

AUGUST
2019

LAND REFORM

Status update



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“Constructive engagement with Government and Parliament remains the only plausible way to resolve the land question in South Africa.”



INTRODUCTION



On 15 November 2018 the Constitutional Review Committee made the recommendation that section 25 of the Constitution should be amended to 'clarify' that this section does make provision for expropriation without compensation. An ad hoc committee was mandated to consult with legal experts and draft the contents of the amendment. The ad hoc committee will finally be responsible for drafting a Constitutional Amendment Bill and will invite public consultation. Agbiz will engage on this Bill, as well as make oral submissions to Parliament if permitted.

The revised Expropriation Bill is now of critical importance as it contains the conditions under which land may be expropriated at nil compensation. The revised Bill published for public comment contained a discretionary list of properties for which it may be just and equitable to award nil compensation. Agbiz submitted comprehensive written comments.

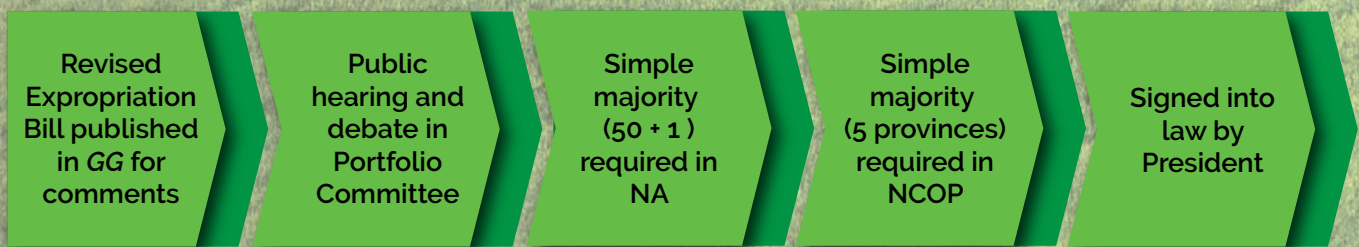
Expropriation is, however, merely one element of the broader land reform debate. There are several outstanding issues which predate the expropriation debate and which are vital to the success or failure of land reform in South Africa. Policy decisions on a number of these issues have largely been held in abeyance pending the recommendations of the Presidential Advisory Panel on Land Reform and Agriculture but could see movement in the medium term as the report has been released. Agbiz will analyse the outcomes and provide reasoned inputs if formal policy proposals are subjected to public participation.

This document is intended to place the latest developments on expropriation in context and to provide an overview of the broader direction in which land reform is moving.

Process flow for review of section 25



Parallel process could be followed to amend the Expropriation Bill, where the detail will be prescribed.



There are several outstanding issues which Agbiz is focusing on to improve the outlook on land reform.

Expropriation Bill

The Expropriation Bill provides for a uniform procedure to be followed whenever expropriation takes place under an empowering provision in legislation, as well as for the methodology to be used in calculating compensation. The Bill dates back to 2013 but was republished for public comment in December 2018. The salient difference is the insertion of a provision for the discretion to award nil compensation for specified categories of land, including land

- that has been abandoned;
- held for speculative purposes;
- owned by SOEs;
- occupied by labour tenants; and/or
- acquired using subsidies that exceed the market value.

Discretion is retained and the Bill is not prescriptive in the sense that it stipulates that the compensation paid must be nil. The decision still hinges on what is just and equitable in the circumstances.

Extension of Security of Tenure Amendment Act (ESTA)

Six years after the ESTA Amendment Bill passed through Nedlac, it has finally been enacted into law. Aside from a questionable provision which seeks to limit access to the courts, the Bill makes positive strides in alternative dispute resolution measures to settle tenure disputes on commercial farms.

Land Reform (Labour Tenants) Act 3 of 1996

After a damning judgment was handed down against the Department of Rural Development and Land Reform (DRDLR) in 2016, a special master is being appointed to oversee the implementation of the Labour Tenants Act.

