a. The previously included “... South Africans wield real economic power while the overwhelming majority of...” the previously excluded “... South Africans are still identified with unemployment and abject poverty,”... for “... they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty.”<sup>248</sup> Quoted is the CJ, Mogoeng Mogoeng. The previously excluded’s extreme exclusion in the participation in the economy is a result of the past racial laws. The landlessness must be stopped.
- b. Those who have land use it for many purposes. The previously excluded should not be shy to state that they want to use land for many purposes. In addition to being used for agriculture and contribution to food-security, land could be expropriated for many other purposes such as for related reforms. After all, the previously included do not use land only for food-production. Why should we be limited to agriculture?
- c. Let us not forget that there are so many wild plants which we do not have access to. There is so much African medicine to which we are denied access. The medication grows in the bushes. There is so much commercialized wild meat, game as they call it.
- d. Whilst elders who know a variety of African medicine are still alive, we have to go and get the land. They should teach us before they leave us. Educated as we might be thought to be, we

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<sup>248</sup> *Agri South Africa v Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013), para [1]

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are incomplete without indigenous knowledge systems, including our medicine.

- e. We should apply our progressive<sup>249</sup> and transformative<sup>250</sup> Constitution. Section 25 is progressive and transformative. It allows progressive realization of land reform. Land reform, itself is transformative. Transformation can only be achieved progressively. This parliamentary process proves the progressive nature of the transformative Constitution. In addition to land disposed in 1913 and after, sub-section (8) permits any other land to be expropriated. We could also depart from the 1913 principle.
- f. If we act, and act seriously, we should not have the fruit growers of the **Groenland Water Users Association** (GWUA) in the Western Cape, for instance, deciding to release water when there is a crisis.<sup>251</sup> Government should do such. A study of water challenges may reveal that villages in Giyani, for instances, have farms nearer them which have sufficient water facilities. Such water never gets released and you may guess why.
- g. The above given, were **section 25** to be applied properly, the state should be able to cause release of water from any water facilities even on an urgent basis, as best may be regulated. Insufficient access to water in Cape Town should be declared a disaster. Insufficient access to water in Giyani should be declared a disaster. Any evidence of possible water shortages should trigger a process for the state to extract water from any piece of land. This may happen under deprivation, expropriation or access program. An installation of a water facility may not substantially interfere with land.

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<sup>249</sup> *Agri South Africa, para [2]*

<sup>250</sup> *Japhter, Afri-Forum* matter, *para [165]*

<sup>251</sup> <https://www.news24.com/SouthAfrica/News/fruit-farmers-opening-sluices-for-cape-town-20180205>. An investigation of how the Association gained water and kept it may reveal a violation of the Water Act. We should not be heard saying there is a violation, we are saying it is possible that that has occurred.

h. Interference with land without compensation, whether through expropriation, deprivation or access program should lead us to declare that the new legislation:

“... Constitutes a break through...” from “... the barriers of exclusivity to equal opportunity and to the commanding heights of wealth-generation, economic development and power. It seeks to address the injustices of the past in the economic sector of our country in a more balanced way, by treating individual property rights with the care, fairness and sensitivity they deserve.”<sup>252</sup>

Were we to achieve “wealth ... economic development and power... ”, in addition to having land for religious, recreational and other purposes, we believe there would be fewer incidents of disrespect and incidents which are racially motivated. The previously included are not about to have respect for us due to our state of landlessness.

We walk as though we are unclothed; the previously included look at us and say,

Shame! they think they are governing, well we have land and economic power.

Let us take land, for “***The Land is ours***”,  
as Adv Tembeka Ngcukaitobi says.

**PREPARED BY  
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<sup>252</sup> Agri-SA, para [73]