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the way to prosperity

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The Director-General: Rural Development and Land Reform
184 Jeff Masemola Street
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Attention: Mr Barry Levinrad

Per email: Bsla@drdlr.gov.za

WRITTEN INPUTS ON THE DRAFT BENEFICIARY SELECTION AND LAND ALLOCATION POLICY

Dear Mr Shabane

Agbiz would like to thank the Department for the opportunity to submit written comments on the draft Beneficiary Selection and Land Allocation Policy.

1. Who we are:

The Agricultural Business Chamber (Agbiz) is a voluntary, dynamic and influential association of agribusinesses operating in South and southern Africa. Key constituents of Agbiz include the major banks in South Africa, Development Finance Institutions, short term and crop insurance companies, commodity organisations, agribusinesses and co-operatives providing a range of services and products to farmers, and various other businesses and associations in the food and fibre value chains in the country. Conservative estimates attribute 14% of South Africa's GDP to the food and fibre value chain, although its proportionate contribution to the rural economy and rural job creation is significantly higher.

Agbiz's function is to ensure that agribusiness plays a constructive role in the country's economic growth, development and transformation, and to create an environment in which agribusinesses of all sizes, can thrive, expand and be competitive. One way in which we seek to achieve this is by providing thoroughly researched inputs on draft laws and policies affecting our members.

Agbiz is also an active member of Business Unity South Africa (BUSA) and participates in many Nedlac activities through the Business Constituency.

2. Introduction

Agbiz and its members are committed to building an agricultural sector that is prosperous, dynamic, efficient, inclusive and sustainable. The transformation of the agricultural value chain is hence a core objective of Agbiz and land reform naturally plays a significant role therein. Many of our members, particularly cooperatives, agribusinesses and commodity organisations are actively involved in land reform and run their own farmer development programmes. The vast majority of the farmers which these programmes support are the beneficiaries of land reform, and hence our members have first-hand experience relating to the attributes, experience and partnerships required for a beneficiary to succeed in the agricultural sector.

Whilst farmer support programmes such as those run by our members can aid a future farmer by providing the necessary technical advice, training, skills development and mechanisation support, it is equally important that an appropriate beneficiary is selected from the outset. The comments contained in this document is intended to assist the Department by providing inputs as to the critical elements which we believe are required to ensure that the individuals which benefit from land reform and possibly form part of our members' support programmes, are the best candidates available. We trust that our comments will be considered within this context.

We furthermore believe that the policy is so critical to the success of the land reform project that it justifies a socio-economic impact assessment (SEIA) being conducted. It is acknowledged that a SEIA is not a legal prerequisite but rather a requirement for the cabinet to make an informed decision on the policy. Should a SEIA be undertaken, it would certainly assist interest groups and stakeholders such as ourselves if it can be made available.

3. General inputs

3.1. Policy versus legislation

The policy must always predate legislation, however, there is no indication in the document that the substantive elements of this policy will be captured in framework legislation or specific legislation to give content to the principle of 'equitable access' contained in section 25(5) of the Constitution.

Under the topic of beneficiary selection, the High-Level Panel[1] described decision-making on beneficiary selection as "Opaque".[2] Whilst noting the existence of the White

[1] Parliament. 2017. Report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change. (hereafter referred to as the *High-Level Panel*).
[2] The *High-Level Panel* at p212.

Paper on Land Reform,[3] it makes the crucial point that there is no legislative mechanism that would provide transparency and accountability to the process. Without a legal instrument, a potential beneficiary would not be in a position to challenge an administrative decision and there would be no measure in place for Parliament to assess whether the Constitutional right to equitable access is being realised.[4] The report then goes on to make the recommendation that dedicated land redistribution legislation is required.[5] This recommendation was likewise endorsed by the Presidential Panel's report.[6]

Agbiz supports this recommendation and therefore propose that critical elements of the policy must be translated into draft legislation. Without such legislation, potential beneficiaries have little legal recourse in the event that the prescripts of the policy are not followed. It is worth mentioning that this has occurred in the past as the State Land Lease and Disposal Policy does contain guidelines as to the categorisation of beneficiaries but this has not always been followed or uniformly applied in the past.[7] The legislation is required to break away from the perceptions of beneficiary selection as opaque and unaccountable.

