



**B M F**

**BLACK MANAGEMENT FORUM**  
DEVELOPING MANAGERIAL LEADERSHIP

**BMF Submission on Amendment of Section 25 of the Constitution**

**30 January 2020**

## **1. BACKGROUND CONTEXT**

The Black Management Forum (BMF) is a non-racial, thought leadership Organization with the main purpose of influencing socio-economic transformation of our country, in pursuit of socio-economic justice, fairness and equity. The organization stands for the development and empowerment of managerial leadership primarily amongst black people within organizations and the creation of managerial structures and processes, which reflect the demographics and values of the wider society. It is against this background that the BMF spearheads the process of systemic transformation of the workplace anchored largely through the Employment Equity Act of 1998 (EE Act) and Broad-Based Black Economic Empowerment Act of 2003 (BBBEE Act) as amended.

Land is a limited resource and fundamental to socio-economic transformation of our country. Only 30% of earth is covered by land and only a handful of this is useful for production. All other resources can only be provided on land. Land is the basis of human existence as it enables for habitation, agriculture, forestry, mining and industry. Thus, ownership of land is a fundamental economic currency that will always be highly contested. As such, there must be unambiguous Constitutional stance on the issue of ownership.

South Africa is a majority Black country. White people constitute only 9% of the population yet they own 87% of the land. The history behind this fundamentally flawed picture is very well known. Land reform has been in place since the dawn of democracy to transfer land ownership into black hands. Yet, since 1994, about 9% of the 83 million hectares of land owned by whites has been transferred to blacks. There has undoubtedly been a very slow pace of land redistribution that has denied justice to the people of South Africa, and this must be corrected.

## **2. BMF POSITION ON LAND REFORM**

In June 2016 the BMF submitted a position towards land reform stating that it was opposed to “land ownership and custodianship of the state” and linked to this, the idea of “land-use licenses, which should be granted only when there is a purpose for the land being applied for”. The reasons behind this position are that land dispossession in South Africa was visited upon the citizens, specifically black people as a group, by the State through force and legislation. As a result, it is black people who lost ownership and use of their land, and not the state. It stands to reason then, that land ownership and use must be returned to the people who lost it.

However, in returning and fast-tracking land redistribution South Africans agree that the following issues need to be considered:

<p><b>Impact on production capacity</b></p> <ul style="list-style-type: none"> <li>• Sustainability</li> <li>• Food production and security</li> <li>• Exports and country's competitiveness</li> </ul>	<p><b>Impact on the rest of the economy</b></p> <ul style="list-style-type: none"> <li>• Slow economic growth, unemployment effect</li> <li>• Downgrading to sub – investments by rating agencies</li> </ul>
<p><b>Impact on capital investment in agriculture</b></p> <ul style="list-style-type: none"> <li>• Large disinvestment in the sector.</li> <li>• Productivity</li> <li>• Job losses</li> <li>• Systemic risk for the South African banking/financing industry</li> </ul>	<p><b>Possible damage to the agri-sector and economic collapse</b></p> <ul style="list-style-type: none"> <li>• Effect on GDP growth, employment creation and food security</li> </ul>

Accordingly, a proposal has been made to amend s25 of the Constitution to reflect the wishes of the majority of South Africans to responsibly fast track land redistribution. This wish is reflected by a motion that was adopted by more than 2/3 of Parliament proposing a Bill to amend s25 of the Constitution, which is reflected as thus:

*...in his State of the Nation Address, President Cyril Ramaphosa, in recognizing the original sin of land dispossession, made a commitment that Government would continue the land reform programme that entails **expropriation of land without compensation**, making use of all mechanisms at the disposal of the State, implemented in a manner that increases agricultural production, improves food security and **ensures that the land is returned to those from whom it was taken under colonialism and apartheid** and undertake a process of consultation to determine the modalities of the governing party resolution."*

It is crucial therefore, that the implementation of the amendment consider all the elements of the motion namely "**Expropriation of land without compensation**" and "**Ensures that the land is returned to those from whom it was taken under colonialism and apartheid.**"

### 3. GAPS IN THE PROPOSED AMENDMENT BILL

The facets of the Draft Constitution Eighteenth Amendment Bill, 2019 ("Bill") are largely a reflection of the current section 25 framework. There are several hurdles standing in the way of the Bill's restorative justice object. Not the least of these is that, fundamentally, it provides little certainty and leaves the court as the arbiter of the very same socio-economic challenge of the past two and a half decades as it has over said period.

