

Submission to the Constitutional Review Committee on Expropriation Without Compensation Within a Future Tenure Regime for South Africa

PHUHLISANI NPC: 15 June 2018

About Phuhlisani NPC

Phuhlisani is a non-profit company with a long history of work in the land reform space.¹ We generate solutions based on research, dialogue and reflexive practice to secure rural citizens' rights and build organisation to address poverty, landlessness and tenure insecurity. We recognise that the rural and urban land questions are closely connected and network with organisations operating within the urban sphere. Phuhlisani was commissioned to undertake research for the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP) which published its report in December 2017.

Starting points

Phuhlisani welcomes the opportunity of making this submission to the National Assembly's Constitutional Review Committee whose task is to gather further information and to take input from members of the public and interested parties on the proposed constitutional amendment.

¹ See www.phuhlisani.org for more detail.

Given South Africa's history, Phuhlisani recognises that addressing the rural and urban land questions is central to the realisation of key constitutional imperatives and makes an important contribution to the achievement of meaningful social and economic inclusion. This means that the conversation about land is also a discussion about the deep rooted inequalities which characterise our society and the persistent marginalisation of the majority of South Africans from many of the anticipated benefits of democracy. In this setting land remains a potent metaphor for dispossession - a signifier that South does not yet belong to all who live it.

Voices in the current national debate carry important messages about land. They confirm that:

Most discussions about land reform are not actually about land, or about reform. They are displaced discussions about national identity, colonialism, and reparation. And this displacement is in turn symptomatic of the lack of resolution about those issues.²

Land is not just about agriculture. It is about freedom, identity and complex intersections between belonging, dignity, property, wealth, security, culture and customary practices.³

In that land carries such a potent symbolic charge it provides a powerful source of political capital for politicians which may be misused:

It enables politicians to dodge difficult economic questions and promote seemingly simple solutions to what are very complex problems. Poverty, lack of job creation, lack of public service delivery can all be blamed on inequality rather than policy or political failure".⁴

² du Toit, Andries in Michael Aliber, M. 2013. *The opportunities and limitations of the Willing Buyer/Willing Seller approach to land reform in South Africa*. Land Divided Conference 24 - 27 March. Cape Town.

³ Gasa, Nomboniso. 2018. *The land issue is about restoring identity*. City Press 18 March. <https://www.news24.com/Columnists/GuestColumn/restoring-identity-20180318-2>

⁴ Keeton, Gavin. 2014. *Inequality in South Africa*. The Journal of the Helen Suzman Foundation. Issue 74: 26 - 31 P. 27

Phuhlisani supports approaches which will sustainably advance equitable access to land and ensure tenure security and recorded rights for all in fulfilment of the obligation conferred by Section 25(5) and 25(6) of the Constitution. In this we emphasise the overwhelming importance of the need:

- to address the systemic problems contributing to the poor performance of the land reform programme
- for a practical, affordable and integrated property rights system as the platform to afford all citizens with secure and legally enforceable tenure rights given that the property rights of an estimated 60% of South Africans remain off register.⁵

Our position on expropriation without compensation

In our view the current impetus to consider amending the Constitution to enable land expropriation without compensation can be interpreted in three ways:

- As an indicator of the persistence of poverty and rising inequality where persistent and deeply inequitable access to land is a marker of the failure to bring about a more equitable society in post apartheid South Africa
- As a political response to either exploit, or attempt to mitigate the immense national damage and erosion of popular confidence as a consequence of “systemic state capture by the Zuma centred power elite” which has been described as akin to “a silent coup”⁶
- As a land acquisition solution which responds to the above factors, but which masks the policy and programmatic failures of land reform.

Clearly all three perspectives have relevance given the current conjuncture in South Africa. However irrespective of which interpretation seems persuasive, legal opinion confirms that the Constitution places no impediment in the way of expropriation. This can be with zero

⁵ Such a system has to encompass the rights of those in informal settlements and inner cities, housing development schemes, communal land held in trust by the State, land acquired through restitution, labour tenant claims, redistribution land held by communal property institutions and privately owned farms where occupiers have statutory rights.

⁶ State Capacity Research Project. 2017. *Betrayal of the Promise: How South Africa is Being Stolen*. Centre for Complex Systems in Transition, Public Affairs Research Institute, Development Policy Research Unit, South African Research Chair Programme on African Diplomacy and Foreign Policy. P. 4

compensation, minimum compensation or compensation that is below, or at market value depending on the circumstances of the case. This must be implemented by way of a law of general application and in a manner which meets the requirements of just administrative action as required by the Promotion of Administrative Justice Act (No. 3 of 200).