3.2. Landholding arrangement

When land is allocated to a specific beneficiary, the policy is largely silent as to what form of legal entitlement the beneficiary will have to the land. The State Land Lease and Disposal Policy made provision for land acquired through the Proactive Land Acquisition Strategy (PLAS) to be leased for a period of between 5 and 30 years. Following an assessment, the beneficiary would obtain an option to purchase the land. It is not clear whether this policy changes still endorses this approach as no alternative landholding arrangement, namely transfer of title deed, institutionalised land holding or long-term leases are proposed. We believe that this is a critical matter which should be clarified in the draft policy.

3.3. Beneficiary selection

3.3.1. Agricultural focus and land reform for settlement purposes

The draft policy notes the need to address diverse and different land needs including "agricultural production, human settlements, commonage, residential and industrial purposes".[8] The in-depth criteria, however, is heavily biased towards agricultural

[3] The White Paper on South African Land Policy, 1997.
[4] The *High-Level Panel* at p217.
[5] Recommendation 3,1 of the *High-Level Panel* at pp222 - 224.
[6] The Presidency. Final Report of the Presidential Advisory Panel on Land Reform and Agriculture. 2019 (hereafter referred to as the *Presidential Panel*).
[7] See the findings of the *High-Level Panel* at pp217 – 219; Hall and Kape. 2017. Elite Capture and state neglect: new evidence on South's land reform. *Review of African Political Economy*; as well as the dictum of the court in Rakgase and Another v Minister of Rural Development and Land Reform and Another 2020 (1) SA 605 GP.
[8] Clause 4.1 of the draft policy.

production, both commercial and subsistence. The level of in-depth considerations and criteria applied to agricultural applicants is not matched by equivalent considerations for industrial or human settlement purposes. It may be that other state institutions such as municipalities or the Department of Human Settlements are better placed to pronounce on the qualifying criteria for urban or industrial applicants. For this reason, it may best that the policy only focuses on agricultural applicants and the qualifying criteria for other land use applicants be developed in a separate policy.

3.3.2. Industry equivalents opposed to turn-over

The categorisation of agricultural producers appears to be aligned with the proposals made under the Comprehensive Producer Development Support Policy, although the last version of the latter made reference to 6 categories of beneficiaries where this policy makes reference to 4. This alignment is welcomed. Agbiz provided inputs to the producer categorisation when the CPDSP was under consultation as well as when the policy was consulted upon at Nedlac. Many of the inputs provided, for example, alignment with VAT registration and the AgriBEE Sector Code classifications have been adopted but we still believe that there is merit in measuring a producer's size not solely on turnover, but also on commodity-specific thresholds.

Several commodities have developed industry-specific thresholds used to classify producers in their farmer development programmes. For example, a livestock farmer may be classified according to herd size, a crop farmer according to hectares planted and a horticulturist according to hectares under orchard. These thresholds may be more representative and consistent than turnover alone. During the consultations at Nedlac, the industry representatives compiled information from the largest and most common commodities. We would be more than willing to share this information and recommend that the categorisation of agricultural beneficiaries align with the categorisation used by commodity organisations. Some flexibility may well be required as many farm enterprises are mixed-enterprises consisting of livestock and other commodities.

3.3.3. Means test

The policy is at pains to set out the different categories of persons who should benefit including the landless, indigent and the various categories of farmers but it never proposes a mechanism to determine what category a beneficiary may fall into. The landless, indigent and vulnerable persons should undertake a means test as recommended by the High-Level Panel[9] as well as the Presidential Panel.[10] Likewise, the various categories of farmers should furnish financial statements which will assist government in placing them in various beneficiary categories. In the latter instance, a tax clearance certificate should also be produced to verify that the beneficiary does

[9] The *High-Level Panel* at p209, 212, 217.
[10] The *Presidential Panel* at p56.

not have alternative revenue streams outside of the farming enterprise. In other words, a beneficiary who owns a farm enterprise with a relatively small turnover should not benefit if they are a high nett worth individual owing to other business ventures.

