



COUNCIL
FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN
CONSTITUTION

SUBMISSION TO AD HOC COMMITTEE TO INITIATE AND INTRODUCE LEGISLATION AMENDING SECTION 25 OF THE CONSTITUTION

INTRODUCTION – THE UNFULFILLED PROMISE OF SECTION 25

1. The Council for the Advancement of the South African Constitution (CASAC) supports land reform, to alter the skewed land holding patterns in South Africa. CASAC believes that the history of land dispossession must be urgently addressed. CASAC is of the view that the assumption behind the proposed amendment is that the Constitution presently does not allow for expropriation with no compensation. This is a wrong interpretation of the Constitution. Accordingly, the first part of the submission is devoted to illustrating why this is so. The second part focusses specifically on the proposed amendment, and illustrates why, without fundamental institutional changes, these amendments will not likely bring about sustainable land reform underpinned by the rule of law.
2. CASAC argues that without some fundamental changes to the entire programme of land reform by the state it is not likely that any changes in the Constitution or the

law will shift the land holding patterns to achieve the vision of the Constitution. The areas of focus for land reform must accordingly be:

2.1 The institutional re-organisation. The Commission responsible for restoration and restitution of land rights needs a new mandate, and additional resources. It has failed to provide a proper institutional base for land reform.

2.2 Focus on corruption and looting in land reform. There are many indications that land has also become a site of corruption. Capture of the land reform programme by the elite presents a danger as great the failure to distribute land to those who need it the most.

2.3 The resolution of existing land claims in accordance with the order of the Constitutional Court in the matter of Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others (CCT40/15) [2019] ZACC 10; 2019 (5) BCLR 619 (CC); 2019 (6) SA 568 (CC).

2.4 A clear policy decision to focus on redistribution of land to those in need. While the restitution of land to those who were dispossessed remains important, it is now plain that land restitution will not resolve the shortage of land to those who need it. The central challenge of the state is to shift its focus towards a framework for the redistribution of land based on need.

2.5 To affirm the centrality of the rule of law. No land reform programme can succeed if it is not based on the rule of law. There is a risk of elite capture of the land reform programme to benefit state officials, politicians and those with access to funds. However, land reform should prioritise the needs of the landless.

Role of section 25

3. We commence by a proper characterisation of the role of section 25 in our constitutional design. It has been stated that the Constitution is “*transformative*”. This transformation of society through the Bill of Rights takes place on a range of levels. One of the most important is the transformation of property relations, particularly land. The most obvious area of transformation is land ownership and the rights of persons living on land, which is provided for in section 25. Security of tenure sits alongside land ownership in section 25.
4. The primary purpose behind section 25 is to transform property ownership patterns from the colonial and apartheid past to a future based on equality, dignity and freedom. Land ownership, however, is not the whole story. The manner in which the rights of occupiers – who have no rights of ownership – are regulated is an important function of section 25.
5. Section 25 is intended to redress the history of apartheid and colonial dispossession, rather than entrench that history. As explained by Froneman J in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and others*,¹ the history is based on “*dispossession and the transfer of land and*

¹ 2015 (6) SA 125 (CC).

property to the colonizers accompanied by an economic system that sustained the dispossession."²

6. Moreover, as noted in *Daniels v Scribante & Another*³ "*dispossession of land was central to colonialism and apartheid.*"⁴ Dispossession of land "*first took place through the barrel of the gun*".⁵ When the wars of dispossession ended, law begun, as a series of laws were passed to entrench white hegemonic rule.

7. It is now the primary constitutional function of the legislature to undo the legacies of dispossession. The manner in which the land is distributed is a graphic representation of the racialized dispossession of land. Because of the centrality of land dispossession to South Africa's story, section 25 is the primary instrument for the transformation of land rights. Thus, in *Agri SA v Minister for Minerals & Energy*⁶ the Constitutional Court held that section 25 must be interpreted to reverse the "*gross inequality in relation to wealth and land redistribution in this country.*"⁷ Private property rights of the racial groups that were privileged under apartheid are not the focus of section 25. Quite the contrary. It is the transformation of those relations that is the focus of the section. That transformation, in turn, aims at protecting and advancing the property interests of the previously dispossessed.

² *Shoprite Checkers* supra at para 34.

³ 2017 (4) SA 341 (CC).

