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Dear Committee Members

**SUBMISSION TO THE JOINT CONSTITUTIONAL REIEW COMMITTEE ON THE REVIEW OF SECTION 25 OF THE CONSTITUTION**

1. **Introduction**

- 1.1 The South African Property Owners Association (**SAPOA**) is the representative body and official voice of the commercial and industrial property industry in South Africa.
- 1.2 South Africa's property industry is currently estimated to be worth some R8 trillion and is the bedrock of our economy.
- 1.3 SAPOA supports land redistribution and reform so as to redress past historical imbalances. Unless there is significant reform and redistribution within the property sector, the entire sector is placed at risk. Accordingly, SAPOA welcomes the opportunity to submit representations on the issues identified by Parliament in its resolution of 27 February 2018 namely :
  - (a) Whether current policy instruments, including the willing buyer/willing seller policy and the other provisions of Section 25 of the Constitution are hindering effective land reform;
  - (b) Whether expropriation of land without compensation should be introduced and whether it is possible to implement this in a manner that increases agricultural production and food security;

(c) What future land tenure regimes should be adopted or implemented.

- 1.4 The progress of land reform and land redistribution, since 1994, has been inadequate. Quite clearly, steps need to be adopted so as to accelerate the pace of land reform and redistribution.
- 1.5 Parliament, the State and civil society, including such organisations as SAPOA and its members, need to work collectively to achieve this aim.
- 1.6 SAPOA agrees that some of the current policy instruments, such as the willing buyer / willing seller policy may have hindered effective land reform.
- 1.7 Section 25 of the Constitution provides all of the effective mechanisms to achieve land reform. The State needs to unlock its considerable land holdings, mainly vacant and unused land, in urban and rural areas so as to accelerate reform and access to land. The willing buyer / willing seller policy needs to be changed and the State needs to use its powers under Section 25 of the Constitution to expropriate land required for land reform.
- 1.8 There is no need for land to be expropriated without compensation. Section 25 of the Constitution provides that just and equitable compensation is to be paid on expropriation. This does not necessarily mean that the compensation has to be at market value, but rather equitably determined taking into account the factors set out in Section 25 of the Constitution.
- 1.9 All expert reports and opinions gathered thus far conclude that Section 25 does not need to be changed for effective land reform.
- 1.10 Financial resources have not been the impediment to achieving effective land reform.
- 1.11 The economic impact of amending Section 25 of the Constitution, so as to provide for expropriation without compensation, needs to be considered. A wider and more considered consultation is required. It is important not to undermine the R8 trillion investment in the property sector.
- 1.12 It would appear that the focus of expropriation without compensation is on unused land, vacant land and disused buildings. These are all located within the urban context and therefore, have no bearing on food security and agricultural production. Rather, the economic impact to the property sector, as a whole, needs to be considered.

- 1.13 SAPOA supports a new framework for land reform which includes tenure reform. A credible and independent database on land ownership should be developed. A land redistribution policy needs to be formulated. It needs to distinguish between land in urban areas and land used for agricultural purposes. The recommendations of the Parliamentary High Level Panel on tenure reform should be implemented. This would provide security of tenure for some 17 million South Africans which in turn would significantly boost the property sector. Affording tenure security to this group of 17 million South Africans will result in significant further investment and growth to the economy.
  - 1.14 The Constitution, and in particular, the Bill of Rights, is to be interpreted in the context of International Law and our Constitution measured against other democratic countries.
  - 1.15 International Law does not permit expropriation without compensation.
  - 1.16 Actions which erode legally enforceable property rights will raise concerns for investors both locally and internationally.
  - 1.17 If South Africa is seeking to promote international investment, the amendment of the Constitution, so as to allow expropriation without compensation, would be unwise.
  - 1.18 It is in the interests of all South Africans, and particularly the property sector, that the challenge of land reform and land restitution is solved. SAPOA would like to work with Parliament in seeking a solution to this problem which protects the investment in the property sector and the overall economy.
2. **SAPOA and the Commercial Property Sector**
- 2.1 The property sector, excluding agriculture, is valued at R8 trillion. It has increased in value from R5,8 trillion, which was the estimate provided by the Property Sector Charter Council in 2015.
  - 2.2 The residential property sector accounts for three quarters of all property owned in South Africa.
  - 2.3 From the Property Sector Charter Council's report, residential property accounts for three quarters of the value at R3,9 trillion. Commercial property carried a value of R1,3 trillion with R790 billion held by corporates, R300 billion held by REITs, listed on the Stock Exchange, R130 billion by unlisted property funds and R50 billion by life and pension funds.

