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Parliament of the Republic of South Africa  
Committee Section  
90 Plein Street  
Cape Town

**SUBMISSION: WHETHER IT IS NECESSARY TO AMEND SECTION 25 OF THE CONSTITUTION AND OTHER SECTIONS WHERE NECESSARY, TO MAKE IT POSSIBLE FOR THE STATE TO EXPROPRIATE LAND IN THE PUBLIC INTEREST WITHOUT COMPENSATION**

Dear Ms Jayiya

**INTRODUCTION**

1. I, 691010 6649 084, Mr Zinasele Kani residing at the abovementioned address, do hereby make a submission as a response to the invitation by the Joint Constitutional Review Committee on the review of section 25 of the Constitution and other sections where necessary, to make it possible for the state to expropriate land in the public interest without compensation. My Ancestral home is Alice, Eastern Cape the Head Quarters of Paramount Chief Ngqika son of Chief Mlawu ka Rharhabe, the warrior Chiefs who together with their subjects fought gallantly against the might of the British colonial power for nearly a century and got dispossessed of most of their land in the process.
2. I am also a small scale farmer farming on small communal land with no access to adequate farmland, not only as a result of the past racially discriminatory laws but also as a result of the failure of the current government to implement a credible Land Reform programme to enable farmers like I am to acquire their own land and to be able to develop into successful commercial farmers like their White counterparts.
3. On the eve of the new South Africa the ANC and the Nationalist party held a series of conferences called the "BOSBERAAD", outside the CODESA process where all political parties participating in the talks for a new South Africa were represented. In these meetings the ANC agreed among other things that White South Africans will not be dispossessed of "their" land. It is my considered opinion that among others, the reason the ANC government is not implementing aggressive Land Reform policies is to keep the promises they made in the BOSBERAAD and not necessarily as a result of the limitations placed by the Constitution on land expropriation.
4. The democratically elected government, once it came to power, embarked on a Land Reform programme aimed at redistributing 30% of white-owned commercial agricultural land by 2014 to black South Africans and settling all claims for redistribution by 2005. For this purpose the government enacted the Restitution of Land Rights Act 22 of 1994 in order

to enable people whose land was expropriated unjustly by racially discriminatory laws to reclaim it. Under this Act, the claimants had only 5 years to lodge their claim. However, this law stipulated that claimants can only claim land taken from them only after 1913. It is common knowledge that by that time Black people were dispossessed to the extent that they owned only 13% of the South African land while their White counterparts owned 87% in a systematic dispossession programme that spanned over 300 years. Moreover, it is not clear why the democratically elected government would want to return only 30% of the land to more than 90% of the people who used to own 100% of the same land before 1652, being the start of the land dispossession of Black South Africans.

5. Secondly the government embarked on a Land Redistribution programme by which it sought to acquire land from White commercial farmers and redistribute it to Black farmers. Notwithstanding Land Restitution and Land Redistribution policies, to date, 4 years post the target date, less than 10% of the redistribution target has been achieved and not all land claims have been settled. The current Land Reform programme, through mismanagement, corruption and incompetence did nothing more than entrench the current status quo of land ownership in South Africa.

6. In *Alexkor Ltd v Richtersveld Community and Others (CCT 19/03) [2003] ZACC 18*, the Government of the Republic of South Africa Joined Alexkor Ltd in appealing the decision of the Supreme Court of Appeal that recognised the right of the Richtersveld Community to the land they were dispossessed of as a result of a racially discriminatory law. Alexkor and the government contended that any rights in the subject land which the Richtersveld Community might have held prior to the annexation of that land by the British Crown were terminated by reason of such annexation. They contended further that, in any event, the dispossession of the subject land after 19 June 1913 was not the consequence of racially discriminatory laws or practices.

7. The above is but one example of how far the government contributed in frustrating the land reform programme they were supposed to uphold and champion. This is exactly why we are where we are at in Land Reform and not necessarily because section 25 of the Constitution is an impediment to do so.

