THE FW DE KLERK FOUNDATION

Upholding South Africa's National Accord

The Committee Section: Constitutional Review Committee
Attention: Ms Pat Jayiya
PO Box 15
CAPE TOWN
8000

Per Email: pjayiya@parliament.gov.za

15 June 2018

SUBMISSION ON THE REVIEW OF SECTION 25 OF THE CONSTITUTION

1. The FW de Klerk Foundation was established in 1999 to protect and promote the Constitution of the Republic of South Africa, as the most important legacy of its founder, former President FW de Klerk.

2. On 15 March 2018, the Foundation issued a statement setting out its position on expropriation without compensation (EWC) and the amendment of section 25 of the Constitution. For ease of reference, we attach it as **Annexure A**.

3. The Foundation welcomes this opportunity to comment on the motion adopted by the National Assembly on 27 February 2018 relating to land reform.

4. The Constitutional Review Committee was tasked with reviewing "Section 25 of the Constitution and other sections where necessary to make it possible for the State to expropriate land in the public interest without compensation."

5. The Foundation regards this question as being of central importance to the future of South Africa - not only with regard to the essential requirement for a successful process of land reform, but also for the future of property rights and hence the future prospects for the economy, as well as for the future of race relations in South Africa.

6. The Foundation therefore submits this proposal to the Constitutional Review Committee. We will also attend the public hearings and would be available to make an oral submission.

Yours sincerely,

EXECUTIVE DIRECTOR

PO Box 15785, Panorama, 7506, South Africa / Zeezicht Building, Tygerberg Park, 163 Uys Krige Drive, Plattekloof, 7500, South Africa
Tel: +27 21 930 3622 Fax: 27 21 930 3898 Email: info@fwdeklerk.org Website: www.fwdeklerk.org NPO 031-061// PBO 930004278

FW de Klerk (Chairman *Emeritus*), DW Steward (Chairman), T Eloff (Executive Director)
H Bailey, BC Bester, WAM Clewlow, E de Klerk, D Konar, R Kadalie, PJM Kunutu, WYN Luhabe, FM Mathebula

EXECUTIVE SUMMARY

1. As per **Annexure A**, the Foundation's position is that land reform and the expansion of property rights to all South Africans is of the utmost importance.

2. The Foundation believes that it is not necessary to change section 25 of the Constitution to achieve land reform and extend property rights to all South Africans. The reasons for this view are:
   2.1. Contrary to the view expressed in the Parliamentary motion, "the current policy instruments, including the willing seller policy, and other provisions of section 25 of the Constitution" (sic) have not been the main factors hindering effective land reform. According to the High Level Panel Report, the failure of land reform thus far may instead be ascribed primarily to the incapacity of the government departments involved and to corruption.
   2.2. The present formulation of section 25 and a proper legislative framework can and should be used to speed up the land reform process and extend property rights to all.
   2.3. We do not believe that section 25 has been properly utilised to effect land reform and property rights for all. In this, we support the recommendations of the High Level Panel Report.

3. We further believe that:
   3.1 an amendment of section 25 to allow EWC would have extremely negative political implications for the country, including political instability and all but destroy the national accord reached in 1994 and 1996;
   3.2. an amendment to section 25 to allow EWC will harm agricultural production and food security, as well as future investment and other sectors of the economy;
   3.3. there is a need for policy coherence and a proper legislative framework for land reform/redistribution;
   3.4. tenure reform laws provide inadequate legal protection and need to be amended;
   3.5. there is a need for secure informal land rights in both urban and rural areas (including redistributed and restored land);
   3.6. there is urgent need for a full-scale and accurate land audit;
   3.7. a special purpose vehicle (SPV) must be established to extend property rights to all South Africans effectively.

4. We endorse the findings of the High-Level Panel Report, especially its recommendation that there be greater institutional arrangements to guarantee transparency, reporting, as well as accountability. In particular, we support the Panel's recommendation that Parliament should exercise its oversight function over the Executive to ensure successful land reform.

5. The body of this submission is divided into three sections.
   5.1. **Section A** (5 pages) deals with the Foundation's view of the amendment of section 25 to allow EWC, including the political, economic and legal implications thereof.
   5.2. **Section B** (4 pages) pertains to legal and legislative recommendations.
   5.3. **Section C** (5 pages) makes recommendations pertaining to preliminary and implementation measures.