- 2.4 Of the non-residential properties, retail property had the highest value of R534 billion, office properties at R357 billion, industrial properties at R281 billion and hotel and other properties accounting for R94 billion.
- 2.5 Informal residential properties were not valued. Making up the balance of the property sector, is the public sector at R0,2 trillion and vacant land zoned for residential use at R0,5 trillion.
- 2.6 The public sector land is divided between State Owned Enterprises (R66 billion), metros and selected local municipalities (R69 billion), and the Department of Public Works (R102 billion).
- 2.7 These figures also exclude agricultural land and land held by the State or Ingonyama Trust.
- 2.8 In 2012, the formal property sector's contribution to GDP was R191 billion and in terms of annual income and expenditure flows, generated R46,5 billion to the fiscus.
- 2.9 The Property Sector Charter aims to achieve that the property sector be held 25% by blacks within 5 years and 50% within 10 years, representing, on 2018 figures, R4 trillion.

### 3. **Section 25 of the Constitution**

- 3.1 The Freedom Charter which the ANC Congress adopted in Kliptown in 1955 called for all land to be returned to the people and redivided.
- 3.2 When it came to negotiating the final constitution some 40 years later, the same call was made. It was, of course, a different era. Nonetheless, Section 25, the property clause, was the most hotly debated and the last to be resolved. A compromise was reached. Ownership of property was protected, subject to 3 exceptions :
  - (a) the State was conferred the right to expropriate property not only for public purpose but also for public interest;
  - (b) public interest included the nation's commitment to land reform and to bring about equitable access to natural resources; and
  - (c) compensation would be just and equitable and not necessarily based on market price.

- 3.3 Two further sections were also inserted. Section 25(5) obliges the State to take reasonable legislative and other measures to enable citizens to gain access to land on an equitable basis.
- 3.4 Section 25(8) states that no provision of Section 25 would impede the State from taking legislative and other measures to achieve land, water and related reform, so as to redress the imbalances of the past.
- 3.5 These measures, however, were qualified by Section 36(1) which provides that limitations have to be reasonable and justifiable in an open and democratic society based upon principles of dignity, equality and freedom.
- 3.6 Section 25 created the necessary compromise and balance between the protection of our economy based on private property and free market enterprise and the need to dramatically transform the economy following decades of oppressive laws and policies.
- 3.7 There is no requirement that the State must follow a policy of a willing buyer / willing seller. Rather, Section 25 mandates the State to expropriate land so as to achieve land reform.
- 3.8 Unfortunately, the State's track record over the last 20 years, in giving effect to restitution and redistribution, has been poor. It adopted a willing buyer / willing seller policy when there was no need to do so. It has not used its expropriation powers to redistribute land.
- 3.9 It must also be borne in mind that the Constitutional Court has, on numerous occasions, emphasised that Section 25 must be interpreted in a manner that balances the pressing public interest in reform and transformation as against the private interests of the property holder. Section 25 should not be interpreted in a manner that frustrates meaningful land and other reform.
- 3.10 This was clearly set out in the AgriSA judgement<sup>1</sup> where the Constitutional Court held that Section 25 must be interpreted in the context of the need to facilitate nation building and reconciliation and the opening up of economic opportunities. In interpreting Section 25, it was necessary not to over-emphasize private property rights at the expense of the State's social responsibilities. There would inevitably be a tension between the interests of the wealthy and the previously disadvantaged.
- 3.11 Section 25(3) states that the amount of compensation must be just and equitable reflecting an equitable balance between the public interests and the interests of those affected having

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<sup>1</sup> AgriSA vs Minister for Minerals & Energy 2013 (4) SA 1 (CC)

regard to all relevant circumstances. Market value is only one of the factors listed in Section 25(3).