Although the Constitution is clear, in practice the content of "just and equitable" compensation, remains insufficiently developed or understood. Neither government nor the courts have weighed in on the content or developed a transparent procedure for arriving at what is 'just and equitable' compensation. The Property Valuation Act (No. 17 of 2014) makes a single reference to expropriation and just and equitable compensation in its preamble but the body of the Act is silent on the procedures involved. Draft regulations try to provide guidance but without this being addressed in the Act this can only be limited in scope.

We argue that willing buyer-willing seller (WBWS) and expropriation should be conceptualised as two poles that mark a continuum. However, these approaches to land acquisition are not necessarily mutually exclusive and can both be employed in different combinations. In instances where the WBWS approach is used, the state's option to expropriate remains as a power that could be invoked at any point in price negotiations. Likewise in instances where the state has chosen to expropriate, it is also possible to negotiate levels of compensation payable.

While there appears to be no compelling argument to rule out cases where expropriation could result in zero compensation such instances will likely to constitute a tiny minority of cases where specific circumstances indicate that this calculation will be just and equitable. The compensation rationale will vary from case to case and a combination of factors will determine the calculation of the level of compensation where land is expropriated in the public interest. This may result in levels of compensation at below market value. Likewise there is no requirement that such compensation be paid in cash.

In all of this it is critically important to recognise that, alongside the registered owner, there are often others with rights in the land which is subject of expropriation⁷. Used incorrectly,

⁷ These laws include the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 (PIE), Extension of Security of Tenure Act No. 62 of 1997 (ESTA), Land Reform (Labour Tenants) Act No. 3 of 1996 (LTA), and the Interim Protection of Informal Land Rights Act No. 31 of 1996 (IPILRA)

expropriation has a potential to extinguish or undermine these rights. While the focus of expropriation has been on the registered rights of the owners with the titles, expropriation also has enormous repercussions for those with off-register rights. Before expropriation, there is a necessity to ascertain and recognise off-register rights that are also eligible to compensation (or comparable redress), for example farm dwellers, communal land rights holders, informal settlement dwellers. Section 25(6) of the Constitution makes mention of 'comparable redress' for such groups, as part of what will constitute 'just and equitable' compensation.

In cases where the land of rural communities may be expropriated for mining purposes, the true meaning of 'just and equitable' compensation needs to be given content. This suggests the need to calculate compensation packages appropriate to these settings which also add a premium to properly compensate people for the multiple hardships and social consequences associated with the loss of their land.

The unintended consequences and impacts of expropriation need to be carefully weighed up. The area of compulsory acquisition is a highly litigated area of law, not only in South Africa, but also internationally. While expropriation has not been used successfully, for purposes of advancing land reform, the courts have dealt with a range of complex, costly and time consuming expropriation cases since 1994.⁸ Where land acquisition becomes the subject of litigation this results in delays and cost escalation due to incurring substantial legal fees.

Safeguards will also be required to ensure that expropriation does not become a vehicle for asset capture by elites and that it does not undermine the tenure security of the very groups that are meant to benefit from land reform.

In summary the principal obstacle preventing land expropriation and the testing of compensation levels payable has been a general lack of political will, and a failure to pass an updated Expropriation Act. Even if these obstacles are overcome it will be important to

⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC). *Harksen v Lane* No 1998 (1) SA 300 (CC). *Miller v Schoen* 276 US 273 (1928). *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC). *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC); *Haffejee NO and Others v eThekweni Municipality and Others* (CCT 110/10) [2011] ZACC 28; 2011 (6) SA 134 (CC); 2011 (12) BCLR 1225 (CC) (25 August 2011); *Attorney-General v De Keyser's Royal Hotel, Ltd* (1920) AC 508 (HL); *First English Evangelical LUTHERAN Church of Glendale v County of Los Angeles* 482 US 304 (1987) 318; *Nhlabati and Others v Fick* 2003 (7) BCLR 806 (LCC); See AJ van der Walt (2011) for the full spectrum (p334 – p519)

reflect that there is no evidence to demonstrate that EWOC will make land reform cheaper or make it faster. Indeed expropriation may slow down and increase the costs of land acquisition. This suggests that while expropriation must be available as part of the state land acquisition machinery it should be used expeditiously and not as a matter of first resort.