The adoption of the provisions of section 25 of the Constitution sought to ensure that government can expropriate land for a public purpose in the public interest. In its more than 24 years of existence, the adoption of section 25 of the Constitution has had little impact in transforming the socio-economic dynamics and in the land redistribution / reform programme. By way of example, many of the expropriation cases that have come before the courts have centered on the quantum of compensation as contemplated by section 25(2) of the Constitution. To date, very few expropriation cases have been successfully negotiated (quantum included) between the 'willing seller' (white minorities) and the 'willing buyer' (the State). As a result of this poor track record, the socio-economic landscape remains largely untransformed and land ownership remains highly concentrated. The Bill is susceptible to the same courtroom contests and is doomed to suffer the same fate of a poor track record. Land expropriation is still subject to compensation under the Bill, with the only slight difference introduced by the Bill being that" ...a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil." [our emphasis]

The most direct way of forging ahead with the restorative justice object would be to, inter alia, insert a social obligations clause in the Constitution, as has been done in Brazil. This clause affirms the rights of landless people who openly occupy unused land for basic livelihood purposes. This would provide legal protection to occupiers, instead of criminalizing their actions. Although this was a resolution of the 2005 Land Summit, the government has not taken the proposal further and appears deeply reluctant to do so. The relevant clause in Brazil's Constitution reads as follows:

*"The individual who, not being the owner of rural or urban property, holds as his own, for five uninterrupted years, without opposition, an area of land in the rural zone, not exceeding fifty hectares, making it productive with his labor or that of his family, and having his dwelling thereon, shall acquire ownership of the land".*

Alongside a social obligations clause, two approaches must be followed in the planning of acquisition of land namely, (i) land meeting certain criteria in an area is prioritized by the state; and (ii) specific properties are designated and owners are informed that the state wishes to acquire their land without compensation (they would only be receiving any monetary compensation (if needs be) – on a reasonable market value basis – only for significant structures constructed on such land (this is not the same as expropriation subject to compensation whereby the state pays the market value of the land, and not structures, such as a building, constructed on such land).

Where planning has identified which land is needed for redistribution, the state would be able to make a public call for land to be made available, indicating what land is needed, and to invite offers of settlement from landowners (for significant structures constructed on such identified land). Where this fails to elicit the required response, the state would need to enter robust negotiations with landowners for the release of land identified for redistribution in a given (i.e. municipal) area. This would be the basis on which to see whether any workable deal could be made between landowners as a group and the state – essentially a form of social pact.

The state has the ultimate power to make land available to meet demand by using its power of ‘eminent domain’ and expropriating land. Using the amended provisions (as set out below) of the ‘property clause’ in the Constitution, the state would be empowered to expropriate property for a public purpose or in the public interest – including for land reform purposes – without compensation.

Under the ‘new dawn’ regime, information about who owns what property would be a precondition for the above proactive methods of dealing with the supply of land for redistribution. In the first instance, the state would have to conduct land audits on private land to ascertain who owns what and how it is being used, and to identify unused and underutilized land that could be prioritized for ‘speedy’ acquisition without compensation. This information would then have to be made publicly available at a local level both to communities who may have land needs, and to municipalities.

Contrary to the formulation as contained in the Bill, the resolution does not say anything about circumstances or situations where compensation is applicable. The drafters have erred in including compensation related aspects. The resolution is very clear that Parliament must prepare an amendment to enable expropriation without compensation and matters connected therewith, period.

The resolution also does not seek to abdicate the responsibility to declare expropriation without compensation and delegate such a responsibility to the Courts. The drafters of the Bill have erred in this regard. Courts must be protected from the over-reach they are sometimes accused of. The legislators must make clear laws with no deliberate grey areas. Similarly, giving all the decision powers to the Minister is problematic as it opens potential for corruption that the country is already battling with. The Minister must also be protected in this regard.