- 3.12 Section 25(3) and the possible amendment thereof to provide for expropriation without compensation is analysed more fully within the International Law perspective in paragraphs 10 and 11 below where the conclusion is reached that an amendment providing for expropriation without compensation will be contrary to International Law and accepted norms in constitutions in open and democratic societies and would not pass the proportionality test of Section 36(1) of the Constitution. There is, however, room for amendment for expropriation law within a very narrow and properly circumscribed field on the basis that it would still be just and equitable to pay little or no compensation.
- 3.13 SAPOA therefore submits that there is no need to amend Section 25 of the Constitution, which in its current form is not an impediment to land reform.

#### 4. **The Parliamentary High Level Panel**

- 4.1 SAPOA supports the conclusions and recommendations of the Parliamentary High Level Panel (the **Panel**).
- 4.2 It believes that there is an urgent need to address the tenure rights of the 17 million South Africans who occupy State or communal land. It agrees that there is a need to confer individual land rights, recognising customary traditions, under a new form of title and that this should apply both to urban areas as well as to rural areas. Achieving this will result in significant investment in land and in the property sector, generally.
- 4.3 It also supports the creation of a new land record system which would enable the property rights of all South Africans to be recorded and registered on a sustainable basis. This new legislative framework, as recommended by the Panel, would provide for a continuum of rights and encompass not only historic property rights registered in the Deeds Office but also land rights of those in shack settlements around cities, those on communal land within the former homeland areas and those on trust or communal property association land settled post-1994.
- 4.4 SAPOA agrees with the conclusion that Section 25 contains all of the legislative mechanisms so as to enable the State to achieve proper redistribution. The Panel concluded that budget constraints have not been the main barrier to redistribution. There is therefore no need to amend the Constitution or to remove the obligation to pay compensation. The most important constraints to effective land reform, identified by the

Panel, have been corruption, the diversion of the land reform budget to elites, lack of political will and the lack of training and capacity.

- 4.5 The Panel highlighted the need to provide land and housing in urban areas. This is so as to remove the legacy of the apartheid city where the poor are distanced from city centres.
- 4.6 SAPOA believes that municipal and State land, within urban areas, should be identified, as a first step, for development and this can be done in public private partnerships.
- 4.7 Section 25 contains all of the mechanisms to achieve this.
- 4.8 SAPOA also notes the conclusion reached that there has been a significant downward trend in the pace of redistribution measured by hectares since 2008. In 2008, redistribution peaked at 500 000 hectares per annum but by 2016/2017, was almost at zero. Clear policies need to be finalised which identifies the purpose of land redistribution.

## 5. **Other Experts**

- 5.1 Apart from the expert reports contained in the Panel report, other sector experts have all concluded that Section 25 contains the necessary mechanisms to achieve land reform and there is no need to amend the Constitution.
- 5.2 Constitutional Court Judges, Albie Sachs and Dikgang Moseneke have both been critical of the State's failure to use its powers of expropriation contained in Section 25 of the Constitution. The concept of just and equitable compensation provides sufficient flexibility through the weighing of all relevant factors<sup>2</sup>.

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<sup>2</sup> There have been calls for the Constitution to be amended because of the belief that compensation is on the basis of a willing buyer and a willing seller. However, the willing buyer / willing seller formulation is not included in the Constitution. A submission by Justice Albie Sachs states that : "Factors which could considerably reduce the amount of compensation could well include whether the property was given free of charge by the government or acquired at a knock down price, whether the State has invested in, or subsidised the land or improvements, and/or whether the property is in use or simply being held as a speculative investment". He concludes as follows : "Far from being a barrier to radical land redistribution, the Constitution in fact requires and facilitates extensive and progressive programmes of land reform. It provides for constitutional and judicial control to ensure equitable access and prevent abuse. It contains no willing seller / willing buyer principle, the application of which could make expropriation unaffordable". This interpretation is the same as that of former Deputy Chief Justice of the Constitutional Court, Dikgang Moseneke, who states in his submission to the Panel : "Everyone, whose property is expropriated, must be for a purpose the Constitution authorises and against payment of equitable compensation. The willingness of the buyer and/or of the seller may facilitate a smooth transaction but does not seem to be a constitutional requirement".