Communal Land Tenure Bill

Tenure reform for the communal areas of South Africa is long overdue. The draft Bill which was published for public comment in 2017 made provision for title deeds to be given to communities, and for each community to decide on the nature of individual landholdings within the collective. Aside from comments regarding the scope of the minister's discretion, the content of the draft Bill was largely positive. The Bill has, however, been held in abeyance until a decision has been made on the recommendations of the High-Level Panel regarding governance reform in communal areas as well as the recommendations made by the Presidential Advisory Panel in this regard.

Restitution of Land Rights Amendment Bill

After the 2014 Bill was declared unconstitutional on procedural grounds, the Bill has been returned to Parliament for further consultation. As it currently reads, the Bill seeks to open the claims lodgement process for an additional three years. However, Agbiz and other stakeholders have called for the Bill to be reconsidered as key recommendations from the High-Level Panel and the Presidential Advisory Panel will need to be incorporated before any amendment can be considered.

Comprehensive land reform framework legislation

The High-Level Panel also identified the need for overarching framework legislation to guide the principles governing the implementation of all land reform, especially land redistribution. Such legislation should regulate key aspects of redistribution such as land identification and beneficiary selection. No Bill has been published as yet but Agbiz has undertaken to cooperate with the DRDLR in their legal review as a Jobs Summit outcome. The Presidential Advisory Panel's recommendation may also influence the content.

ALSO UNDER SCRUTINY



Status update on Agbiz/BASA land reform proposal:

Commercial financing for NDP model on land reform

Background

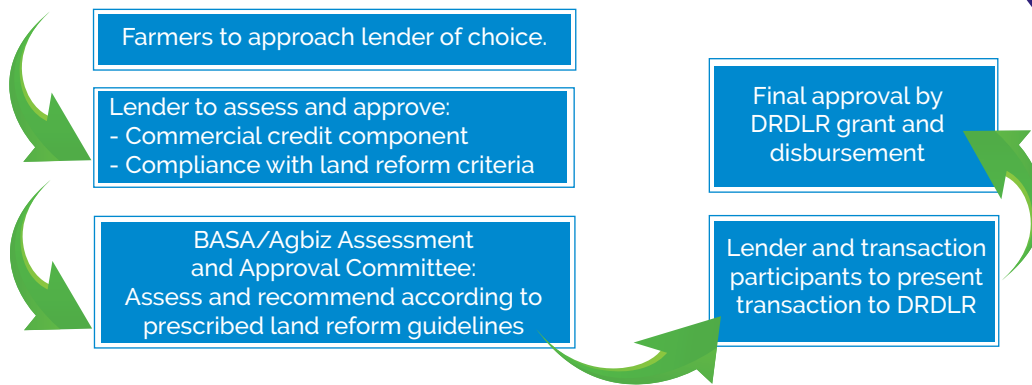
The focus placed on partnerships in the National Development Plan (NDP) in 2012 has prompted Agbiz and the Banking Association South Africa (BASA) to formulate a blended finance proposal for land redistribution.

The BASA/Agbiz Task Team proposal

This proposal comprises a mechanism and process for the commercial financing of land redistribution. It is based on the principle of blended finance, whereby the state can commit resources to unlock commercial funding for land redistribution. The principle will retain competition amongst lenders for the commercial portion and enable the state to achieve better developmental results by doubling up on its developmental spend.

The active participation of commercial farmers in the financing of land reform and establishment of a viable black commercial farming sector is a critical success factor. Commercial farmers contribute commercial acumen and skills to enable the financing process. They would be responsible for initiating commercially viable land acquisition transactions, with possible concomitant operational funding solutions and should receive recognition in the form of B-BBEE points as well as access to incentives such as grants, tax incentives or preferential finance.