⁴ *Daniels* supra at para 14.

⁵ *Daniels* supra at para 14.

⁶ 2013 (4) SA 1 (CC).

⁷ *Agri SA* supra at para 61.

8. Hence section 25 imposes the duty on the State to adopt measures, legislative and otherwise to transform the colonial and apartheid property relations to property relations informed by the respect of equality, dignity and freedom. There can be no doubt that the current property relations, inherited from colonialism and apartheid are a significant constraint to the achievement of the society premised on equality, dignity and freedom – the foundational values in the Constitution.
9. There is, therefore, a duty to undo the existing patterns of property relations and consistently to strive towards a land dispensation that is informed by the dignity, equality and freedom the primary interests being the interests of the previously dispossessed.
10. The instrumentality of section 25 as a vehicle for the transformation of property relations is apparent from its structure. It contains two primary components.
11. Sections 25(1), (2) and (3) contain negative property rights. These include the rights not to be deprived of property in an arbitrary fashion, without a statutory basis and without recourse to law; the right to be treated in a just and equitable fashion when the State expropriates private property for public purposes and in the public interest; and the right to insist that in the event of a disagreement about modes of deprivation of property such as expropriation, such disagreements would be resolved by courts.
12. The second element to section 25, which is implicated in this case can be regarded as the positive aspects of the right. These aspects, as was held in *Haffejee NO &*

*Others v Ethekwini Municipality & Others*⁸ focus on “the need for redress and transformation of the legacy of grossly unequal distribution of land in this country”.⁹

They include the commitment of the State to land reform and to equitable access to land and all of South Africa’s natural resources. Moreover, they create rights to security of tenure in land and the right to the restitution for land dispossessed after 19 June 1913 – the date when the Native Land Act 27 of 1913 came into operation.

SECTION 25 DOES NOT PREVENT EXPROPRIATION WITH NO COMPENSATION

13. Expropriation of land is expressly mandated and allowed in the Constitution. Unlike during the days of apartheid, expropriation of land is not confined to state acquisition of land for state use. Now land can be expropriated for general distribution to the public.

14. This much is plain from section 25(2) which provides:

“(2) Property may be expropriated only in terms of law of general application

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

15. Much of the focus has been on the phrase “subject to compensation”. This has wrongly been interpreted to imply that compensation is compulsory for all

⁸ 2011 (6) SA 134 (CC).

⁹ *Haffejee* supra at para 30.

instances of expropriation. We submit that the whole of section 25 must be placed in context to understand the compulsory nature of compensation.

16. First, section 25 does not contain a right to property. Instead, it protects property holders against arbitrary seizures of their property. But if property is taken in terms of a law, and according to due process that would not constitute an arbitrary taking of property.
17. Secondly, any compensation payable must be “just and equitable”. In practice, however, this is contradicted by the government which has often paid market value for expropriation. Courts have also tended to prioritise market value above all other considerations in the Constitution.¹⁰
18. Thirdly, section 25(8) expressly provides that *“No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).”*
19. This provision is important because it allows the state the powers, legislatively, to restrict any entitlement to compensation which may be claimed by property owners. However, the section has not been put to use and accordingly little or no

¹⁰ With the exception of *Msiza v Director-General for the Department of Rural Development And Land Reform and Others* (LCC133/2012) [2016] ZALCC 12; 2016 (5) SA 513 (LCC).

attention has been paid to it. In this submission we demonstrate how the section can be used to provide a basis for the limitation of any claims of entitlement to property.

20. To recap: The main focus of the debate should be how the state departs from the current approach of either “willing buyer willing seller” or “close to market value” that it currently applies. The Constitution sets the benchmark for when it would be considered appropriate to expropriate with no compensation or with compensation which is substantially below market value.
21. It is necessary then to explore these questions:
 - (a) What type of evidence is needed to show that “full” compensation will impede land reform?
 - (b) When will expropriation without compensation be consistent with s 25?
 - (c) What types of limited compensation regimes will be consistent with s 25?

Compensation will impede land reform

22. The key issue to justify any expropriation with no compensation – or limited compensation – will be to show that the decision is a proportionate measure to avoid an impediment to land reform. This requires an assessment of the following questions:
 - (a) What qualifies as “*land, water and related reform in order to redress the results of past racial discrimination*”?