- 5.3 Professor Elmiën du Plessis of North West University has stated that a land reform programme based upon market value will be unaffordable, and therefore, the courts need to define what just and equitable compensation means<sup>3</sup>. Professor du Plessis has re-affirmed that the challenge lies in the State's failure to give effect to Section 25(3) of the Constitution. Section 25(3) sets out the criteria for determining just and equitable compensation. To date, the State has continued to use market value for compensation rather than defining just and equitable compensation.
- 5.4 Professor Ruth Hall of the University of Western Cape has indicated at various platforms that Section 25 of the Constitution provides a powerful mandate for transformation, land redistribution and the restoration of land that was dispossessed. Professor Hall has stated that the Constitution is not the impediment to land reform, but rather that the State, to date, has failed to use its Constitutional powers<sup>4</sup>.
6. **The Property Charter**
- 6.1 SAPOA is a member of the Property Charter Council. The Property Charter Council has developed the Property Sector Code which is intended to meaningfully transform the commercial property sector.
- 6.2 SAPOA believes that a focus on achieving the goals set out in the Property Sector Code will most effectively achieve transformation within the commercial property sector. The Property Sector Code applies to the residential property industry, the commercial property industry and property services. It therefore affects the entire R8 trillion property sector investments.
- 6.3 SAPOA believes that a combination of the State utilising its powers under Section 25 of the Constitution and the committed implementation of the Property Sector Code will achieve sustainable transformation in the property sector.
- 6.4 This should be the focus of the State, civil society and the private sector.

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<sup>3</sup> At an AgriSA workshop held in March 2018, at which the topic of land reform and expropriation without compensation was discussed, Prof. Du Plessis called for an equitable balance between market value and just and equitable compensation.

<sup>4</sup> Prof. Ruth Hall (PLAAS - University of the Western Cape) Land Reform Challenges, Daily Maverick, March 2018.

## 7. **New Framework for Land Reform**

- 7.1 The current discourse on land reform often fails at the beginning, due to a lack of accurate information on land and property ownership. This has allowed much of the public debate on the interventions required to be misinformed and has become a serious constraint in policy making.
- 7.2 The need for an independent and credible database on land ownership and land transfers, together with appropriate data on the use of land, is essential. The two national audits recently released by AgriSA and the Department of Rural Development & Land Reform, have completely different conclusions.
- 7.3 SAPOA recommends that a public private partnership be established in respect of the acquisition, retention and storage of land data.
- 7.4 A clearly defined land redistribution policy is also required. There is still no consensus on who should get land and for what purpose.
- 7.5 In the initial phase of land reform, land reform was only for the poor. Land acquisitions were modest parcels of land primarily for residents and some land for cultivation.
- 7.6 In the mid-2000s, the government moved away from the pro-poor programme to a commercial farmer programme. In 2009, this programme was abandoned and government introduced the pro-active land acquisitions strategy where farms were acquired by the State and released to persons. This programme was elite driven, with farms often allocated to non-farmers and used for political patronage.
- 7.7 There has been little effective focus on urban or peri-urban land reform.
- 7.8 In 2008, the Centre for Enterprise Development (CDE) recognised the need for urban land reform. Anne Bernstein (2007) stated that :

*“SA is urbanising rapidly. Land reform therefore must include the identification and release of urban and peri-urban land for settlement, housing and economic development, as well as reform of ownership and use of land suitable for farming.”<sup>5</sup>*

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<sup>5</sup> Anne Bernstein, Business Day, 17 April 2018