SECTION A: THE FOUNDATION'S VIEW ON THE AMENDMENT OF SECTION 25 TO ALLOW EWC

1. **The parliamentary motion has a number of points of departure:**
   1.1. In the first place, the motion states that current policy instruments, including the willing buyer, willing seller policy, and other (sic) provisions of section 25 may be hindering effective land reform.
   1.2. In the second place, the President committed to continuing land reform that entails expropriation of land without compensation (sic), using all mechanisms at the State's disposal and implemented in a way that would actually increase agricultural production and improve food security.
   1.3. This should ensure that the land is returned to those from whom it was taken under colonialism and apartheid.
   1.4. For these reasons, a process of consultation must be undertaken to determine the modalities of the governing party resolution.
   1.5. Any amendment to the Constitution to allow for land expropriation without compensation must go through a parliamentary process (through the Constitutional Review Committee). We are engaging in this process.
   1.6. In coming to a view on the intended amendment of section 25, it is necessary to note that the motion and the process essentially has three aspects to it: political, economic and legal. One cannot do justice to the motion and its process without attending to all three of these aspects. For instance, any section of the Constitution could be amended by a two-thirds majority of Parliament (with the exception of the founding provisions in Chapter 1 - that requires a 75% majority). In theory, this could be a purely political decision, with no legal motivations. But the juridical and economic consequences of any change will have to be considered, before an amendment is made.

2. **The political implications of an amendment to section 25 to allow EWC**
   2.1. The political objectives of the parliamentary motion are clear: to ensure that the land is returned to those from whom it was taken under colonialism and apartheid. Furthermore, it must be noted that the parliamentary motion speaks of a consultative process that must be undertaken (presumably by the Constitutional Review Committee) to "determine the modalities of the governing party resolution". This can only mean the Nasrec resolution in December 2017.
   2.2. The political objectives of the Nasrec resolution are that land reform and rural development must be seen as part of the programme of radical socio-economic transformation. The approach to land reform is based on three elements: increased security of tenure, land restitution and land redistribution. The accelerated programme of land reform must be done in an orderly manner and strong action must be taken against those who occupy land unlawfully. The programme of land reform must have clear targets and timeframes, be guided by sound legal and economic principles, and must contribute to the country's overall job creation and investment objectives.
   2.3. The political objectives are therefore clear: as part of radical socio-economic transformation, an accelerated land reform programme must be implemented, focusing on increased security of tenure, land restitution and land redistribution. This should not lead to the occupation of land in an unlawful manner and should also be guided by sound legal and economic principles, and contribute to the country's overall job creation and investment objectives.
   2.4. Where the political objectives are clear, the political implications and consequences can be deducted from what is happening in the country at the moment. An amendment is only being considered, however (also possibly as a result of some parties irresponsibly urging people to occupy land unlawfully), illegal occupations have increased sharply in the last number of months. If the accelerated land reform programme includes amending section 25 in such a way that expropriation without compensation becomes a reality, it could lead to widescale socio-

economic unrest, widespread land grabs and unlawful occupation of any land - regardless of who the owners are. This could lead to political instability and have dire consequences for the country. Taking the ineffectiveness and lack of capacity and numbers of the SAPS into account, the possibility of land owners taking the law into their own hands is very real. This could lead to a serious deterioration of race relations and even bloodshed and anarchy.

2.5. If EWC is adopted, even in diluted form, it would be a turning point for South Africa. The property clause was one of the most tightly negotiated compromises in the final Constitution. Non-ANC parties conceded the principle of expropriation in the national interest - which included land reform. In return, the ANC accepted that just and equitable compensation would be paid for expropriated property.

2.6. EWC, if based on the race of land owners, would also raise fundamental questions regarding property rights - and hence the right to equality - of especially white South Africans. The political implications of EWC would be to reduce white South Africans to second-class citizens in the land of their birth, with dramatically reduced rights to property because of their race. This would inevitably have far-reaching implications for national unity.

2.7. It is therefore our view that an amendment of section 25 to allow EWC would have extremely negative political implications.

3. The economic implications of an amendment to section 25 to allow EWC

3.1. In the case of the parliamentary motion on section 25, economic factors form part of the motion already - the amendment should be implemented in such a way as to increase agricultural production and improve food security. The amendment therefore must not be worded in such a way that its implemenmtation could harm agricultural production and affect food security negatively. These essentially economic factors speak to the nature of the amendment and must therefore form part of the consideration in the wording of the amendment.