In addition, the adopted resolution is quite explicit on the question of time period over which the land dispossessions occurred. The resolution is unambiguous, it specifically mentions that the land that must be returned is that land which was taken under colonialism and apartheid. The reference to colonialism impacts section 25(7)

#### **4. BMF PROPOSAL TO THE BILL**

This Bill aims to amend the Constitution of the Republic of South Africa, 1996, by providing for the expropriation of land without the payment of compensation and amending all the subsequent subsections to give full effect to the resolution as adopted by Parliament.

“Section 25 of the Constitution must be amended to remove any ambiguity in the Constitution, with regards to expropriation of land without compensation, as a legitimate redress for land reform, so as to address the colonial and apartheid historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership of all categories of land including commercial, Industrial, Residential and Agricultural.

BMF further recommends that Parliament must urgently establish a mechanism to effect the necessary amendment to the relevant parts of section 25 of the Constitution. That mechanism was established by a resolution of the National Assembly first during the Fifth Parliament, and then again, in the Sixth Parliament, which resulted in the development of this Bill.

BMF proposes the following amendments to the purpose and preamble of the Bill.

##### **BILL**

**To amend the Constitution of the Republic of South Africa, 1996, to provide that where land and any improvements thereon are expropriated for the purpose of land reform, there should be no compensation and to make any other amendments to give full effect to the entirety of the resolution as adopted by Parliament.**

##### **PREAMBLE**

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

**AND WHEREAS** section 25 of the Constitution of the Republic of South Africa, 1996, must be amended to remove any ambiguities, so that expropriation without compensation is the only legitimate mechanism for land reform;

**AND WHEREAS** such an amendment will contribute to addressing the colonial and apartheid historic wrongs caused by the arbitrary dispossession of land;

**AND WHEREAS** such amendments will further ensure equitable access to all land and will further empower the majority of South Africans to be productive participants in ownership of all categories of land including residential, industrial, commercial and agricultural;

**AND WHEREAS** this Act is called the Constitution Eighteenth Amendment Act, 2019, and comes into effect on the date determined by the proclamation in the Gazette.

#### **BMF'S PROPOSED WORDING TO AMEND SECTION 25 OF THE CONSTITUTION**

**BE IT THEREFORE ENACTED** by the Parliament of the Republic of South Africa, as follows: -

##### **Amendment of section 25 of the Constitution**

Section 25 of the Constitution of the Republic of South Africa, 1996 is hereby amended-

- a) the deletion of subsection (1).
- b) substitution of subsection (1) by this wording "***Property, identified and designated by the state for a public purpose or in the public interest, including land reform, may be expropriated only in terms of law of general application without compensation***".
- c) the deletion of subsection (2).
- d) substitution of subsection (2) by this wording "***Notwithstanding subsection (1), the state may be required to pay compensation for any significant structures constructed on land that has been identified and designated by the state for a public purpose or in the public interest, including land reform, provided that such structures are in use at the time the land is identified and designated by the state for expropriation without compensation***".
- e) the deletion of subsection (3).

- f) substitution of subsection (3) by this wording ***“A previously disadvantaged individual who, not being the owner of rural or urban property, holds as his or her own, for 3 (three) uninterrupted years, without opposition, an area of land in the rural zone, not exceeding fifty hectares, making it productive with his or her labor or that of his or her family, and having his or her dwelling thereon, shall acquire ownership of the land”***
- (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.
- (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.
- g) the deletion of subsection (7).
  - h) substitution of subsection (7) by this wording ***“A person or community dispossessed of property after 6 April 1962 as a result of past colonial and racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, to restitution of that property or to equitable redress”***
  - i) deletion of subsection (8).
  - j) substitution of subsection (8) by this wording ***“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.”***
- (9) Parliament must enact the legislation referred to in subsection (6).

## 5. CONCLUDING REMARKS

The above constitutional amendment proposals are critical and necessary constitutional changes that as BMF, we respectfully request the Committee to consider and accept if we are to trudge ahead with our land redistribution / reform objectives to achieve a “just and equal constitutional democratic ‘rainbow’ nation” in a highly concentrated constitutional democracy.