

Joint Constitutional Review Committee
Parliament of the Republic of South Africa
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To the Joint Constitutional Review Committee

SUBMISSION ON THE REVIEW OF SECTION 25 OF THE CONSTITUTION, TO ENABLE EXPROPRIATION WITHOUT COMPENSATION IN THE PUBLIC INTEREST AND PROPOSE CONSTITUTIONAL AMENDMENTS WHERE NECESSARY

INTRODUCTION

1. Business Unity South Africa ('BUSA') welcomes the opportunity to submit written comments to the Parliamentary Constitutional Review Committee established with the mandate to "*review section 25 of the Constitution and other clauses where necessary, to make it possible for the state to expropriate land, in the public interest without compensation, and propose the necessary constitutional amendments where necessary*".
2. BUSA is a confederation of business organisations, including chambers of commerce and industry, professional associations, corporate associations, and unisectoral organisations. It represents a cross-section of business, large and small, on macro-economic and cross-cutting policies and issues which affect business in all three spheres of government and at the international level. BUSA's function is to ensure business plays a constructive role in economic growth, development and transformation, and to ensure an environment in which business can thrive, expand and be competitive. As the principal representative of business in South Africa, BUSA conveys the views of its members in various national structures and bodies, both statutory and non-statutory.
3. In 2017, BUSA adopted the 'Business Approach to Black Economic Transformation for Inclusive Growth', which recognises that the pace and depth of transformation within business have been inadequate. BUSA identified four elements to drive transformation within business: embed a

diversity culture; education and skills development; employment, particularly of youth; and rapid enterprise development of black-owned businesses. BUSA's submissions in this regard are made in the context of the Transformation Approach, which is copied hereto, and reflects the consolidated input BUSA members.

THE NATURE OF THE LAND REFORM CHALLENGE & PROPERTY RIGHTS

4. The legacy of land and property ownership continues to be an obstacle to transformation, economic growth and social development. South Africa's unique history of dispossession and current challenges of poverty, inequality and unemployment require a strengthening and spreading of ownership of property, including land, to address these structural imbalances.
5. Business acknowledges the urgent need to address the persistent effects of apartheid-era land dispossession and recognises the inextricable link between land and restoring dignity. Land reform, and by extension, the furthering and entrenching of property rights to a broader segment of South African society, has been unacceptably slow and beset by problems.
6. Business is, however, concerned by a response that focuses on constitutional reform rather than addressing the endemic structural and administrative challenges in implementing land reform, which has been riddled by inefficacies.
7. Section 25 of the Constitution already allows for expropriation to take place within the provision for the payment of just and equitable compensation. However, the state has never invoked the opportunity to test this in our courts and adjudicate upon just and equitable compensation within the context of land reform. We believe that the bounds of just and equitable must first be tested before a decision can be made on possible amendments. It is, thus, the position of business, along with many others, that Section 25 is sufficient to achieve sustainable land reform to enable transformation and growth, while still maintaining confidence in South Africa's commitment to property rights, as well as fostering a growth-friendly policy environment. Further, caution should be applied so as not to elevate the risk of undermining property as an asset to invest in or to use as collateral to access finance, as this will hamper growth and investment efforts.
8. Business largely endorses the findings of, *inter alia*, the *High-Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change*, headed by former president Kgalema Motlanthe, as well as *Operation Phakisa*, that the existing constitutional framework is not an obstacle to sustainable land reform.
9. The *High-Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change* made the following findings as to the biggest stumbling blocks:
 - the requirement to pay compensation is not the biggest stumbling block to land reform;
 - there is inadequate differentiation of approaches between pro-poor policies and development of black commercial farmers;
 - poor implementation of existing policies and indifference by officials to beneficiaries;
 - legislative gaps;
 - corruption; and
 - reluctance to transfer ownership.

10. *Operation Phakisa*, with government, agribusiness and labour, identified the following key obstacles:

- Large-scale lack of consensus on the purpose of land reform and targeted beneficiaries;
- poor governance and functioning of land holding entities;
- inadequate land reform delivery mechanisms;
- slow pace of researching and settling restitution claims;
- challenge of financing land reform and lack of private sector participation; and
- corruption

11. It is the overarching view of business that, in reality, it is the challenges and failures associated with the implementation of land reform which have led to perceptions that the current constitutional framework has failed. Moreover, much of the current debate around land reform appears to focus largely on agricultural land, with the resultant risk of overlooking the heterogeneity of potential beneficiaries of land reform (holistically defined), such as land reform in urban areas.

CONSTITUTIONAL CHANGES & BUSINESS CONFIDENCE

12. The Constitution is the foundation stone of South Africa's democracy, and has provided for a stable platform of rights and obligations, which upholds the rule of law through the separate arms of the executive, the judiciary and Parliament.