3.2. In this regard, it must be noted that the Nasrec resolution brings into play two more economic factors for the amendment of section 25. These are that the amendment must not lead to the undermining of “future investment in the economy” or harming “other sectors of the economy.” These are two even stronger factors with regard to expropriation without compensation. The amendment to allow this should not cause national and international investors to decide not to invest further in the economy because the assets that they have invested in may be taken away from them without compensation. In its implementation, the amendment may also not harm other sectors of the economy, by triggering non-investment, for instance.

3.3. It is widely accepted that investors will only invest in a country where their investment and its fruits are safe from arbitrary dispossession, and even “legalised” expropriation without compensation. If they suspect or fear that this may happen, they will seek another country to invest in, or just keep their money in cash or shares. It therefore stands to reason that the amendment of section 25 cannot, by definition in terms of both the parliamentary motion and the “governing party’s resolution”, be such that its implementation harms the agricultural sector, food security, any other sector of the economy, or discourages investment.

3.4. What makes this point stronger, is that the test of whether implementation of the amendment would have negative effects, is not an objective one. Parliament and the governing party cannot by any objective standard or law decide that the implementation of the amendment would not be harmful. Because investment and agricultural production are voluntary actions, the test is a subjective one. If the implementation of the amendment is perceived as such that it would not render an investment safe, the investor would go somewhere else - and the economy would be harmed. The slightest perception that the title deed to a farm is not safe against EWC, could cause a farmer to consider discontinuing with farming - with harmful effects to food security. This applies to South African farmers from all communities, as well as foreign farmers. This subjectivity places an

even greater responsibility and burden upon the Constitutional Review Committee and Parliament to ensure that no amendment to allow EWC is made, or that any amendment made is worded in such a way as not to cause the harmful effects that both the motion and resolution mention.

3.5. In effect, and in our view, the harmful economic consequences of amending section 25 to expropriate land (or other property) without compensation, would be against the spirit and wording of both the parliamentary motion and the Nasrec resolution. It would cause irreparable harm not only to the agricultural sector and food security, but also to future investment and other sectors of the economy. Certainty of property rights is the cornerstone of successful economies all over the world. EWC is the exact opposite of that.

4. **The legal implications of an amendment to section 25 to allow EWC**

4.1. Possible inconsistency with section 36

If you remove the term "law of general application" at section 25(2), then the amendment is going to run contrary to the limitation clause at section 36(1)(a). The limitation clause states that in limiting any rights, such limitation has to take into context an open, democratic, society that is based on human dignity, equality and freedom. In targeting a specific group of South Africa's population, the law no longer becomes a law of general application and it is running contrary to the values of section 36, which need laws not to run contrary to the notion of equality.

4.2. Removal of just and equitable compensation

Should the amendment remove the reference to just and equitable compensation, and instead make provision for zero compensation, it infringes upon the foundational values of the Constitution, which establish South Africa as a nation based on the Rule of Law. Taking away the just and equitable requirement detracts from the principles of legality, which undergird the Rule of Law.

4.3. Taking out the jurisdiction of the court to approve the compensation

Ousting the jurisdiction of the court in the finalisation of compensation transgresses all known legal principles, given that courts are the upper guardians of the law and the Constitution. As such, this amendment would run contrary to established legal norms.

5. **In summary**:

5.1. As can be gleaned from **Annexure A**, the Foundation's position is that land reform and the expansion of property rights to all South Africans are of the utmost importance.

5.2. Together with numerous respected jurists, including the late Arthur Chaskalson CJ, and the High Level Panel, the Foundation believes that it is not necessary to change section 25 of the Constitution to effect land reform and extend property rights to all South Africans. There are a number of reasons for this view:

5.2.1. Contrary to the view expressed in the parliamentary motion, "the current policy instruments, including the willing seller policy, and other provisions of section 25 of the Constitution" (sic) have not been the main factors hindering effective land reform. According to the High Level Panel Report, the failure of land reform thus far may instead be ascribed primarily to the incapacity of the government departments involved and to corruption.

5.2.2. We are of the opinion that the present wording of section 25 and a proper legislative framework can and should be used to speed up the land reform process and extend property rights to all.

5.2.3. We do not believe that section 25 has been properly utilised to effect land reform and property rights for all. In this, we support the recommendations of the High Level Panel Report.

5.2.4. We believe that an amendment of section 25 to allow EWC would have extremely negative political implications for the country, including political instability and all but destroy the national accord reached in 1994 and 1996.