3.3.4. Beneficiary groupings

The eligibility and criteria for beneficiary selection in the draft policy seems biased towards individuals as beneficiaries. Although group beneficiaries are not excluded, the policy's criteria, especially in so far as the categories for agricultural production are concerned, seem to address the needs of individuals. The land restitution and farm equity scheme programmes in particular allocated land rights to groups of people opposed to individuals. This will likely continue to be the case as many restitution claims are instituted by communities and several empowerment projects are constituted as a trust, CPA or some other form of communal property holding institution.

Where land rights are awarded to a group, the draft policy should consider that the grouping are not necessarily an not autonomous, functioning community but instead may be a group of people brought together from diverse backgrounds with the sole connecting factor being a common interest in the land. The land reform workstream at Operation Phakisa rightly identified the governance challenges that can be encountered where a community is 'manufactured' and forced to work together.[11] There have even been situations whereby farm worker trusts operating on farm equity schemes have not been able to obtain finance as some of the trust's members have criminal records.

These types of conflicts can often derail an empowerment project and it is necessary for the policy to build in processes to manage conflict, vet beneficiaries within groupings and mediate disputes. There are a number of credible NGOs that specialise in social facilitation and managing beneficiary expectations. One would recommend that the policy recognises the roles which these NGOs can play and prescribe their role in relation to beneficiary groupings.

3.3.5. A budget must follow priority beneficiaries

The draft policy largely follows the recommendations of the *Presidential Panel* in so far as it includes pro-poor as well as emerging commercial farmers as beneficiaries. However, a crucial element which is missing is the apportionment of the budget that will be allocated to each category. In this regard, the *Presidential Panel* stated the following:

> *"Given that the state has limited resources, the panel proposes that available budget be rationed across different priority needs. While urban land reform will be financed through a variety of mechanisms, rural and agrarian reform should*

[11] See pp55 & 56 of the Final Report on Operation Phakisa, Agriculture, Land Reform and Rural Development.

> *distinguish between four categories of landholders and farmers as set out in the State Land Lease and Disposal Policy of 2013. We propose that over half the budget for land reform for agricultural purposes should be rationed as illustrated in this Table. The rationale for this distribution is to prioritise the most need, while giving less to those who can leverage private resources (see Finance section.)"*[12]

The draft policy proposes at point 6.8 that no less than 50% of the allocation of agricultural farmland go for smallholder producers, 40% to women and 10% to people living with disabilities. This delineation is not in line with the recommendations made by the *Presidential Panel* quoted above as it makes no distinction between pro-poor beneficiaries and emerging commercial farmers. It is furthermore unclear what percentage should be allocated to pro-poor beneficiaries as the smallholders, women and people living with disabilities can overlap.

The *Presidential Panel* made reference to emerging commercial farmers leveraging private sector resources but a portion of the state's budget is still required to achieve this leverage. As such, the policy should expressly state which percentage should be reserved for pro-poor land reform and which percentage should be reserved to leverage private sector capital through blended finance. For instance, if the annual budget for redistribution amounts to roughly R3 billion, R2 billion could be used for pro-poor beneficiaries whilst R1 billion is used to leverage an additional Billion Rand from the private sector through blended finance. In this instance, the Department can still prioritise the most-needy but simultaneously stretch the funds available for redistribution to R4 billion. It is our considered opinion that the policy should not make loose recommendations as to the budgetary delineation but rather make firm and prescriptive allocations.

3.3.6. State-assisted land reform

In line with the recommendations of the *Presidential Panel* quoted above, there is a move within the ambient of Government, Private Sector as well as Nedlac to provide for state-assisted land reform in the form of blended finance to supplement the delivery of land by the state. The policy in question is being developed in parallel so this policy need not deal with the intricacies of blended finance. It should, however, recognise that land redistribution to emerging commercial farmers, the so-called category 4 listed in the policy, may take place via state-assisted land reform.