- (b) Can the state show that it does not have sufficient funds to pay more compensation?
- (c) Why would it impede land reform to allow a court decide on a case-by-case basis what amount of compensation is justified?
- (d) Given the failure to efficiently implement existing measures for land reform, it may be argued that the state cannot rely on its own failures. But the point being made here is that compulsory compensation in all instances at market value can be said to constitute an impediment to land reform.

What is land reform?

23. Section 25(8) does not apply to all laws. It is triggered only by “*legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination*”. The Constitution recognises three forms of land reform, all three of which are designed to redress racial discrimination:
- (a) Promotion of “equitable access” to land envisaged under ss 25(4) and (5) **(land redistribution)**;
 - (b) Provision of secure tenure under s 25(6) **(tenure reform)**; and
 - (c) Restitution of land dispossessed after 19 June 1913 in terms of s 25(7) **(land restitution)**.
24. This is permissible in terms of section 25(8), and given the breadth of land redistribution, this will cover a wide range of possible approaches to land reform.
25. Land reform is often regarded relating primarily to agricultural land. There is no reason why that should be the case. The idea of “*equitable access*” to land is not

only about the amount of land that is owned by different race groups. It also relates to where that land is owned. Measures that are designed, for example, to address apartheid urban geography should also qualify under s 25(8). For example, measures to access land in inner cities to make them available to Black people who have historically been forced to live on the outskirts of cities could be justified under s 25(8).

26. The “*water and related reform*” is harder to define with precision. It would obviously include measures to ensure that Black farmers have equitable and sufficient access to water to make use of their land.

Budget

27. The obvious rebuttal to any attempt to expropriate with no compensation is that if the state wants to expropriate, it should simply re-allocate resources so that it can pay more compensation. Put differently, the argument will be that paying close-to-market-value compensation will not impede land reform because the state can afford to pay compensation at that level.
28. There is precedent for this type of argument. In *Blue Moonlight* the Court held that the City of Johannesburg’s failure to budget to provide alternative accommodation to people evicted from private residences was no justification for not providing that alternative accommodation.¹¹ The analogy would be that if the state’s budget

¹¹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 74 (“it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.”)

cannot be relevant to determining whether, and to what extent, it should pay compensation under s 25.

29. There are two problems with this type of argument:
 - (a) The issue in *Blue Moonlight* concerned only one constitutional obligation – the obligation to provide alternative accommodation – and the failure to budget for it. Other constitutional obligations were affected only indirectly by reductions in budget to meet those ends. In this context, there are two constitutional obligations directly at play: the obligation to pay just and equitable compensation, and the obligation to reform unequal access to land. These competing obligations are mediated in the ways identified above.
30. Nonetheless, a proper calculation of the comparative cost of paying compensation is likely to be extremely persuasive to a court. This analysis would seek to compare:
 - (a) The cost of paying compensation at close-to-market-value, combined with the administrative cost of judicial determination on a case-by-case basis; with
 - (b) The cost of paying limited or no compensation, and the cost of an alternative administrative means of determining compensation (with a judicial safety valve).
31. If that is combined with a significant increase in the budget for land reform, a court will be hesitant to question the state's decision about how to allocate resources.

32. However, if there is no meaningful increase in the resources allocated to land reform, and no assessment of the consequences of paying greater compensation, a court will be more hesitant to accept that the measure meets the purpose of s 25(8) – whether in its role of interpreting the rights in ss 25(1)-(3), or limiting those rights.
33. The goal would be to demonstrate that paying compensation according to the current system would “*impede*” land reform because it would significantly delay the state’s ability to transfer land as it waited for funds to become available.

The determination will impede land reform

34. The prior section considered how the *budget* necessary to fund the current approach will impede land reform. But the system might also cause delay. As we noted earlier, both the Restitution Act and the Land Reform Act require that, if there is no agreement about compensation, it must be determined by a court. This has several negative consequences for speedy land reform:
 - (a) It disincentivises owners from agreeing to compensation;
 - (b) It incentivises the state to pay market value to avoid the delay and cost of litigation;
 - (c) It incentivises landowners to force litigation in order to either delay the expropriation, or force a better offer.
35. All of this increases both the time and the cost of land reform.
36. In our view, the major advantage of a system that provides for no compensation, or predetermined compensation is to avoid these perverse incentives. It removes

the ability for landowners to delay expropriation or push up the price. And it will avoid delays in expropriation while any fights about compensation are determined.