5.2.5. We believe that an amendment to section 25 to allow EWC will harm agricultural production and food security, as well as future investment and other sectors of the economy.

6. In addition, we would like to take the opportunity to make a few general remarks, pertaining to agricultural land reform and urban land reform.
   6.1. We believe that expropriation should be the last option that the State should consider in achieving effective agricultural land reform, as there are millions of hectares of government-owned land are available for redistribution and 20 000 commercial farms are up for sale.
   6.2. The average age of commercial farmers is over 60. Thousands of farmers are leaving the land because of farm murders, recurrent droughts and uncertainty caused by land reform. Some of our best young farmers are emigrating to countries where their skills are eagerly sought. The governing party's real challenge may in future be to keep farmers - of all races - with proven food-producing abilities on the land.
   6.3. There are other promising approaches to land reform. Organised agriculture has repeatedly - but without any effective response - made practical proposals for the development of a prosperous black agricultural sector, and land reform schemes in the Western Cape have met with considerable success.
   6.4. Putting millions of new farmers onto small farms that they do not own is not the solution to South Africa's economic or agricultural problems. Agriculture contributes only 2.7% to GDP and more than 75% of all our food is produced by approximately 100 mega-farms. According to a World Economic Forum report in 2015, just 3% of South Africa's farmers produce 95% of the country's formal sector food. The other 5% is produced by 220 000 emerging farmers and two million subsistence farmers.
   6.5. The acquisition of suitable urban land for housing should be the primary objective of urban land reform efforts, as there is enormous demand for urban land to house the millions of people who have poured into cities in recent years.
   6.6. Government should also consider the adoption of legislation to enable the fast-tracking of the provision of title deeds to the 7.5 million black South Africans who own their own homes. It is estimated that the value currently locked up in these homes may be approximately R1.5 trillion. This is five times the value of all the agricultural land in South Africa.

7. Our strong views in this regard do not mean that we support the *status quo* on property rights and land reform. Please find the Foundation's recommendations below suggesting how to extend property rights to all South Africans and effect meaningful land reform.

SECTION B: LEGAL AND LEGISLATIVE CONSIDERATIONS AND RECOMMENDATIONS

1. **Introduction**
   1.1. As stated above, we believe that section 25 has not been properly utilised to effect land reform and property rights for all South Africans.
   1.2. In order to do this, a number of legislative changes need to be made. Before we go into these, a few preliminary considerations are necessary.
   1.3. The purpose of section 25 has to be seen both as protecting existing private property rights, as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.[1] Subsections (4) to (9) of section 25 underline the need for, and are aimed at, redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa.[2]
   1.4. The Constitution recognises that land rights and the right of access to housing and of not being arbitrarily evicted, are closely intertwined. The stronger the right to land, the greater the prospect of a secure home. Land reform is facilitated, and the State is required to foster conditions enabling citizens to gain access to land on an equitable basis. Persons or communities with legally insecure tenure because of discriminatory laws are entitled to secure tenure or other redress, and persons dispossessed of property by racially discriminatory laws are entitled to restitution or other redress. Furthermore, sections 25 and 26 create a broad overlap between land rights and socio-economic rights, emphasising the duty on the State to seek to satisfy both.[3]
   1.5. The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*[4] explains the schematic relationship between sections 25 and 26 of the Constitution. This interpretation emphasises a relationship between land hunger, homelessness and respect for property rights, without creating a hierarchy, but rather a reconciliation of seemingly opposed claims. Importantly, the decision makes apparent that the Constitution is strongly supportive of orderly land reform and does not sanction arbitrary seizure of land, whether by the State or by landless people.

2. **Amending the *Expropriation Act***
   2.1. Section 25(2) and (3) of the Constitution, as detailed above, allow for expropriation of property in terms of law of general application, for a public purpose or in the public interest, subject to just and equitable compensation.
   2.2. Section 25(3) lists non-exhaustive factors to be considered when either the State or a court is deciding the compensation amount. All of these are subject to the fact that the compensation paid must be "just and equitable" and the amount must either be agreed by those affected or decided or approved by a court (25(2)(b)).
   2.3. The Constitution stands as the supreme law of the land and as such, all other laws are subject to the Constitution - this also applies to the current *Expropriation Act* 63 of 1975 (*Expropriation Act*). The *Expropriation Act* provides that all expropriations are subject to the compensation principles established in the *Expropriation Act*. Compensation must be paid for the value of the property, which is market value. Market value is then determined by considering what a willing buyer would pay a willing seller for the property in question.