- 7.9 The motivation for urban land reform raised by CDE has now come to the fore. Across many cities, people are mobilising and there is a growing discourse that land reform is not a rural issue. It is imperative that a new comprehensive land reform framework must address the need to access land for changing the spacial layout of apartheid “untransformed” cities, where the poor live furthest from their place of employment and informal settlements continue to grow. Rapid access to land on the periphery of urban areas for housing and other economic activities should be a prioritised programme.
- 7.10 In the restitution space, claims need to be resolved and the restitution process finalised. The threat of pending or future land claims is a serious impediment to property development.
8. **Clarification Statements**
- 8.1 SAPOA notes the clarification statements made by Deputy Minister Cronin and others to the effect that the expropriation without compensation process will target unused vacant land in cities, abandoned buildings and commercial properties held unproductively and for speculative purposes.
- 8.2 It appears that the focus of the debate is on urban land as opposed to rural farming land.
- 8.3 The clarification statements do not provide any comfort to SAPOA and its members. As indicated above, the Property Charter Council, in 2015, valued vacant land which is awaiting development at R500 billion. It therefore has very significant value.
- 8.4 It is submitted that it is inappropriate to categorise commercial property as unproductive. Although it may, at any point in time, not be used in the most productive manner, through market forces, land would naturally be converted to a better and higher use.
- 8.5 Speculative investors invest in land where there is a high risk and potentially high return.
- 8.6 Vacant land attracts higher rates and property owners are prepared to pay these rates because of the future potential of the land.
- 8.7 An economic study of the Waterfall Development in Gauteng prepared by Dr. D Prinsloo in April 2018 shows that the R40 billion development cost creates 46 000 construction jobs and upon completion, 60 000 permanent jobs. In addition, the development will add R75 billion to the local economy and R700 million in property taxes per year. Parcels of this land have been invaded as a consequence of the call to expropriate so called “idle land” held for speculative purposes with a significant adverse effect to our economy.

- 8.8 There appears to be no logic or justification for singling out these categories of land as being appropriate for expropriation without compensation.
- 8.9 If vacant land is required so as to achieve urban land reform, then it should be expropriated as against the payment of just and equitable compensation.
9. **Economic Factors**
- 9.1 The Parliamentary Resolution (as well as various statements made by the ANC following the December Conference resolutions and by President Ramaphosa in the State of Nation Address) states that the concept of expropriation without compensation is to be implemented in a manner that increases agricultural production and food security.
- 9.2 As the thrust of the debate appears to be on urban land, agricultural production and food security is irrelevant.
- 9.3 The economic impact, and the impact generally to the property sector (valued at R8 trillion) needs to be carefully considered by all experts.
- 9.4 SAPOA believes that the economic cost of introducing a policy of expropriation without compensation and amending Section 25 of the Constitution would far exceed the financial benefit of acquiring land without having to pay compensation.
- 9.5 The Zimbabwe example shows that the economic cost of expropriation without compensation was US\$20 billion whereas the compensation that would have been payable was estimated to be US\$11 billion<sup>6</sup>.
- 9.6 The Panel report concludes that compensation is not the impediment to effective restitution.
- 9.7 There is accordingly no need to link land reform and redistribution with no compensation.
10. **Expropriation without compensation is a breach of International Law**
- 10.1 Customary International Law does not countenance expropriation without compensation, i.e. confiscation of property. In terms of Section 232 of the Constitution, Customary

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<sup>6</sup> See “Why Land Expropriation without Compensation is a Bad Idea” by Wandile Sihlobo and Dr. Tinashe Kapuya, agricultural economists, Pretoria, May 2018, an article drawn from essays on land reform co-authored by Prof. Johann Kirsten, Director for Bureau for Economic Research, Stellenbosch University

International Law forms part of South African Law, unless it is inconsistent with the Constitution or an act of parliament. The question is thus whether the Constitution or an act of parliament can be adopted or amended to provide for expropriation without compensation, whilst still conforming to International Law.