37. The state will have to demonstrate – based on evidence of how the current system has operated – that it impedes land reform. There are several studies that already provide this type of evidence.

The State is Responsible for Delays

38. A strong likely rebuttal to any reliance on s 25(8) is that it is not the existing legislation that causes the impediment, but the state's failure to properly implement it. This is certainly partially true. The state has been inexcusably remiss in its implementation of both the Restitution Act and the Labour Tenants Act. It has also failed to enforce the protections provided in ESTA. If it had properly implemented the existing statutes, and taken full advantage of all the mechanisms they provide, there is no doubt that substantially more progress would have been made.
39. It must also be accepted that reducing compensation and altering the manner in which it is determined are not, on their own, the answer to all issues regarding land reform. The state must still put in place the mechanisms to, for example:
 - (a) Speedily assess contested restitution and labour tenant claims by significantly increasing the capacity of the Land Claims Court and the alternative dispute resolution mechanisms those statutes permit.
 - (b) Provide the necessary pre- and post-restitution support to communities who are given land to ensure that they make effective and equitable use of the land.

- (c) Ensure that people – particularly in the former homelands – have secure tenure to their own land and are not subject to the whims of traditional leaders.
- 40. Without these and other related reforms and investments land reform will remain ineffective even with alternative compensation mechanisms.
- 41. Nonetheless, the history of neglect and the existence of additional impediment will not, in our view, be a bar to relying on s 25(8) to justify compensation reforms:
 - (a) The government's obligations under ss 25(4) to (7) cannot be affected by its past conduct. This government, today, must take reasonable measures to advance land reform. Measures cannot become unreasonable or unjustified because the government, in the past, acted unreasonably.
 - (b) The government should be able to show that even if it had fully applied the existing measures, they would still constitute an impediment to land reform for the budget and system reasons set out above.
 - (c) The existence of other impediments does not mean that the calculation and determination of compensation is not an impediment. As long as the legislature does not treat expropriation with limited or no compensation as the silver bullet for land reform, and demonstrates a commitment to address the other issues, a court is unlikely to hold that the existence of other impediments means the government cannot address one of them.
- 42. In sum, any defence of limited compensation laws must acknowledge the existence of past failures and other obstacles. But the government should still be able to justify limited compensation laws.

No Compensation

43. The first option is to expropriate property with no compensation. There are three possible ways this can be achieved under s 25:
- (a) To construct the legislation as a deprivation, not an expropriation. This can be done by transferring the land directly from existing landowners to new landowners. The law will then have to be justified in terms of s 25(1). In our view, this is unlikely to survive constitutional scrutiny.
 - (b) To argue that, in a very limited set of circumstances, expropriation without compensation is “*just and equitable*” under s 25(3).
 - (c) To accept that expropriation without compensation would limit either s 25(1) or s 25(3), but to seek to justify it in terms of s 25(8).
44. Whichever theoretical route is used to justify expropriation without compensation, the fundamental questions are likely to be the same:
- (a) Are the categories narrowly defined to cover situations where the ordinary justifications for compensation do not apply?
 - (b) Is expropriation without compensation reasonably necessary to further land reform?
 - (c) Is provision made for exceptions where expropriation without compensation would cause especially harsh results?

Narrow Categories

45. Allowing compensation without any compensation is unlikely to be upheld by Courts as a default rule. However, it is possible to expropriate without compensation in limited circumstances.
46. There are four possible circumstances where property could be expropriated without compensation:
 - (a) The land is abandoned or unused;
 - (b) The land is held purely for speculative purposes;
 - (c) The land is under-utilised and owned by public entities; and
 - (d) The land is actively farmed by labour tenants in the absence of a title deed holder.
47. We assume that expropriation without compensation in these instances will be for the purpose of land reform and not for other public purposes such as the building of roads, dams and so on. Expropriation without compensation outside the land reform context is not justifiable. This is so especially because the latter category of expropriations affects every piece of ground regardless whether or not the land was acquired in a manner reflective of the racial discrimination of the past.
48. What justifies treating these particular categories of land as not warranting any compensation? Three issues stand out:
 - (a) The common theme for all the categories is that there is no emotional connection to the land in any of those cases. The owner will suffer, at worst, pure economic loss. In some situations there will be little or no loss at all.