---

[1] *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* 2002 (4) SA 768 par 50.

[2] Per Ackerman J in *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 2002* (4) SA 768 par 49-50.

[3] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) at para 19.

[4] *Port Elizabeth Municipality v Various Occupiers 2005* 1 SA 217 (CC) at paras 20 - 23.

2.4. The *Expropriation Act* conflicts with the Constitution. Notably the *Expropriation Act* only refers to public purpose, while the Constitution refers to public purpose and the wider public interest. In the calculation of compensation, the *Expropriation Act* prescribes market value, whereas the Constitution provides for "just and equitable compensation".

2.5. Further, the *Expropriation Act* does not recognise unregistered rights in land and as such does not offer protection for such rights in the event of an expropriation. To this extent, the *Expropriation Act* fails constitutional muster and arguably fails to ensure tenure security - as is demanded by section 25(6) of the Constitution as quoted above.

2.6. The Land Claims Court in *Msiza v the Director General of Rural Development and Land Reform*[5] on the question of what constitutes just and equitable compensation stated that the point of departure in such enquiry should be "justice and equity", with market value being merely one of several factors to be considered in the quest to achieve just and equitable compensation.

2.7. The dissonance between the Constitution and the *Expropriation Act* hampers the ability of the State to effect land reform and a concomitant extension of property rights to all South Africans.

2.8. Accordingly, the *Expropriation Bill* [B4D-2015] - which was returned by the President to the National Assembly due to reservations about inadequate public participation - should be amended to define "just and equitable compensation".

3. **Land redistribution/reform legislation**

3.1. The challenges facing land redistribution are well known and it is not our intention to rehash the challenges.[6] Nonetheless, we submit that the well-documented failures of land redistribution can be, at the minimum, rescued by comprehensive legislation to govern land redistribution.

3.2. In line with this, there is a need for a clear definition of land reform as it is used in section 25. Most South Africans agree on the need for an effective and equitable process of land reform. Land reform, in terms of section 25, is also a constitutional imperative. However, there is no definition of land reform: it could be used to enhance vastly the property rights and freedom of millions of South African citizens - or it could be used to consign them to a condition of perpetual dependency in a system in which the State would be custodian of all the land in the country, or the traditional leader controls the land on which they live and work.

3.3. There is currently no law that governs the access to land on an equitable basis. There is a need for a comprehensive framework, and in particular, there needs to be an alignment of land redistribution with agrarian reform.

3.4. This alignment needs to create a right to State support in post land reform circumstances, to guard against any possible threats to food insecurity. There needs to be a guarantee of skills transfer to ensure the re-emergence of African farmers. At present, the *Proactive Land Acquisition Strategy* (PLAS), as implemented by the Department of Rural Development and Land Reform, involves the State purchasing land and leasing out the same to beneficiaries without transfer of title. This creates an untenable situation in which land redistribution beneficiaries are unable to raise capital against title to continue farming activities, hence a possible threat to food security. It is submitted that the proposed land redistribution legislation obliges the State to transfer title to beneficiaries to ensure tenure security and minimise the risk of farming failure.

3.5. This legislation should detail -

3.5.1. the intended beneficiaries with due cognisance of the need to rectify gender imbalances;

[5] *Msiza v Director General for the Department of Rural Development and Land Reform and Others* 2016 (5) SA 513 (LCC).

[6] For a complete diagnostic report on the challenges and shortcomings of land reform, see the High Level Panel Report at: https://www.parliament.gov.za/high-level-panel [accessed 11 June 2018].

3.5.2. a definition of the term "equitable access to resources" as mentioned in section 25(5) of the Constitution; and

3.5.3. possible indicators (signaling a sunset clause) of successful land redistribution, namely improved food security, more income, increased wellbeing, reduced vulnerability and improved agricultural sustainability.

4. **Security of tenure**

4.1. A key function of the property clause is tenure security for individuals and communities whose tenure of land is legally insecure and further, Parliament is mandated to enact such a law, in accordance with section 25(6). However, this is yet to happen and as such, Parliament is in breach of its constitutional obligations. Current legislation including the *Interim Protection of Informal Land Rights Act* 31 of 1996 (IPILRA), the *Land Reform (Labour Tenants) Act* 3 of 1996*,* and the *Extension of Security of Tenure Act* 62 of 1997 (ESTA) are insufficient in guaranteeing tenure security.