- 10.2 Expropriations are indeed lawful in International Law if for a public purpose, without discrimination against foreign nationals and if compensation is paid promptly.
- 10.3 It must however be stressed that the subjects of International Law are sovereign states and international organisations with legal personality. Private individuals or companies benefit from the protection of International Law on two levels:
- (a) Firstly through diplomatic protection of their state of nationality if the host state acted in breach of the minimum international standard applicable in the case of expropriation of property of a foreign national; and
  - (b) Secondly through international arbitration in terms of treaties, should the host state expropriate property without compensation and in breach of the treaty.
- 10.4 Diplomatic Protection
- (a) Should the host state expropriate property without compensation, it amounts to an international delict against the state of nationality of the investor. That state of nationality is entitled that the host state treats its nationals according to the international minimum standard which requires that compensation be paid.
  - (b) The state of nationality which have been so offended may then lawfully revert to diplomatic protection of its national. Diplomatic protection may take various forms including economic sanctions, as were instituted against the Republic of Zimbabwe by *inter alia* the United States and Great Britain. The dispute may also end up before the International Court of Justice. However, the Republic of South Africa has not consented to its jurisdiction yet.
  - (c) It would thus be rather foolish to heed a political cry for expropriation without any compensation as a general measure. This would be a very blunt instrument to attain internal political objectives and land reform. South Africa may then find itself in an international controversy from which there may be very little chance of escape from international censure.

## 10.5 International Arbitration

- (a) Private foreign nationals may not commence international proceedings against a host state in any international tribunal, unless status is granted to them through treaties or agreements between states, whereby rules of International Law may govern the relationship between the states and the individuals or companies concerned. The individual or company is then entitled to institute international arbitration proceedings directly against the offending host state.
- (b) The Republic of South Africa has indeed been taken on international arbitration twice on the basis of Bilateral Investment Treaties (“BIT’s”) with Switzerland, Italy and Lichtenstein. Since then, most of the BIT’s were cancelled or were not renewed and statutory provision has sought to be made to accommodate such claims.

## 10.6 Quantum of Compensation under International Law

- (a) The traditional measure of compensation which was accepted as Customary International Law until about 1974, was *adequate* or *effective* compensation which was equated to full compensation or at least market value of the expropriated property. Full compensation means an amount that, insofar as money can do so, will restore the expropriatee to the same financial position in which he / she was before the expropriation. This is still the measure insisted upon in International Law by certain countries such as the United States, Britain and most of the European countries in BIT’s. This was also the state practice of the Republic of South Africa in a large number of BIT’s.
- (b) However, since the acceptance of the Charter of Economic Rights and Duties of States by General Assembly Resolution 3281 (XXIX) on 12 December 1974 there has been a marked deviation from the said measure of compensation. In the Charter, which is not binding International Law, because a General Assembly Resolution is not binding on member states, the measure of compensation was watered down in Article 2(2)(c) to “*appropriate compensation*” taking into account the particular state’s relevant laws and regulations and also contentions that the state considers pertinent. Although the article has been described as an utter rejection of International Law and has since 1974 given rise to the most disputed issue in International Law, the erosion of International Law has gone so far that the United States judiciary has already expressed doubts upon the validity of the traditional measure of compensation in International Law. What is, however, clear

is that a mere subjective norm for assessing appropriate compensation is still unacceptable. The subjection of compensation solely to municipal (or internal) law cannot be regarded as part of International Law unless the norm set in such law conforms to the requirements of International Law. The norm of *appropriate compensation* has no fixed meaning of its own and depends upon the circumstances of each case. It has been decided by an International Tribunal that in every case it would be necessary to have regard to all circumstances with special reference to the legitimate expectations of the parties.