- (b) The land is not being used productively. The justification for land reform is both to redress historic wrongs, but also to ensure that access to land is “*equitable*”. Allowing land to be unutilised, while others are landless – even if it is not subject to a specific restitution or labour tenant claim – does not promote “equitable” access to land.
 - (c) There is a stronger justification for expropriating without compensation where the purpose is land reform generally: The point of departure for those expropriations, it must be recalled is that the land was acquired through laws or policies which are discriminatory.
- 49. It may be possible to identify other situations that meet these two criteria – only economic meaning, and unutilised – that would also justify expropriation without compensation.
- 50. Whichever of the three technical options is used – s 25(1), s 25(3) or s 25(8) – these two factors are the key bases to justify expropriation without compensation:
- 51. Section 25(1): when assessing whether the deprivation is arbitrary, the nature and extent of the loss is compared to the reason for it. Ordinarily the complete deprivation of land requires strong justification. But in these instances:
 - (a) The land only has economic meaning to the owner. It is, in some ways, the equivalent of taxation rather than expropriation.
 - (b) The justification is strong because: (a) it is to meet the purposes in ss 25(4) to (8); and (b) the land is not currently serving a useful purpose.

52. Section 25(3): if the payment of zero compensation is defended as just and equitable under s 25(3) the “*current use*” of the property, and the “*purpose of the expropriation*” strongly support reducing compensation from market value.
53. Section 25(8): even if a court concludes that zero compensation cannot be justified under s 25(3), the legislation can be defended under s 25(8). The key issue here will be the showing that compensation with compensation would impede land reform.

Limited Compensation

54. In our view, expropriation without any compensation will only be justified in the limited situations identified above (and other similar situations). It is doubtful whether expropriating that land alone will be sufficient to meet the demands for land reform. What may provide a far more effective way to achieve land reform is to combine expropriation without compensation in limited circumstances with limited compensation in other circumstances.
55. The limits would relate to both the determination and the calculation of compensation.

Calculation

56. There are a variety of possible ways in which compensation can be determined other than by placing competing valuer reports before a court. Some options include:

- (a) Determination by a state valuer with clear guidelines for how to weigh competing concerns. There could also be an internal appeal mechanism that would be cheaper and more efficient than a court. This avoids the difficulty of competing valuation reports. But it will still be an expensive exercise to set up the bureaucracy of a state valuer.
- (b) Compensation could be determined by market value reduced by a particular percentage. For example, 50% of market value. Of course, this still relies on a determination of market value. We argue that market value itself requires interrogation as the assumptions behind it have proved to be an illusion. The state needs specific market value determination which is suited to the circumstances of land reform, as opposed to a perceived “normal market”. Market value in South Africa is a distorted concept since many South Africans were excluded from participating in land ownership, and land acquisition.
- (c) An alternative value could be used, such as the municipal valuation, or an altered version of the municipal valuation. The advantage of this approach is that the municipal valuation will already be determined.
- (d) Or it could be calculated with reference to the original purchase price adjusted according to inflation. The Constitutional Court has accepted this is an acceptable method to determine just and equitable compensation for restitution claimants where restoration is not possible.

- (e) The government could determine a formula that considers multiple factors – municipal valuation, previous purchase price, current use and others – to determine the compensation payable.
 - (f) A flat rate could be paid per hectare, which is predetermined for different areas and different types of land.
57. Whatever method might be adopted would have to balance competing concerns: efficiency and cost of calculation, the amounts the method will generate, the flexibility, and the likelihood that it could be defended against constitutional attack. The ability to defend any particular method of calculation will also depend on the extent to which the initial calculation can be altered by judicial intervention.
58. It is now plain that the proper understanding of the Constitution, the proposed amendment is not necessary. However, we consider the text of the amendment and its implications next.

COMMENTS ON THE PROPOSED AMENDMENT

The proviso

59. The amendment is contained in a proviso to section 25(2)(b) which states: “Provided that in accordance with subsection (4A) a court may, where land and any improvements thereon is expropriated for the purposes of land reform, determine that the amount of compensation is nil.”
60. What does the proviso mean? On the most sensible reading, the proposed section means no that a court may determine that in a particular case, land or improvements on land may be expropriated for nil compensation. But when will

this be the case? How does an owner of land know that their land is liable to be taken with no compensation? These questions are not answered in the proviso, but in another proposed amendment, in subsection 4A, which enables national legislation to be passed to set out these instances.