## LAND EXPROPRIATION UNDER COMMON LAW

8. In *Harvey v uMhlatuze Municipality Case No 4387/08* the High Court stated thus:

“The State has no general common-law power to expropriate. The power to expropriate is derived from various statutes dealing with the expropriation of property by governmental institutions for specific purposes. The right to expropriate, granted under statute, for example the Expropriation Act 63 of 1975, which is sometimes referred to as the right of eminent domain, empowers the expropriator to expropriate the property for a public purpose against payment of compensation.” This view is also supported by authors, *Silberberg and Schoeman’s: The law of Property*, 5 ed, Butterworths, pg 101

9. **NB!** In addition to the above, section 39 (2) of the Constitution states, “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” With a clearly defined expropriation clause in the Bill of Rights of the Constitution (Section

25) and valid expropriation legislation in place (Act 63 of 1975), no court in the Republic can resort to common law as a basis of Land Expropriation.

## LAND EXPROPRIATION LEGISLATION

10. Section 26(1) of the Expropriation Act, Act 63 of 1975 provides, “Subject to the provisions of section 5, the provisions of this Act shall not derogate from any power conferred by any other law to expropriate or take any property or to take the right to use property temporarily, but shall not preclude the expropriation or the taking of property or the taking of any such right being effected either under the said provisions or under the said power: Provided that if any such power is exercised after the commencement of this Act, the compensation owing in respect thereof shall *mutatis mutandis* be calculated, determined and paid in accordance with the provisions of this Act.” Section 2 (1) of the Act provides, “The obligation to pay compensation is a condition of expropriation, but not a prerequisite for its operation.”

11. In **Arun Property Development (PTY) LTD v City of Cape Town (CCT 78/14) [2014] ZACC 37** the question was whether a local authority that has acquired land, by operation of legislation, from a private owner in a planning approval process for a residential development, is obliged to pay compensation for the land so acquired. The owner and developer of the land claimed compensation from the local authority for the value of the land it has so acquired. The claim was on the ground that the land was unrelated to the normal need for the provision of public streets and spaces for the residential development but was required for a future road network planned for the region as a whole.

12. The Court found that the expropriated land had vested in the City in terms of section 28 of The City’s Land Use Planning Ordinance 15 of 1985 and that the developer was entitled to compensation for it. The court further held that compensation was to be reckoned in terms of the provisions of the Expropriation Act, Act 63 of 1975. In reaching this conclusion, the court reasoned that legislation is not presumed to take away existing rights unless it expressly or by necessary implication states so. The object to take away property without compensation should also not be imputed to the Legislature unless it is expressed in clear terms.

13. The expropriation requirements in terms of the Expropriation Act, Act 63 of 1975 were adequately addressed in the Harvey case quoted in paragraph 8 above. The Act prescribes two prerequisites for expropriation to be legally binding. The first one is that the expropriation must be for public purposes and secondly that there must be payment of compensation to the owner of the property. The court observed that, “the justification for the expropriation lies not in the payment of compensation but in the purpose for which the property is expropriated. In other words the payment of compensation by itself cannot justify an expropriation. It is merely the result of an expropriation which is directed at a particular purpose.”

14. The court went on to found that in terms of the Act ‘public purposes’ includes any purposes connected with the administration of the provisions of any law by an Organ of State. It stated further that the Act gives the expropriator a wide power to expropriate the property and that in the pre-constitutional era the term ‘public purposes’ also included purposes aimed at social engineering for example by implementing the then government’s racially discriminatory policies such as for instance the Group Areas legislation.

15. **NB!** More significantly the Constitutional Court in the Arun Case quoted in paragraph 11 above, endorsed the Expropriation Act, Act 63 of 1975 as having passed the Constitutional muster as the applicable law of general application to decide expropriation of land and the manner of compensation for it. Had the Expropriation as provided for in Act 65 of 1975 been used as an instrument of Land Reform, it would have aided the Land Redistribution Programme to complement the Land Restitution Programme. The Municipalities are using this Act to expropriate land when it is in the public interest of the town or a City to do so. I have not come across a case where a Municipality lost a case for expropriating land under the correct application of Act 63 of 1975.