3.3.7. Demand-led vs supply-led land redistribution

At the Operation Phakisa for agriculture, land reform and rural development held in 2016, a multi-stakeholder team identified the critical stumbling blocks to effective land implementation of land reform in South Africa. When formulating the problem

[12] The *Presidential Panel* at p57.

statements, it was noted that land redistribution was supply-led rather than demand-led. This means that beneficiaries were allocated land as and when it became available irrespective of whether the land in question matches the needs and ambitions of the beneficiary. The *Presidential Panel* took this recommendation on board and proposed a "demand-driven land reform process in which citizens are encouraged and supported to articulate their land demands…".[13]

Land redistribution will always have a supply-side element to it as the state can only provide access to the land it has available to it. However, special care should be taken to assess the needs and ambitions of the beneficiaries when they submit applications. In short, the beneficiary's needs must be placed at the forefront of considerations and the beneficiary selection, as well as land allocation process, must be designed to give effect to such aspiration and realities of what can be managed properly

3.4. Institutional arrangements

Both the *Presidential Panel* as well as the *High-Level Panel* criticised the lack of transparency in land allocation. The *Presidential panel* went as far as to recommend the creation of a Land Depository which will work with District Land Reform Committees (DLRCs) to allocate land in a decentralised manner.[14] Given this background and the firm recommendations that were made, one cannot understand the rationale behind retaining the existing NLARCC and PLARCC structures. Many stakeholders in the agricultural value chain resigned their participation from the DLRCs as their recommendations were summarily overturned by the provincial or national structure without any explanation or recourse.

Likewise, some private sector entities withdrew their nominations to the DLRCs as they were faced with a vague and ever-changing mandate. The DLRCs were supported in principle by most stakeholders as it was intended to give effect to the recommendations in chapter six of the National Development Plan. It was the implementation thereof that resulted in many institutions withdrawing nominations, thereby losing critical skills and collaborations in the process. The functions, powers and nature of the recommendations made by the DLRCs, especially vis-à-vis PLARCC and NLARCC, was never contained in a document with legal standing. Various Terms of Reference was developed however it was silent as to these critical aspects and resulted in prolonged debates about what the DLRCs can and cannot do.

It was also hampered by the notion that the mandate of the DLRCs remained in constant flux and at one stage the implementation of Agri-Parks was also summarily added to their mandate by the Department. As a result of this experience, the Land Reform Workstream at Operation Phakisa recommended that the scope, mandate and powers in the DLRC either be clarified in legislation or that they are established as

[13] The *Presidential Panel* at p56.
[14] The *Presidential Panel* at p57.

legal entities known as District Land Reform Delivery Centres.[15] The latter recommendation was never implemented as the Minister at the time did not agree with the consensus position at Phakisa.

The policy still envisions the same role for national and provincial structures and again refers to the creation of DLRCs through a term of reference. Given the history of these structures, it begs the question of how any different results can be expected if the same methodology is used? As evidenced in both reports listed above, non-statutory institutions with limited checks and balances in place result in a lack of transparency and accountability. We are firmly of the view that all structures responsible for the beneficiary selection and land allocation must meet the following criteria:

- Its roles and responsibilities should be set out in legislation so that there are legal consequences for non-adherence to the prescripts of the law;
- An applicant must have recourse to take the institutions' decisions on judicial review;
- The institutions must be accountable to the Portfolio Committee as well as the Minister to ensure transparency.

We recommend that the land depository be established and the DLRCs be constituted through legislation. An informal structure with no statutory backing (such as those established merely by terms of reference) will not meet the criteria detailed above.

3.5. The role of agribusinesses, commodity organisations and NGOs

Many agribusinesses and commodity organisations have invested in farmer development and support programmes. These projects have often been undertaken in partnership with the Department or by accessing funds raised through statutory levies and allocated for transformation by the National Agricultural Marketing Council. These entities have experience in selecting beneficiaries, providing skills development and mentorship as well as assisting them with the development of business plans. In addition, NGOs such as the Seriti Institute and the Future Farmers Foundation have a proven track record in selecting promising agricultural graduates and placing them with established farmers. Many of these beneficiaries have gone on to take over the enterprises.

The most effective way to select promising beneficiaries, assess viable business plans and conduct monitoring and evaluation would be through service level agreements or partnerships with these institutions. Given the fiscal constraints that the state is currently experiencing, it is vital that the most promising, qualifying beneficiaries are selected as this will provide the state with the greatest returns on its social investment.