61. Above, we have set out the possible categories which would be legally justifiable to expropriate with no compensation.
62. There are, however, some further ambiguities in the proposed amendment: assuming that land falls within the category identified in national legislation for expropriation with no compensation, how will a court determine if it should in fact be taken with no compensation? We propose that this should be answered by the formulation of “just and equitable” which is the centrepiece of section 25. So if land falls in a category identified by national legislation for compulsory taking with no compensation, a court must apply the formula of justice and equity to finally determine if it should in a specific instance be taken with no compensation.

Expropriation and determination of compensation

63. The Constitution already draws a distinction between two separate acts. The act of expropriation and the decision to compensate the owner of expropriated property. The state retains the right to expropriate, subject to judicial review, but not the power to decide on compensation.
64. The power to decide whether compensation for expropriated land should be paid or not lies with the courts, not the government. The current formulation to section 25(2)(b) provides that any compensation to be paid to a property owner must either

be agreed to “or decided or approved by a court.” This section has recently given rise to public controversy. It is possible to construe the section as permitting the state carte blanche authority to determine compensation subject to a limited role of courts. But we submit, when read with section 1(c) – the rule of law – and section 34 – access to courts – section 25 must be construed as requiring the courts to determine just and equitable compensation in all instances where this is in dispute. Now the amendment will further entrench this by requiring courts also to decide whether or not compensation should be paid.

65. However, one of the factors that slow down land reform is the inability of the state to assume control over expropriated land. This has been decided by the Constitutional Court in Haffajee:

“[43] In summary then:

(a) The provisions of section 25(2)(b) do not require that the amount of compensation and the time and manner of payment must always be determined by agreement or by the court before expropriation under section 25(2);

(b) Generally the determination of compensation, in accordance with the provisions of section 25(3), before expropriation will be just and equitable;

(c) In those cases where compensation must be determined after expropriation, this must be done as soon as reasonably possible, in accordance with the provisions of section 25(3);

(d) Eviction following expropriation may not take place unless agreed upon between the parties to the expropriation or in the absence of agreement, under court supervision; and

(e) In disputed cases of eviction the courts must grant orders that ensure just and equitable outcomes in accordance with the provisions of sections 25(3) and 26(3) of the Constitution.”

66. As such, nothing in the Constitution restricts the ability of the state to assume control over expropriated property before the determination and payment of compensation. It all depends on whether it is just and equitable for property to be acquired immediately upon the act of expropriation.

Only land is subject to expropriation with no compensation

67. The second facet of the amendment is the category of the property to which it applies. The amendment is limited to “land” and “improvements on land”. Plainly, it excludes other forms of property, such as stocks, pensions, cash, credit etc. In limiting the class of properties to land, the amendment follows the proposals of the African National Congress at its Nasrec Conference. That resolution stated, among other things:

“On Land Redistribution

14. We must pursue with greater determination the programme of land reform and rural development as part of the programme of radical socio-economic transformation.

15. Expropriation of land without compensation should be among the key mechanisms available to government to give effect to land reform and redistribution.”

68. Thus, from the onset, it was never envisaged that other property classes will be subject to expropriation with no compensation. The same applies to the Resolution of Parliament, adopted in February 2018.
69. It is, however, notable from a comparable perspective that the Zimbabwe Constitution favours an even narrower category of “agricultural land” for no compensation. The limitation to land can be viewed as a positive development because most property rights of ordinary people are not held through land. However, by excising from the scope of the amendment other forms of property the implications may turn out to be negative. The argument in favour of retaining the present formulation has always been founded on the flexibility of the notion of “just and equitable”. Particularly, it has been argued that a compensation regime based on justice and equity factors in history, present use and purpose of the acquisition. This model may allow for above market-based compensation, for instance to land holders of Xolobeni, expropriated to make way for mining, while it would contemplate for below market value compensation to commercial land holders expropriated to make way for low cost housing. By fixing the target of “nil compensation” to land, the consequences might to set the default of market-based compensation for all other categories of property. If this is the consequence, it will be a retrogressive step in a constitutional dispensation whose aim is to resolve unfair patterns of property holding.
70. When one takes into account that land taken in 1913 has since transmogrified into stocks and other items of value, focusing on land and improvements on it might

only scratch the surface of property relations, leaving the property regime unchanged.