4.2. In particular, the IPILRA was intended as a temporary measure to ensure temporary legal protection for people without formally-recognised land rights, while the State developed more comprehensive legislation to protect and regulate communal tenure. However, IPILRA is annually extended as Parliament has failed to enact laws to ensure the protection of communal tenure. The IPILRA has limitations, namely its lack of legal certainty over the nature of the rights which it seeks to protect.

4.3. There are 16 million people dwelling in erstwhile homelands, which areas are disproportionately poor compared to the rest of South Africa. Many inhabitants of the erstwhile homelands have secure forms of tenure, which can be characterised as "informal". The use of apartheid-era "Permission-to-Occupy" (PTO) certificates, as proof of some form of land rights, is still rife in many of these areas. There is however no policy directive in respect of how the State deals with PTOs.

4.4. We submit that that the IPILRA be amended to strengthen further both the legal and practical protection of informal rights in land. In particular:

4.4.1. The publishing of regulations to grant legal certainty over the nature of rights, in accordance with section 4 of the Act, which explicitly provides that the Minister may make regulations in order to achieve the objects of the Act.

4.4.2. The abolishment of PTOs and, as replacement, secure title, recognising the communal aspects of some forms of ownership - where the layered and interconnected property rights are already recognised and respected by communities.

4.4.3. Amending the temporal nature of the IPILRA to ensure permanent legislation governing tenure security in communal areas.

4.5. The *Labour Tenants Act* has widely failed in its intentions, due in most part, to implementation failures. While the *Labour Tenants Act* has given labour tenants increased bargaining power, as well as legal protection from eviction, such successes are however few and far between. As such, it is submitted that the *Labour Tenants Act* be amended. In particular

4.5.1. the inflexible conception of the definition of what constitutes a labour tenant is arbitrary and as such, excludes many individuals currently living and working on farms from the protection offered by the *Labour Tenants Act*;

4.5.2. ensuring the increased role of the Land Claims Court, while also increasing the role of Alternative Dispute Resolution (ADR) mechanisms;

4.5.3. giving Parliament an increased oversight role in guaranteeing that the Department of Rural Development and Land Reform is held to account for its obligations to protect and advance the rights of labour tenants.

4.6. The *Extension of Security of Tenure Act* was promulgated to give effect to sections 25(5) and (6) of the Constitution. It is roundly criticised for its main function of regulating evictions rather than rather than extending substantive statutory tenure rights.[7] It is on this basis that we submit that there is a need to amend the ESTA to create secure tenure.

4.6.1. In particular, the *ESTA* can be amended to include a process through which farm dwellers can upgrade their tenure *in situ* to become freehold owners on the portion of the farm on which they currently live;

4.6.2. the mandatory provision of legal representation to farm dwellers faced with eviction; and

4.6.3. the introduction of Alternative Dispute Resolution (ADR) mechanisms to resolve disputes over provisions in the *ESTA.*

[7] 2005 National Evictions Survey concluded that more people living on farms had been evicted in the 10 years of democracy (1994-2003) than in the 10 years prior. See https://pmg.org.za/committee-meeting/5542/ [accessed 11 June 2018].

SECTION C: RECOMMENDATIONS WITH REGARD TO PRELIMINARY WORK AND IMPLEMENTATION

1. **The urgent need for a proper and reliable land audit**

1.1. The Department of Rural Development and Land Reform did a land audit in 2013, using 2010 statistics. As such, it is already outdated. It also followed a wholly inadequate and questionable methodology. It looked at what land was registered as State land, while all other land was regarded as private land (including the communal land in the former homelands), and this was deemed to belong to white South Africans.

1.2. The second land audit was done by the Department of Rural Development and Land Reform in 2017, using statistics up to 2016. Its methodology was to go the primary sources of data at the Deeds Office, the Surveyor-General, the Department of Home Affairs and Stats SA. It gives the number of landowners by "land parcel type". It then deals with three types of land ownership (farms and agricultural holdings, erven, and sectional title) in terms of the individual landowners by race, gender and nationality.

1.3. There are, however, several serious problems with the 2017 government audit, amongst others:

1.3.1. A number of glaring inaccuracies and mistakes, especially in the executive summary. For instance, it is stated that "individuals, companies and trusts own 89 523 044 hectares or 90% of the 114 223 276 hectares land". The correct number is actually 78.3%. When the subtotals of the types of ownership are combined, they also do not add up.