- (c) The basic principle underlying payment of full compensation is that of equality in the bearing of public burdens. It is on the basis that where one or more individuals has to bear a sacrifice in the form of the loss of property for the common good their individual and excessive burden should be compensated by the community. That burden should not partially or wholly be imposed on expropriated land owners. The equality principle does not allow nominal compensation nor as a rule does it justify less than market value.
- (d) However, various countries had deviated from the traditional full compensation concept and require in their constitutions just or fair compensation. Fair compensation is an amount that will redress the imbalance caused by the expropriation between the public interest and the interest of the expropriated land owner. Fair compensation can be equal to full compensation, but it may also be less.
- (e) The South African circumstances and imperative for land reform, may give rise to an internationally acceptable formulation of measures of compensation in individual specified cases. In various international arbitrations a wide margin of appreciation has been allowed for necessary social and economic reforms in applying International Law when quantifying compensation on expropriation.
- (f) The measure of compensation in section 25(3) of the Constitution is a very flexible instrument which may in some circumstances give rise to full compensation and if just and equitable, to less than full compensation and even very little or none in very exceptional cases. It is premised on a just and equitable balance of interests. Justice and equity may under very restricted circumstances have the result that very little or any compensation will be payable, for example where the expropriated property has been abandoned by the owner prior to expropriation. It is important to note that the expropriatee, even if no compensation is payable under these circumstances, is not the victim of a confiscation, because he is under Section 25(2) and (3) of the Constitution entitled to just and equitable compensation which

may then conceivably be none. In applying Section 25(3) the principle of equivalence whereby the expropriatee should not bear the burden on behalf of the society at large, remains important and will be inherent in the concept of just and equitable compensation, even though it may be minimal.

- (g) As background and whether Section 25(3) is acceptable in terms of International Law, Article 16 Paragraph 1 of the Charter may not be ignored. It provides that it is the right and duty of all states, individually and collectively, to eliminate colonialism, apartheid, racial discrimination *and the economic and social consequences thereof as a prerequisite for development*. This section of the Charter is not part of the International Law controversy. If evaluated against this background, Section 25(3) read with Section 25(4)(a) and Section 25(8) of the Constitution, provides for legislation, such as an expropriation act to be adopted or amended so as to provide for the application of Section 25(3) in order to eliminate the consequences of apartheid by taking into account all relevant circumstances and to provide for a comprehensive formula which is acceptable in international terms as an exception to the traditional full compensation measure.
- (h) However, a statutory provision for blanket expropriation without compensation in respect of all expropriations, is from an International Law perspective totally unacceptable.

#### 10.7 The necessity to amend the Constitution from an International Law perspective

- (a) It is thus submitted that it is unnecessary to amend Section 25 of the Constitution as the measure of compensation in Section 25(3) thereof is flexible enough to accommodate the concept of just and equitable compensation which is less than full compensation and which may in very narrow circumstances lead to minimal compensation. It is submitted that Section 25(3) of the Constitution is acceptable in terms of International Law, taking into account the imperative of the elimination of the economic and social consequences of apartheid, as a prerequisite of development, for which a wide margin of appreciation will be allowed.
- (b) If the Expropriation Bill (2015) is to be amended to unpack Section 25(3) of the Constitution in order to provide for specific relevant circumstances when minimal or no compensation will be payable, it will be necessary to:
  - (i) closely and very clearly circumscribe the circumstances; and

- (ii) subject such provision to the just and equitable qualification of Section 25(3) in order to ensure that the equivalence principle discussed above, remain applicable.
- (c) The expropriated owner will then be entitled to show that no or minimal compensation is not just and equitable. It is submitted that, that would also close the door to a successful challenge of the of the constitutionality of such provisions under Section 36(1) of the Constitution. It is submitted that, that would also make such amendments internationally acceptable, particularly in view of Section 16 Paragraph 1 of the Charter.
- (d) It is difficult to conceive that an amount of compensation can be just and equitable under Section 25(3) but not “reasonable and justifiable” under Section 36(1) of the Constitution. Should, however, the political call for expropriation without compensation, even if only in land reform cases, be heeded, the position changes dramatically. We undertook a comparative constitutional study, not only for purposes of Section 36(1) of the Constitution, but also for the international acceptability of expropriation without compensation.

