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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 chaired by Thoko Didiza 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 inviting 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.

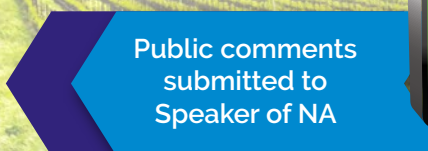
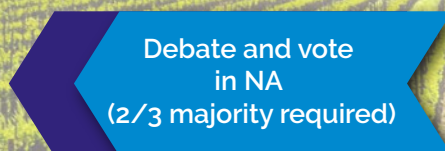
Expropriation is, however, merely one element of the broader land reform debate. There are several outstanding issues which predate the expropriation debate and which are vital to the success or failure of land reform in South Africa. Policy decisions on a number of these issues have largely been held in abeyance pending the recommendations of the Presidential Advisory Panel on Land Reform and Agriculture. 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.

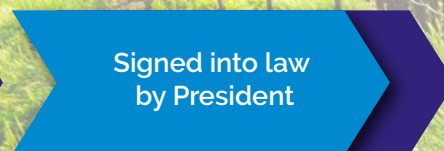
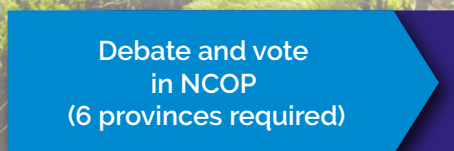
Process flow for review of section 25



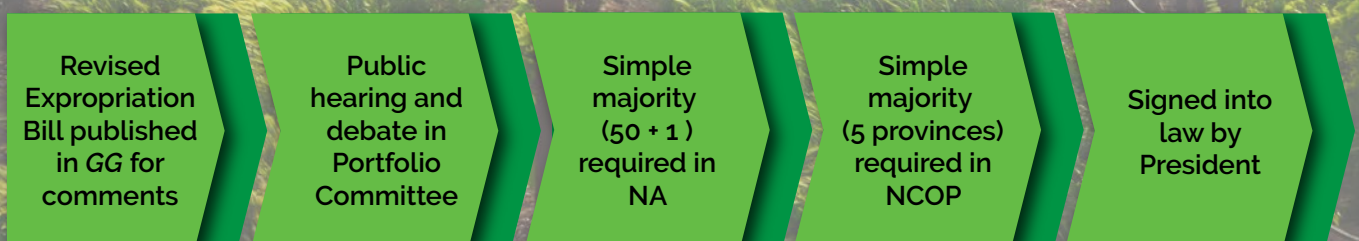
We are here now



Possible legal challenges?



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



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
- 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 Bill (ESTA)

Six years after the ESTA Bill passed through Nedlac, it has finally been enacted into law. Aside from a questionable provision which seeks to limit access to 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.

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

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 which the Presidential Advisory Panel will make 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 presidential 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 will undoubtedly also address this element.

Also under scrutiny



Status update on Agbiz/BASA land reform proposal:

Commercial financing for NDP model on land reform

Background

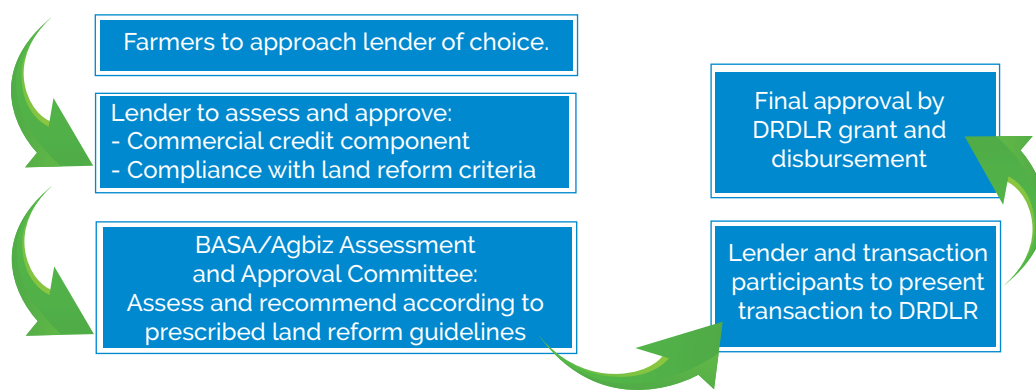
- ▶ The focus placed on partnerships in the National Development Plan (NDP) in 2012 has served as an incentive to the South African agricultural sector to collaborate in addressing land reform.
- ▶ Government has requested that the commercial lenders most active in agricultural financing propose a mechanism for the commercial financing of land reform.
- ▶ The Banking Association South Africa (BASA) and the Agricultural Business Chamber (Agbiz) subsequently formed an Agbiz/BASA Task Team in order to respond to this request.

The BASA/Agbiz Task Team proposal

1. This proposal suggests a mechanism and process for the commercial financing of the land reform model as detailed in Chapter 6 of the NDP.
2. Tangible land reform results are the measure of success of the financing process.
3. The NDP model on land reform is essentially a framework, not a "one-size fits-all" model or plan. It does, however, provide a number of principles for orderly land reform implementation. It is supported by both Agbiz and BASA as it is underpinned by market principles that support the retention of commercial agriculture. At the same time, it does not undermine agricultural property values on which lenders place reliance for the repayment of loans which they extend to commercial farmers.
4. 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 offer commercial acumen and skills to enable the financing process. They will be responsible for initiating commercially viable land acquisition transactions, with possible concomitant operational funding solutions.
5. Commercial farmers need to be incentivised to participate in these joint ventures through measures that will enable them to benefit from incentives such as access to grants, tax incentives, B-BBEE ratings and recognition. These incentives should be guaranteed by government and communicated to all parties involved.
6. The proposal is premised on the retention of competition between lenders.

7. Farmers must have the right to choose or select partner beneficiaries – the process must be demand driven, i.e. selection must be apolitical and voluntary.
8. Normal commercial lending criteria principles will apply. Freedom of choice of financier is endorsed.
9. This proposal is informed by the following principles:
 - ▶ Transfer of title into any legally accepted entity, for example a trust or company, in which the black-owned stake is deemed to be acceptable to government.
 - ▶ State-owned land, communal land and other land transactions that do not meet normal commercial agricultural lending criteria are excluded. Separate funding models for such transactions will require development by government.
 - ▶ Speed of decision-making relating to the grant approval process is critical and decisions should be taken within 45 days to allow funds to flow within 14 days thereafter.
 - ▶ The BASA/Agbiz Assessment Committee will vet the proposed land reform transactional framework in principle for recommendation to the DRDLR. BASA/Agbiz representation to be specified by BASA and Agbiz. Assessment guidelines will be aligned with DRDLR conditions/criteria and this framework.
 - ▶ Normal recovery processes under the Insolvency Act will apply.
10. The Task Team proposes the following process model:

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 Department of Agriculture, Forestry and Fisheries (DAFF), the DRDLR, 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. At its core will be the need to blend seed funding from government or development finance institutions (DFIs) with funding from commercial farmers and banks to provide deserving agricultural development projects with blended finance and support services. It is also intended to fill the void in support services and contract with creditable institutions to provide training and extension support, among other services. While the ADA is still in the process of establishment, Agbiz has played a pivotal role in guiding its proposed scope, mandate and structures

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