Process flow: Commercial financing of land reform



Status update

The Jobs Summit outcomes for the agribusiness sector emphasised the need for blended finance models to fast-track land reform and farmer development. Arrangements are being put in place between the former Department of Agriculture, Forestry and Fisheries (DAFF), the former Department of Rural Development and Land Reform (DLDLR), the Land Bank and the Jobs Fund to create a blended finance model for farmer support. The Agbiz/BASA model for land redistribution was also captured in the Jobs Summit agreement and expressly referred to by the President in his opening address. Despite this commitment, it has been a challenge to secure engagements on the proposal, resulting in little progress being made.

Agricultural Development Agency

To fill the vacuum which currently exists in support provided for land reform beneficiaries and developing farmers, the In-Transformation Initiative led by Roelf Meyer has drawn in multiple stakeholders in an attempt to establish an agricultural development agency (ADA). The ADA is not intended to deal with land acquisition, but rather to provide comprehensive support and blended finance to deserving projects, including the beneficiaries of land reform. The purpose, scope and structure of the ADA are currently being finalised but it is envisioned as a multi-stakeholder agency based on the principle of public-private partnerships. While the ADA is still in the process of establishment, Agbiz has played a pivotal role in guiding its proposed scope, mandate and structures.



Report of the Presidential Advisory Panel on Land Reform and Agriculture



Background

In 2018, President Ramaphosa convened a panel of experts to formulate proposals to fast-track land reform and stimulate agricultural development. Panellists were not nominated nor did they represent any particular constituencies. Instead, they were chosen on the basis of their expertise and served in their personal capacity. The report was finalised early in 2019 and the Presidency made it available to the public in July 2019.

Context

It is important to note that the report contains the ideas and recommendations of experts but has no formal standing in official government policy. As the President exercised discretion in appointing the panel, he is entitled to exercise discretion as to which recommendations, if any, are adopted as government policy. It was never the intention to outsource policy-making functions to the panel.

It is unclear whether or not the panel's recommendations will be made available for comment. The state is under no obligation to request comments until such time as the recommendations, if any, are adopted as draft state policy. Not all proposals in the report require legislative amendment but those that do will have to follow the usual route of public consultation, in which case Agbiz will make use of all available avenues to provide inputs.

Proposals

The following recommendations do not require legislative amendments but merely political will and stakeholder commitment for their initiation:

- ▶ Create innovative financing mechanisms.
- ▶ Create a 'land register' to house donations.
- ▶ Identify and release state land.
- ▶ Conduct a land audit.
- ▶ Subdivide land already acquired by the state.
- ▶ Provide tenure grants for certain occupiers.
- ▶ Root out corruption.
- ▶ Reallocate water rights in conjunction with land allocation.
- ▶ Finalise outstanding restitution and labour tenant claims.
- ▶ Split the budget between reforming the commercial farming sector and land reform on the basis of social considerations.

In theory, these proposals, if accepted by Government, could be implemented immediately. It would require substantial political will, however, as the existing business processes of the department would need to be adjusted.

Other recommendations require amendments to the legislative framework, including the following:

- ▶ Introduce institutional arrangements such as the creation of a land reform ombudsman.
- ▶ Create legally enforceable rights for the holders of off-register tenure rights.
- ▶ Amend the municipal property rates regime.
- ▶ Amend the legislative framework regulating land rights on farms (ESTA).
- ▶ Clarify the role of traditional councils and communities in natural resource governance in communal areas.
- ▶ Expand the capacity and mandate of the Land Claims Court.
- ▶ Establish a compensation policy for expropriation.

The latter issues require legislative amendments which cannot be undertaken without substantive public consultation, usually characterised by the following processes:

- ▶ gazetting for public comments;
- ▶ Nedlac process; and
- ▶ public hearings in the Portfolio Committee and Select Committee of the NCOP where applicable.

Agbiz is well positioned to participate on each platform.

Compiled by:

Dr John Purchase, Theo Boshoff and Wandile Sihlobo

Address

The Grain Building, 477 Witherite Street, The Willows, Pretoria, 0184, South Africa

Tel: +27 12 807 6686,

Email: admin@agbiz.co.za,

Website: www.agbiz.co.za

Design & layout: Fire Cherry Creative Branding - www.firecherry.co.za