[15] See point 3.5.3 of the Final Report on Operation Phakisa, Agriculture, Land Reform and Rural Development. (2016).

Private sector institutions can also greatly assist with the development of selection criteria and the weighting of factors for emerging commercial farmers.

4. Comments applicable to specific sections of the policy

Section 1 – Definitions

"communal land" - The definition refers to section 2 of the Communal Land Rights Act 11 of 2004. This Act was declared unconstitutional in its entirety by the Constitutional Court in 2010.[16] A declaration of invalidity means that the Act is no longer on the statute books and it would hence not be appropriate to refer to it. The definition contained in section 2 of that legislation could simply be copied over into the definitions clause in this policy.

"Development Support" – It is unclear why only capital renewal and restructuring is included in the definition as support can relate to non-financial commitments such as the provisions of training, skills development, market access etc.

"Disability" and "Persons with disabilities" – The definition includes people of all races with a disability. This is in line with the definition of disability contained in the Employment Equity Act but not aligned to the definition in the BBBEE Act. The latter only includes previously disadvantaged people with a disability whilst the former does not. Which definition the policy aligns to is a policy decision which should be considered.

"Double-dipping" – Whilst the intention is lauded, it should be qualified to include only state support received in the form of grants or developmental funding. There should be nothing that stops a person who receives state funding from also getting mentorship support or technical support from the state, agribusinesses or commodity organisations. This should not be considered double-dipping.

Aside from the definition, the draft policy does not specify the checks and balances that will be put in place to prevent double-dipping. The CPDSP proposes the creation of a register containing the details of all farmers who receive state support or who have received state support in the past. We propose that this database be used whenever assessing applications to mitigate the risk of double-dipping.

"Effectiveness" - This seems like a dictionary definition of effectiveness, which is accepted, but how is this applied in the context of an agricultural start-up? What are the thresholds, milestones and over what time frame is this assessed? There has been a lacuna for some time as to when a beneficiary is regarded as successful or not. Perhaps this should be considered in greater detail.

[16] Tongoane and Others v National Minister for Agriculture and Land Affairs and Others 2010 (6) SA 214 (CC).

"Farm dweller" – the definition seems to be incomplete. Consider the following section extracted from ESTA:

"*occupier" means a person residing on land which belongs to another person*

and who has consent or another right in law to do so but excluding:

> *(a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996*
>
> *(Act No. 3 of 1996); and*
>
> *(b) a person using or intending to use the land in question mainly for*
>
> *industrial. mining, commercial or commercial farming purposes, but*
>
> *including a person who works the land himself or herself and does not*
>
> *employ any person who is not a member of his or her family; and*
>
> *(c) a person who has an income in excess of the amount prescribed under ESTA."*

"Rights to land" – this definition may create ambiguity as not all unregistered rights are recognised in law and it is unclear what the nature of certain rights recorded in public registers are. To be comprehensive, we propose the following insertions:

> *"Means any real or personal right in land recognised in law, whether registered nor required to be registered, including a right to cropping and grazing land."*

"Traditional leader" - The intention is well understood, especially in so far as it includes those parties covered under the definition contained in the Traditional Leadership and Governance Framework Act, however, there is little clarity about when, and if, the Khoisan Leadership Bill will become law as it is still being debated in the National Assembly. Why not rather refer to traditional leaders as recognised in chapter 12 of the Constitution?

"Vulnerability" – It appears as if this vulnerability only relates to climate change vulnerability. If so, should consider aligning with the definition contained in the draft Climate Change Bill and draft National Climate Change Adaptation Strategy.

"Vulnerable Groups" and "Vulnerable Person" - Read in isolation, this definition would be well understood. However, if the definition of vulnerability relates only to climate change then the implication is that these groups are vulnerable to the effects of climate change narrowly and not vulnerable to wider socio-economic challenges.

Section 3 - Legislative Provisions

The Restitution of Land Rights Act and the Upgrading of Land Tenure Act could also be of relevance.

3.2 refers to the policy being about equitable access and not about "revenue generation". It is unsure if this refers to the creation of profitable enterprises or if it relates to revenue generation by the state through land rentals. This should be clarified.

