



The FW de Klerk Foundation
CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

The Hon R Mohlaloga, MP

Chairperson

Portfolio Committee on Agriculture and Land Affairs

3rd Floor

90 Plein Street

Cape Town 8000

Per telefacsimile No: (012) 403-2808

10 July 2008

Per e-mail:mkoff@parliament.gov.za

Dear Sirs

Re Provision of Land and Assistance Bill [B40-2008]

1. The Centre for Constitutional Rights records its full support of any land reform initiative that is constitutionally compliant and sustainable. The Centre is deeply concerned that land and agrarian reform has not taken place at sufficient pace and that much of the redistribution that has taken place has not been sustainable. In particular, the Centre is concerned by the admission of acting Land Affairs Director-General, as reported in Business Day of 19 February 2008, that up to 50% of the agricultural land which has been redistributed is not sustainable due to inadequate post-settlement support.

2. The Centre accordingly welcomes moves by the department to render land reform sustainable. Any criticism of the Bill is thus not to be construed as criticism of land reform or moves to improve its sustainability. However, the Centre is concerned that the Bill in its present form will neither promote nor expedite fair, viable, sustainable and efficient land reform. More importantly, the Centre believes that certain aspects of the Bill will not pass constitutional muster. The Centre accordingly values the public participation which your Committee has facilitated.

A UNIT OF THE FW DE KLERK FOUNDATION

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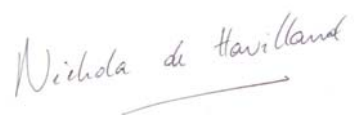
3. Clause 10 (1)(b) of the Bill allows the Minister to acquire property on such terms as he or she may determine. Section 12 of the Provision of Land and Assistance Act allows for land to be acquired through expropriation. Sub-section 25(2) of the Constitution permits expropriation subject to compensation, the amount, time and manner of payment of which have either been agreed to by those affected, or decided or approved by a court of law and which is just and equitable, reflecting an equitable balance between the public interest and the interest of the affected person. The imperative nature of sub-clause 2, coupled with the inclusion of the term “only”, requires that both conditions have to be complied with in order to survive constitutional scrutiny. This sub-clause should accordingly be amended to allow that the terms concerning compensation must be just and equitable.

4. Moreover, justice and equity require that *in propria causa nemo iudex* (Cod. Theod. 2.2.1. (AD 376). As one of the parties to the dispute, the Minister cannot unilaterally determine the terms of acquisition, be the acquisition by way of expropriation or purchase. In particular, it is clearly not possible for the Minister to determine what constitutes fair and equitable compensation. If the requirements of sections 25(3), 33 and 34 of the Constitution are to be met, the final decision on the terms of acquisition and specifically on compensation must reside with the courts in the event of no agreement.

5. In accordance with the principle of subsidiarity, the Bill allows for delegation down to municipal level of all the Minister’s powers, save for the power to make regulations. In general it is appropriate that this be allowed when dealing with land usage as very often implementation is better administered at this level. However, given the unfettered powers afforded the Minister in respect of both agricultural and residential land use, the right to delegate the powers contained in sub-section 2(1) and sections (3) & (4) of the Act and clause 10 (1) of the Bill should be confined to an official of a level not lower than director-general.

6. Lastly, the Centre notes with concern the figures recently released by the Labour Department which reflect a shortage of more than 400 000 farmers and farm workers within the commercial farming sector. More specifically, there is an alleged shortage of 102 670 crop farmers in the country, 150 000 crop and livestock farmers and almost 220 000 farm workers. (N Tolsi "Where are all the farmers?" *Mail & Guardian* 16 to 22 2008). The scale of these missing skills poses a serious threat to South Africa's food security. In order to not further exacerbate the situation, where agricultural land is acquired, the Bill should specifically provide for the training and acquisition of the skills necessary to ensure sustainable and viable agricultural entities.

Yours faithfully,

A handwritten signature in cursive script that reads "Nichola de Havilland". A horizontal line is drawn underneath the signature.

Adv N de Havilland
Deputy Director
Centre for Constitutional Rights