1.3.2. The second problem is that the audit assumes certain numbers or does not explain them. When private land ownership is discussed, it jumps (with no explanation) from the 114.2 million hectares mentioned above, to a number of 93.956 million hectares. This presumes that the State owns 27.96 million hectares, a figure for which no explanation is given. In an even stranger way, when it gives tables for individual land ownership for farms and agricultural holdings, its numbers fall to 37 078 289 hectares - without any explanation. According to the report, of these 37.1 million hectares of land, whites own 72%, coloureds 15%, Indians 5% and Africans 4%. But this represents only 30.4% of all land, and only 39.4% of all privately-owned land.

1.3.3. Third, for the purposes of land reform, the audit leaves a number of questions unanswered. What is the size of State-owned land? Does this include communal land? What percentage of farms and agricultural holdings can and should be available for land reform?

1.3.4. The audit makes no distinction between agricultural, urban and communal land. In one section it states that "Agricultural holdings and Farms" make up 111 million hectares (or 90.9%) of the country. This is clearly not correct.

1.4. The third audit was recently commissioned by AgriSA and done by Agri Development Solutions (ADS). The full ADS report was never published, but AgriSA used some of its data to produce a report that focused almost exclusively on agricultural land. Their methodology was a transactional approach: to follow and record the commercial land transactions registered in the Deeds Office, supplemented with data from Stats SA and the Department of Agriculture, Forestry and Fisheries (DAFF). The report states that South Africa consists of 122.8 million hectares, of which 29.2 million hectares (25%) consist of government land, urbanised land, industrial areas, mining land, privately-owned conservation areas and national parks. The total available agricultural land consists of 93.3 million hectares (76%). Government programmes for the purchasing of agricultural land yielded 2.2 million hectares, where private purchases by previously disadvantaged individuals amounted to 4.3 million hectares, with a total of 6.5 million hectares transferred since 2000. The report therefore shows

that there was some progress in agricultural land reform - more so from the "market" than from the State. The main problem with the results of the AgriSA Report is that it focuses only on agricultural land and is by definition limited in its scope.

1.5. It is clear from the three audits that there are crucial areas in which there is no reliable data available - and this missing data is essential for the planning of an accelerated land reform process. This includes the following:
    1.5.1. What is the extent of agricultural land in South Africa? ADS says 97 million hectares, while the 2017 government audit puts it at 111 million hectares.
    1.5.2. How many hectares of agricultural land are owned by individuals? The government audit puts this at only 37 million hectares, but no explanation is given for this figure.
    1.5.3. What is the real number of hectares owned by black South Africans? How much communal land do black South Africans have tenure on? How much of this could be converted to individual ownership?
    1.5.4. How much State-owned land can be used for land reform? How many farms has the State bought or expropriated that could be available for black farmers?
    1.5.5. How much land has the government already acquired for black farmers? And how many commercial transactions have taken place? What is the real total of land that went from white to black hands (including State-owned land) since 1994? AgriSA puts this at 11.3 million hectares. However, this is not even mentioned in the government audit.
    1.5.6. What is the breakdown of ownership of agricultural land in terms of use? The government audit talks about 13.9 million hectares that are "cultivated" and 97.5 million ha that are "rangeland". But what percentage of this is owned by whom?
    1.5.7. As the need for urban settlement and housing is clearly extensive, what is the amount of municipal land available for this?

1.6. In the light of the above, we recommend that an independent land audit is commissioned as a matter of urgency. This could not be left to any government department or private consultancy. Either Parliament or the Presidency should commission an expert task team to lead such an audit. It should have the cooperation of all relevant departments and have access to all relevant land records and statistics. Even though one understands that such an audit is a mammoth undertaking, a specific timeframe and target dates should be set - preferably not longer than one year.

2. The process to achieve the extension of property rights to all South Africans, through accelerated land reform

2.1. From a careful reading and study of the relevant section of the High Level Panel Report, it is clear that the land reform process has two main shortcomings. The first is the lack of a proper legislative framework. This issue was addressed in section B above.

2.2. The second shortcoming is the lack of political will, as well as a lack of capacity and transparency in the implementation of land reform, including restitution, redistribution and land tenure. The lack of political will has been addressed with the section 25 process. The lack of capacity (and linked to it, the wide-scale corruption that the High Level Panel Report speaks of), however, is not easily addressed.