All of the above suggests that the current enquiry into the need to amend the Constitution could constitute a diversion from the widely acknowledged policy and programme failures of land reform. This is deeply ironic since the challenges facing the land reform programme have recently been analysed in great detail and with exhaustive public input by the *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (HLP). Despite the volume of evidence presented, the HLP report has failed to gain commensurate traction as with the current inquiry the focus has shifted away from the substantive issues limiting fundamental change into the realm of symbolic politics and the simplifications increasingly associated with the expropriation debate.

We submit that while there is no need to amend the Constitution to enable expropriation without compensation there is an urgent requirement for South Africans to take a long, hard and honest look at the multiple factors undermining the performance of land reform and with it our failure to address deep seated spatial inequality and tenure insecurity. We briefly review these issues below before turning to the second element shaping the mandate of the Constitutional Review Committee - that of the need to rethink the future tenure regime to record and protect the property rights of all South Africans.

Assessing the performance of the land reform programme

The land reform programme was designed to give effect to the specific obligations set out in Section 25 of the Constitution giving rise to the Redistribution, Tenure and Restitution programmes respectively. The report of the High Level Panel acknowledges that the land reform programme has failed to meaningfully advance equitable access to land.

Current figures indicated that cumulative land reform delivery as at 2016/17 amounted to 4,7 million ha acquired through redistribution and 3,4 million ha through restitution

totalling 8,13 million ha or 9.9% of commercial farmland.⁹ Official estimates suggest that over 400 000 households have benefitted from land reform (approximately 130 000 households have benefitted through redistribution and 300 000 households through restitution).

However, recent research¹⁰ indicates that there has been a massive shrinkage in the number of beneficiaries. Those who retain active links with land purchased through redistribution and restitution may have shrunk to just 60 000 households. As table 1 indicates below this shrinkage has sharply escalated the costs per actual beneficiary household.

Table 1: Estimates of per beneficiary expenditures per redistribution and restitution beneficiary households¹¹

	Total expenditure (R billion)	Per official beneficiary HH (R)	Per estimated actual beneficiary HH (R)
Redistribution	56	400 000	1 900 000
Restitution	48	160 000	1 600 000

A significant portion of the 8.13 million ha of land acquired through land reform is registered to land holding entities while the remainder is held by the state. According to the DRDLR CPA registrar, there were 1 526 registered CPAs in 2017. By 2010 a total of 1 383 trusts had been established to hold land acquired through land reform. In 2017 DRDLR reported that 82% of 1534 communal property institutions holding land transferred through redistribution and restitution were not compliant with the law despite the fact that “the property portfolio held by CPAs runs into billions”.

⁹ Aliber, Michael (2018) The performance of land reform: Land Knowledge Base Review Paper. Phuhlisani NPC

¹⁰ Ibid.

¹¹ Ibid. P. 28

The problems faced by land holding entities reflect state failure to adequately support and resource them. This has meant that for the membership in the vast majority of these CPIs there is insufficient clarity on land rights and no system to record and certify household and family rights and legally recognise social tenures. Consequently, there has been a reluctance to invest in the land. This resonates with figures in the Medium Term Strategic Framework 2014-2019 which reported that '5 015 farms obtained through land reform comprising 4,3m hectares of land reform land are underutilised'.¹²

While land reform has been focused on redistribution and restitution, land tenure issues remain badly neglected. The extent of this neglect is reflected in the fact that just 3,7% of the DRDLR budget (itself only 0.4% of the national budget) is spent on land tenure and administration.

This is in a context where some 17 million South Africans in former homelands lack security of tenure and there is no legislation to protect their rights other than the Interim Protection of Informal Land Rights Act which to all practical purposes remains largely unenforced . Land administration systems in these areas are in disarray. Ongoing confusion over the role of chiefs in land administration has created spaces for land grabbing and elite capture - particularly with regard to mining deals in communal areas. In other settings legislation to secure land rights and tenure security of farm workers and labour tenants remains poorly implemented.