## 11. **Foreign Constitutions**

- 11.1 After a study of some twenty-four constitutions worldwide, only one constitution could be found which specifically provides for no compensation.
- 11.2 Article 71(3) of the Constitution of the Republic of Zimbabwe provides for fair and adequate compensation on expropriation. However, the Constitution was amended as contained in Article 72(7) which reads as follows:

*“In regard to the compulsory acquisition of agricultural land for the re-settlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance:*

- 10.5.1 *under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;*
- 10.5.2 *the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;*
- 10.5.3 *the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land;*

and accordingly-

- (i) *the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement through an adequate fund established for the purpose; and*
- (ii) *if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.”*

11.3 Various formulations of the norm for compensation are found in various constitutions:

**Just compensation:**

- The Central African Republic, 1995, Art.14;
- The Constitution of the Republic of The Congo, 1992, Art. 30;
- The Constitution of the Arab Republic of Egypt, 1971, Art. 34;
- The Constitution of Japan, 1946, chapter 3, Art. 29;
- The Constitution of the People’s Republic of Mozambique, 1990, Art. 86;
- The Constitution of the Republic of Namibia, Act 1 of 1990, chapter 3, Art. 16(2);
- The Constitution of the Republic of Poland, 1990, Art.7;
- The Constitution of the Republic of Senegal, 1963, Art.12; and
- The Constitution of the United States of America, 1787, Fifth Amendment, 1791, Art. [V].

**Fair compensation:**

- The Constitution of the Arab Republic of Egypt, 1971, Art.34;
- Declaration of the Rights of Man and the Citizen, 1789, incorporated into the Constitution of the Fifth French Republic of 4 October 1958;
- The Constitution of the Republic of Madagascar, 1992, Art.34;
- The Constitution of the Republic of Rwanda, 1991, Art.23; and
- The Constitution of the United Republic of Tanzania, 1977, s.24(2).

**Full compensation:**

- The Constitution of the Kingdom of Denmark Act, 1953, s.73(1);
- The Constitution of Kenya Act 1969, s.75(1)(c);
- The Constitution of Lesotho, 1993, s.17(1)(c);
- The Constitution of the Kingdom of Norway, 1814, Art. 105;
- The Constitution of the Russian Federation, 1993, Art.35.3; and

- The Constitution of the Republic of Seychelles, 1993, s.26(3)(d);

**Adequate compensation:**

- The Constitution of the Republic of Botswana, s.8(1)(b)(i) (interpreted by the Botswana Court as including market value and loss);
- The Constitution of Malta, 1964, s.37(1)(a);
- The Constitution of the Republic of Uganda, 1955, s.26(2)(b)(i); and
- The Constitution of the Republic of Zambia, 1992, s.16(1);

**No norms for assessment of compensation:**

- The Constitution of Jamaica, 1962, s.18(1)(a) (principles to be laid down in law);
- The Spanish Constitution, 1978, Art.33(3);
- The Instrument of Government of Sweden, 1974, Art.18;
- The Constitution of the Republic of Italy, 1947, Art.42;

**Compensation to reflect an equitable balance of interest:**

- Basic Law for the Federal Republic of Germany, 1949, Art.14(3) (a fair balance between the public interest and the interests of those affected); and
- The Constitution of the Republic of South Africa, s.25(3).

11.4 From the foregoing it is clear that no general principle that expropriation may take place without compensation can be found in these constitutions, except in the case of the Republic of Zimbabwe in respect of agricultural land for land reform purposes. The interpretation of courts in Common Law countries is generally that compensation should equate at least market value.

11.5 There would thus be no support in the application of Section 36(1) of the Constitution for a law which provides that no compensation on expropriation is payable having regard to the criteria set out in Section 36(1) of the Constitution.

12. **Conclusion**

We therefore conclude that:

12.1 the call for expropriation without compensation in the field of land reform is totally unacceptable from an economical and legal point of view and has the strong probability of

landing the Republic of South Africa in International controversy and disastrous consequences for the economy;

- 12.2 it is unnecessary to amend the Constitution as Section 25(3) of the Constitution is flexible enough to provide in certain exceptional circumstances in minimal or no compensation being awarded where it is just and equitable to do so;
- 12.3 amendment of the Expropriation Bill (2015) is possible without infringing upon International Law and without successful challenge in terms of Section 31(1) of the Constitution, if the principles set out above are adhered to.

Yours sincerely



**N GOPAL**  
Chief Executive Officer