13. South Africa's Constitution provides long term assurance to all stakeholders that rights will be protected, while providing space for advancing the transformation imperative. Land rights are inextricably linked to property rights which are a necessary condition for democratic freedom, economic prosperity, social development and human dignity. For local and international business investors, the Constitution provides the ultimate form of security that investors will not be arbitrarily deprived of property. Particularly in relation to residential and commercial property and utilised agricultural land, the possibility of expropriation without compensation would result in uncertainty, which will affect investment negatively.

14. In general, the concern about the link between land and property rights has been underscored by sovereign credit ratings agencies, investors (both local and international), who have all indicated that uncertainty about property rights will have an adverse effect on business confidence and hence investment.

15. Business is firmly of the view that constitutional amendments are not necessary to achieve meaningful land reform, and that the consideration thereof is creating policy uncertainty, which the country can ill-afford.

16. South Africa is the only net exporter of food on the continent, with a third of all manufacturing being dedicated to agricultural processing. The sector has massive potential to grow and to create jobs, to provide food security and to be the arrowhead of sustainable transformation. Irrespective of how land is acquired for reform, beneficiaries will require assistance to access market linkages and integrate into the formal agro-food economy. Public-private partnerships with the agricultural, agribusiness and banking sectors and a shared vision for land reform will be the only sustainable solution for real economic empowerment.

IMPLEMENTATION IMPERATIVES

17. Irrespective of how land or property is acquired by the state, there remain systemic problems around the implementation of government policy, which will continue to prevent sustainable land reform and transformation, unless they are addressed. This has been influenced by a number of factors, including:

- Inadequacy of legislation and legal guidance to provide the procedure, criteria or clarity on what considerations will determine *just and equitable* compensation, including expropriation without compensation;
- Insufficient co-ordinated action within government, together with bureaucratic inadequacies;
- Lack of coordinated approaches and action by the private sector;
- Lack of training and capacity, including post-redistribution support to emerging farmers;
- Corruption in both the public and private sectors, which has hampered efforts to redistribute current properties owned by the state;
- Expropriation for the purposes of restitution, which has seldom been used;
- Land tenure - Parliament has not completed its deliberations on the Extension of Security of Tenure Amendment Bill (negotiated in Nedlac in 2013/14), further investment into water and logistical infrastructure is required;
- Restitution – the process must be expedited to achieve redress, good solutions were proposed through operation Phakisa but have not been implemented;
- Redistribution – limited implementation success for large-scale commercial agriculture, despite a number of success stories, difficulties with household and individual beneficiary overlap, together with selection and allocation challenges;
- The lack of concerted planning and action by the state and private sector;
- Insufficient focus on land reform for human settlement purposes, both rural and urban; and
- Inadequate monitoring, evaluation and communication of progress and impact.

18. BUSA submits that, to achieve the objectives of sustainable land reform (broadly defined), the most effective and sustainable solution would be for the government to partner with business and civil society to explore more sustainable, evidence-based land reform models within the context of a national land reform plan. These include, amongst others, and within the existing constitutional framework:

- The establishment of an economically viable plan for land reform that will systematically address poverty, inequality and unemployment through co-ordinated public and private sector participation (broadly defined, including the sector, supply chains and service providers);
- Rapid finalisation of a coherent legal framework providing the basis for commercially viable, job rich land reform as well as diversified interventions for human settlement purposes;
- Institutional capacity to manage, monitor and evaluate land reform, with tripartite involvement in appropriate structures;
- Diversified approaches, with public-private partnership funding models and implementation;
- Promoting joint ventures, 'soft loans' and grants based on commercial principles of scale and viability, with ownership transferring to the beneficiary;
- Focusing on infrastructure, including irrigation, transport, water;
- An integrated, digital platform containing land-based information for monitoring and evaluation;
- Building capacity in the public and private sector, including commodity-specific expertise and

a dedicated rural education and skills strategy including targeting rural youth and equipping them for the 4th industrial revolution and

- Setting aside of land in urban areas for small business trading.

19. Through our affiliates, we have submitted detailed proposals for workable land reform solutions to bring about sustainable transformation in a manner that bolsters, rather than diminishes, economic growth. Redistribution policies that are not based on sound evidence and economic principles are not redistributive at all and have the potential to be anti-transformative over the long term.

CONCLUSION

20. Business stands ready to work with government (both with Parliament and the executive) on an economically viable plan with fit-for-purpose solutions, legislation and regulations to support and to accelerate sustainable land reform.

21. BUSA is available to engage with the Constitutional Review Committee in relation to our submissions should this be required.

Yours sincerely



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