We also submit that this policy provides a golden opportunity to define what the concept of equitable access should entail. Whilst there may well be merit in institutionalised use rights or long leases as an interim measure to assess the beneficiary, the 'end-goal' should be to provide equitable access to the ownership of land in South Africa. In this regard we propose that the policy either provides for a phased approach to transfer ownership to beneficiaries or explicitly refer to the State Land Lease and Disposal Policy.

Section 4 – Policy proposals

Under section 4.1 (d), a proposal is listed to promote urban agriculture via access to development plots in urban areas for agriculture. The ideal is supported, however, it must be recognised that the ultimate decision regarding the land use will not rest with the Department but with the Municipality as spatial planning and land zonation are functions which the Constitutions reserve for local government.

Under 4.2 (g) it is listed that bias must be created towards poor rural residents and municipalities. As outlined above, it is insufficient to merely state that bias must be created – this bias should be given expression through prescriptive targets and an accompanying budget that reflects it as a priority area.

Point (i) refers to a needs assessment and skills audit being conducted. This is supported in principle but perhaps the policy should specify when this will take place. One cannot subject each and every online applicant to such an audit but at the same time, one has to know what skills the person possesses before a decision can be made. A pre-assessment should perhaps be conducted before a full skills audit. The policy should explicitly refer to a beginning and end date to conduct a baseline analysis for land is allocated to a beneficiary. Assessments may be required thereafter to assess progress.

Point 4.3 refers to the allocation of land by the Department to Municipalities. It is unclear why the Department must acquire the land and transfer it to the municipalities opposed to the willing municipalities simply targeting and acquiring the land directly if there is a need for it. Furthermore, a great deal of work will be required in order for municipalities to buy into this policy across the board as they are largely autonomous. The City of Tshwane for example owns vast tracts of unused land but instead of releasing it, they are selling it to boost their income. Does this policy have the power to change such behaviour? – It does not have the power in law to do so, so the municipalities will have to approach and convinced on an individual basis.

Section 5 – Policy objectives

Point 5.8 lists it as an objective to ensure that beneficiaries maintain the immovable assets of the state. A beneficiary will never have an incentive to maintain state land as long as it remains state land. Studies have shown that transferring property rights in land incentivises stewardship.

Section 6 – Categories of beneficiaries for land allocation

There are missing references in the footnotes under points 6.5 and 6.6.

Point 6.7 (e) recommends prioritising land for individuals living on state land under insecure tenure arrangements. Where additional land is required to decongest the communal areas, the rationale is well understood. However, if the intention is simply to provide secure tenure then why not rather reform the legal arrangement and provide secure tenure to the applicant on the state land on which he or she is living? This will surely save a great amount of expense and avoid the trauma of being relocated.

We acknowledge that land is required by beneficiaries for a multitude of purposes including residential, subsistence and commercial agriculture. Depending of the need of the beneficiary, the land allocated must be suitable for the purpose but should also reflect the optimal use of the land in question. South Africa is not a country endowed with vast agricultural potential. According to the Agricultural Research Council, only 13% of South Africa's land mass is suitable for cultivation and only a fraction of this figure is considered high potential. In the interest of national food security, the limited high-potential land should be allocated to beneficiaries who intend to establish commercial agricultural enterprises. Where land is required for residential purposes or a mixture of residential and subsistence agriculture, developments should be channelled towards land better suited for this purpose. These comments are not isolated to this policy but are in line with the National Planning Commission's National Spatial Development Framework as well as the policy imperatives underpinning the draft Preservation and Development of Agricultural Land Bill.

Section 7 – Eligibility Criteria

Point 7.1.5 notes that the spouse of a public servant will only be allocated land subject to a clear control. It is our opinion that the policy should develop and specify precisely what these controls are so as to manage expectations and improve transparency.

A potential rider to this provision is that is should only apply to land redistribution. Where the spouse of a state employee has a legitimate claim to restitution, the occupation of his or her spouse should be immaterial provided all the requirements for a valid claim are met. One should however guard against the perception of bias.

7.2.1 One should be mindful of the effect which an increase in state ownership within a poor municipality will have on their ability to raise municipal property rates. Poor

municipalities will remain poor or even deteriorate if they cannot levy a tax on communal land. One should therefore be extremely wary of shrinking their tax base. Alternatively, legal reform may be required to allow municipalities to levy rates and taxes on the users of state-owned communal land.