2.3. Once an appropriate legislative framework has been created, it would be necessary to consider the institutional mechanisms to implement the process at various levels and in various areas. It is recommended

that a special purpose vehicle (SPV) is created to implement the accelerated land reform process. This has been done before - around 2010 - in the turnaround strategy of the Department of Justice. It essentially means the creation of a legal entity to serve a particular function. The Wikipedia definition is instructive: "A special-purpose vehicle is a legal entity (usually a limited company of some type or, sometimes, a limited partnership) created to fulfil narrow, specific or temporary objectives". An SPV could be established in terms of legislation or ministerial/presidential regulation.

2.4. The staff of the SPV could consist of the best public servants who are available and knowledgeable, as well as some experts from the private sector and NGOs. The CEO of the SPV should report directly to the Presidency. In that way, incompetent and corrupt officials could be isolated and circumvented. One of the advantages of an SPV would be that it could work across government departments and even provinces and municipalities, without the normal "turf wars" and bureaucracy.

2.5. The SPV should receive a very specific mandate, with objectives and targets to be achieved in a specific timeframe. In this case, the timeframe could be five years. The mandate could include the following:

  2.5.1. Create an overall master plan to accelerate land reform in terms of urban, agricultural and communal land. It would have specific sections on restitution, redistribution and land tenure.

  2.5.2. The organisational structure would have to make provision for separate units for urban, agricultural and communal land reform. This would be necessary because the modalities of the three areas are so different.

2.6. Generally, the plan would have to deal with the following issues:

  2.6.1. The factual situation with regard to the present ownership of land (a land audit).

  2.6.2. What land is already available for land reform purposes. Here the 4 000 farms that the State has already acquired, could be a good start.

  2.6.3. Transparent processes through which any potential beneficiaries should be decided. This has been shown to be serious deficiency in the past.

  2.6.4. The legal aspects of any specific land reform processes (redistribution, restitution and land tenure). This would include assisting beneficiaries with property issues, as well as title deeds.

  2.6.5. Post-settlement support, where partnerships with the private sector and NGOs would be paramount. Such support has also proven not to be successful or effective in the past.

  2.6.6. Financial planning and arrangements to manage the process in a sustainable way.

2.7. With regard to urban land reform, the following issues will have to be dealt with:

  2.7.1. Working with local government on the issue of what land could be made available for urban development, and specifically housing.

  2.7.2. Determining through a transparent and fair process who would be beneficiaries of urban erven being made available as part of the programme.

  2.7.3. Working with local government to hand over title deeds to individuals/families for the land on which houses are built in the former townships.

  2.7.4. Ensuring that both categories of owners above receive title deeds for their properties.

  2.7.5. Fast-tracking township development and providing services such as electricity, water and sanitation.

2.8. With regard to agricultural land reform, the following issues will have to be dealt with:

  2.8.1. Start working with the farms already in government possession, so that beneficiaries are determined through a transparent and fair process.

2.8.2. Ensure that title deeds are handed over, and appropriate and applicable conditions are set (e.g. that the beneficiary may not dispose the farm within a number of years, lest it reverts back to the State).

2.8.3. On the basis of the land audit, start identifying what other agricultural land can become available for land reform purposes, either in the open market (there are 20 000 farms on the market today), or in areas where land may be unutilised or underutilised.

2.8.4. Identify the best of these and start the process of identifying possible beneficiaries through a transparent and fair process.

2.8.5. With the help of the DAFF and NGO and private sector partners, establish a proper settlement support programme for beneficiaries. This should include agricultural and financial advice.

2.9. With regard to communal land reform, the following issues will have to be dealt with:

2.9.1. Determine the number of people living in and working the land in communal areas (including State trust land).

2.9.2. Negotiate with the traditional leaders a way of giving secure tenure to those living on and working the land. In this process, the assistance of the government and possibly other political parties would be important.

2.9.3. In the case of those wanting to farm commercially on communal land, a financial mechanism to enable them to use the land as security should be found. In lieu of individual title deeds, the possibility of a State guarantee to the financial institutions may be an option.

2.9.4. We do not venture into the difficulties presented by the Ingonyama Trust, but as the High Level Panel Report has correctly indicated, this goes to the heart of communal land reform.

2.10. The above recommendations are not worked out in detail, but it should give an idea of what is possible if an SPV is created. The Foundation believes that this is the only way to accelerate land reform in a meaningful way, thereby effectively extending the property rights of all South Africans.

Ends