The above factors are aggravated by the fact that there is no nationally agreed land reform policy or legislation to give effect to Section 25(5) which clarifies who should benefit from land reform and how off register rights are to be secured. The multiple shortcomings summarised above have raised serious questions about the value of the returns on public money invested in land reform to date. Its contribution in its current form to poverty reduction, securing rural livelihoods and rectifying spatial inequality are negligible. As an indicator of the relative priority of the land reform programme it was recently verified¹³

¹² DPME, (2014) 'Draft discussion document for Rural Chapter, MTSF 2014 -19 discussed 26 June', DPME, Appendix 7, Pretoria, p. 12.
(<http://www.dpme.gov.za/keyfocusareas/outcomesSite/MTSF%201/Outcome%207%20Rural%20Development%20MTSF%20Chapter.pdf>) accessed May 2018

¹³ Africa check (2018) Yes, South Africa spends as much on VIP protection & security as on land reform

that the budget for VIP protection services was of the same order as the 2,7 billion rand for the land redistribution and tenure security programmes.¹⁴

Our consistent experience over more than decade working in land reform reveals critical incapacity within the state. This has been a major factor contributing to the policy and programmatic adhocism which has hobbled the land reform programme and rendered it increasingly vulnerable to capture by connected individuals. This section provides an important backdrop to the expropriation debate. It is clear from the above that the key issue is not around the difficulty or expense in acquiring land but how far the land reform programme to date has failed to realise the transformative power of the constitution - something we argue will not be addressed by a focus on expropriation without compensation.

The centrality of an integrated system of property rights and a new emphasis on land administration

The Constitutional Review Committee has also invited inputs to “propose the necessary constitutional amendments where applicable with regards to the kind of future land tenure regime needed”. While we have argued that there is no need to change the Constitution to enable expropriation without compensation we have identified an urgent need to change how land tenure and land administration are conceptualised in policy and law, and enabled by new land administration institutions.

Historically African tenure outside of the homelands was completely insecure and subjected to race-based laws, while in the homelands tenure was recognised mainly in the form of occupational rights (PTOs) and traditional authority governance. These rights were easily extinguished through wide-scale dispossession and forced removals. Attempts to simply upgrade these weak rights in the form of surveying and titling have largely run aground, and there is increasing realisation that there is a need to develop an alternative recordal system for registering these rights. This is reinforced by wide-ranging evidence from international experience.

¹⁴ Note that restitution currently has a budget of 3.4 billion and rural development 1.8 billion

As noted by the World Bank title deed systems remain institutionally onerous and unaffordable for poor households, so even if titles are registered on the handover of a house, they are seldom formally transferred to record further transactions on the property.¹⁵

When the new constitutional rights paradigm was created, there was unfortunately no attention paid to the importance of land administration. The failure to build a land administration system to administer the rights that are recognised in the various tenure laws has resulted in wide-scale ambiguity and persistence of vulnerability and non-recognition of indigenous tenure systems. It means that while rights may be recognised locally they cannot be 'defended against the world at large'.

Land administration is central in integrating and binding the diverse land rights into a national land administration system that will give these rights national recognition and legal status as a form of ownership. Building land administration institutions will improve the delivery of land reform programmes and provide the elements to develop an integrated property system in South Africa. While this may not require constitutional amendment it could benefit from being a recommendation of the Constitutional Review Committee which will reinforce the findings in the HLP report.

Conclusion

Expropriation without compensation has been framed by some as providing a possible panacea for the failures of land reform and an answer to the wider national failure to recast 'relations of production, property and power inherited from apartheid'.¹⁶ Others seek to harness the symbolic power of the expropriation narrative to enlarge their political reach.

We caution that injudicious use of expropriation as a mechanism will result in contradictory impacts and macroeconomic consequences that are likely to far outweigh short term political gains and overwhelm benefits of land acquisition through expropriation.

¹⁵ The Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change. (2017). Parliament of South Africa. P. 428

¹⁶ Bernstein, H. (1998). Social change in the South African countryside? Land and production, poverty and power. *The Journal of Peasant Studies*, 25, 1-32.

Unforeseen and unintended consequences of EWOC should be considered particularly with regard to those whose land rights are already insecure. There is a danger that expropriation could become a future entry point for corrupt asset capture.

In its current formulation, the Constitution permits a context specific compensation regime. Expropriation can be a complex and costly procedure and should ordinarily be used when there are compelling reasons which make it the most effective and efficient method of land acquisition. In most circumstances land is unlikely to be expropriated without some level of compensation being awarded. However in these instances the level and form of the compensation could vary substantially. These circumstances need to be determined and built into legislation.

We submit that rather than being diverted by constitutional amendments to enable expropriation without compensation - which as legal opinion confirms is already legally permissible - we submit there is a more important need to pay serious national attention to the thoroughgoing analysis and findings of the High Level Panel. If we are to address its recommendations we have a chance to put land reform on a new path where it will better address the needs of South Africans across rural and urban settings.

In this regard the Constitutional Review Committee can add significant value by giving careful consideration of what will be required to advance and develop an integrated property rights regime which records and protects the rights of the majority of citizens whose rights remain off register.