Point 7.2.3 refers to developers who are registered under the Interim Protection of Land Rights Act but the Act does not require registration. The provision should be reconsidered as it could be open to abuse if developers are granted rights to develop state land. The users of such land should not only be consulted first, but their free and informed consent should be required.

Regarding 7.3: If it is in communal areas, what will be the point of transferring communal land owned by the Minister to the municipality? How will a change in the state entity who owns the land make any difference to access if it is already being used by communities?

It is unclear what is meant by 7.4.1. Does it relate to previously disadvantaged persons who are no longer citizens of South Africa or does it relate to previously advantaged South Africans? If it is the latter then it should be rephrased as previously advantaged South Africans are still citizens albeit that they do not qualify.

The intention under 7.4.5 is supported but it is unclear how it will be tracked and monitored? Likewise, what is the threshold for not appropriately utilising the land or funds previously received? Would previous beneficiaries whose businesses were liquidated due to drought or market conditions be excluded under this provision?

Section 8 – Beneficiary Selection Criteria

8.2 (a) includes an off-take agreement as a prerequisite. The principle that they should be able to demonstrate market access is supported, however, an 'off-take agreement' may be too narrow. There are several instances where successful, black commercial farmers produce for the informal market, fresh-produce markets or even link up with the existing value-chains of other commercial farmers through their participation at feedlots, pack-houses etc. with no formal off-take agreement.

8.3 (d) requires incubation or an apprenticeship programme defined in the policy. We are of the position that applicants who graduated from accredited industry programmes should also be eligible. The skills audit should furthermore supplement and inform this requirement.

8.5 (d) requires the Department to develop rules for the use of communal land. This should not follow a top-down approach since the Department will likely not be able to enforce the rules as it is far removed from the daily governance of the land. Instead, there should be an onus on the community to develop rules that meet a predefined criterion and an obligation can be created for the community to report to the Department on its implementation.

Section 10 – The application process for leasing land

The policy does not specify when the state will lease out land v transferring ownership. Does the State Land Lease and Disposal Policy still apply in the sense that there is a mandatory lease period after which the beneficiary will obtain the option to purchase it? If the land is leased, consideration should also be given as to how the state can incentivise investment by the beneficiary into the capital improvement of the property. Fixed improvements are critical to a successful farming enterprise and studies have shown that the majority of such investment are conducted by farmers themselves. Where the beneficiary owns the farm, the costs of such investment may be recoverable as the market price of the property improves. However, where the beneficiary rents the land, it is unclear what his or her incentive will be. The same can equally apply to land allocated for residential purposes. Where vacant land is provided and the beneficiary invests by building a house, the state should consider transferring ownership to the beneficiary.

Section 13 – Dispute Resolution

An appeal to the Director-General or the Minister is supported as initial steps however the recourse available to a disgruntled applicant should not be limited to these options. The recommendation has been made to create an Ombudsman for land reform as an independent and impartial arbiter capable of dealing with disputes between beneficiaries and the state. This recommendation is still supported as the DG or Minister may be in a conflicted position when the Department is a party to the dispute.

It is furthermore recommended that timeframes be allocated for alternative dispute resolution following which the matter should be referred to the courts for adjudication.

Section 14 – termination and reallocation

Legally secure tenure is a constitutional right equal in status to equitable access. The beneficiaries of land redistribution should likewise be entitled to tenure security. Whilst there might well be justifiable reasons to terminate or reverse a land allocation, the grounds must be spelt out clearly in law to prevent the risk of an arbitrary deprivation. Whilst the grounds in points 14.1.1 to 14.1.6 are supported, we cannot support an open-ended provision such as 14.1.7 as it caters for arbitrary deprivations and in-turn threaten the tenure security of beneficiaries themselves. In line with our previous comments, we believe these grounds must be contained in framework legislation as termination or reallocation will constitute a deprivation of property which can only take place in terms of a law of general application as per section 25(1) of the Constitution.

5. Conclusion

We thank you once again for the opportunity to submit comments and trust that you will consider our comments favourably.

Yours sincerely

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