Significance of national legislation

71. There is a further definitional question: what precisely is land, or improvements on land? Is the business of farming an “improvement on land” or is a structure, such as a house is an improvement on land? We would propose that these are spelt in national legislation, or to be decided by courts.
72. Another feature of the amendment is the role of national legislation. Not all land will be liable to compulsory acquisition with no compensation. Only those categories identified in national legislation. The framework of section 25 is premised on the idea of “striking a balance” between the interests of the land owners and those without land. National legislation, however, may tip the balance, where justifiable. But it would be arbitrary to identify a particular piece of ground for expropriation for no compensation. Only the identification of general categories will pass constitutional muster. We repeat that the categories which would strike a fair balance should contain these features:
- (a) The land is abandoned or unused;
 - (b) The land is held purely for speculative purposes;
 - (c) The land is under-utilised and owned by public entities; and
 - (d) The land is actively farmed by labour tenants in the absence of a title deed holder.

73. Factors such as history of acquisition, current use, state investment, already contained in section 25 might be helpful pointers towards the identification of the classes of land.
74. While not all land is liable for compulsory taking with no compensation, the proviso is even narrower. Only those categories of land taken for “the purposes of land reform” can be taken for no compensation. “Land reform” is not a term of art. But it is taken generally to refer to three pillars: land redistribution, restitution of land, and land tenure security. Recently, some commentators have added “land development” as the fourth pillar.
75. Importantly, however, the amendment does not use the constitutional phrase of “public interest”. Instead, it reduces the scope of public interest even further, by restricting the application of the “nil compensation” clause to land taken for land reform. If land is, however, needed for other public interest reasons, just and equitable compensation would need to be paid.

CONCLUSION

76. A final feature of the amendment is the importance of the rule of law. The centrality of courts as arbiters of disputes in society is entrenched in the Constitution. Not only is the law supreme, judicial pronouncements are final and binding on other organs of state. The amendment affirms this. Only a court may decide whether or not no compensation is to be paid. A flexible standard of just and equitable should still be applicable in cases of disputes over compensation.
77. There are some who have criticised this because it may slow down land reform because disputes about compensation are notoriously slow to resolve in courts.

But we would submit that the rule of law is crucial to avoid arbitrary decision-making.

78. Another important element of the rule of law is absence of wide executive discretion. We note that the amendment curtails wide executive discretion by leaving the contours of the law which may allow expropriation with no compensation to the legislature. The legislature will have to define: which land, for what payment, and for what purpose?
79. In closing, we wish to state, however, that the true challenge of land reform still lies in the combination of weak and dysfunctional institutional structures, corrupt officials, greedy land owners, absence of a people-centred ethics in the political class and failures of the legislature to pass legislation, despite the obligation it has under the Constitution. Recently, the Constitutional Court, accepted that the failures in land reform must be placed squarely at the doors of the government, not the Constitution. The Court summarised the findings of the Motlanthe Panel in these terms:

“The Panel set out with stark simplicity the deficits in land reform. Despite the cut-off date for land claims being 1998, to date, there are more than 7 000 unsettled claims and over 19 000 yet to be finalised ‘old order’ claims. The Panel exposes the extremely slow rate of restitution claims, concluding that it will take up to 35 years to finalise all old order claims, 143 years to settle new order claims and, if land claims are reopened, up to 709 years to complete Land Restitution. Institutional capacity is evidenced in lack of skills and capacity, overlapping and conflicting claims, and inconsistent monetary awards. A possible explanation for these shortcomings is the lack of sufficient resources. However, the budget for land restitution has been

consistently underspent; this evidences how severe problems lie in implementation and the capacity of the system itself.”¹²

80. It is by refocusing the debate to these known challenges that land reform can be meaningful. A constitutional amendment will only provide superficial succour to this pain of landlessness. Its ultimate resolution is institutional re-organisation.

Lawson Naidoo
Executive Secretary
CASAC

Cape Town
29 February 2020

¹² *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) at footnote 87.