16. **NB!** In its own wisdom, the democratically elected government chose not to use the available instrument in the form of the Expropriation Act, Act 63 of 1975. The Act is clearly not in conflict with the Constitution as I have shown above and will show when discussing expropriation under the Constitution below. Instead the government preferred the so called “**willing buyer willing seller**” principle, buying farms on the open market. This resulted in the State being the biggest buyer of land with the result that land prices, which already at that time exceeded the productive potential of the land skyrocketing even further. To make matters worse the relevant department responsible for land reform is not being allocated enough money and does not have the necessary capacity to be able to buy and distribute the requisite number of farms.

#### **LAND EXPROPRIATION UNDER THE CONSTITUTION**

17. Section 25 of the Constitution of the Republic of South Africa, 1996 provides:

“(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(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.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.”

18. I have quoted the entire Section 25 of the Constitution above for ease of reference. From the outset it must be borne in mind Section 25 of the Constitution is contained in Chapter 2 of the Constitution, the Bill of Rights. That means the property rights in South Africa are regarded as fundamental human rights. Note must also be taken of the Supremacy of the Constitution. Section 2 of the Constitution states, “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” However, rights enshrined in the Constitution, including those in the Bill of Rights may be limited as stipulated in Section 36 of the Constitution.

19. Put in the positive language Sec 25(1) of the Constitution states:

- a. A person may be deprived of property only in terms of the law of general application. (A law of general application is any law passed by any legislative authority such as an act of parliament or a Municipal bylaw or ordinance).
- b. Any law that allows arbitrary deprivation of property is invalid.

20. In simple terms the Constitution allows for the deprivation of private property even though it is a fundamental right enshrined in the Constitution. The only provisions are that a law passed by a properly constituted legislative authority must explain how this is to be achieved in order to avoid arbitrary deprivation of property.

21. Sec 25 (2) specifically states that property can be expropriated:

- a. by a law of general application. What that means is explained in paragraph 16 (a) above;
- b. subject to compensation;
- c. for a public purpose or in the public interest;
- d. that the time and manner of payment to be agreed to either by those affected or decided or approved by a court.

22. In the Harvey case quoted above it was stated thus, “In the present constitutional order an expropriation for improper purposes which do not meet the minimum thresholds set in the Constitution are unlikely to be endorsed favourably by our courts. In the present constitutional era the law relating to expropriation in terms of the Expropriation Act or indeed any other statutory legislation permitting expropriation of property must pass constitutional muster. Property rights are protected under s 25 of the Constitution.”

23. In **Haffejee NO and others v eThekweni Municipality and others (CCT 110/10) [2011] ZACC 28**, the question was whether the determination of compensation is a pre-requisite for the constitutional validity of expropriation in terms of the provisions of section 25(2) (b) of the Constitution.

24. The court found “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). That the determination of compensation, in accordance with the provisions of section 25 (3), before expropriation will be just and equitable. Further, that 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). The Court reiterated that Section 2 (1) of the Expropriation Act, Act 63 of 1975, which provides that the obligation to pay compensation is a condition of expropriation, but not a prerequisite for its operation, is not in conflict with Section 25 (b) of the Constitution.

25. Section 25(3) stresses that the amount of the compensation and the time and manner of payment must be just and equitable, balancing public interests and those of the land being or sought to be expropriated. It lists a set of circumstances to be taken into account in this regard. In my mind, among the circumstances mentioned in Section 25 (3) the following were specifically designed for the expropriation of property for the purposes of land reform:

- a. the history of the acquisition and use of the property;
- b. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- c. the purpose of the expropriation.

## **EXPROPRIATION WITHOUT COMPENSATION**

26. **NB!** Regard being had to the discussion above and taking into account the supremacy of the Constitution, it is clear that the Constitution specifically precludes the possibility of expropriation of property without compensation. It does however, allows for expropriation of property in the manner that has been described above with the supporting law including case law. The courts have said however that justification for the expropriation lies not in the payment of compensation but in the purpose for which the property is expropriated. This is even more relevant in South Africa where the whole struggle for liberation was about correcting injustices of the past including land dispossessions and economic exclusion of Black people.

## **CONCLUSION**

27. If the government therefore wants to expropriate land without compensation, Section 25 of the Constitution must be amended. I am not even suggesting that this is what I stand for or what must happen. I am simply stating the fact that in the current Constitutional dispensation it is not legally possible, whether one likes it or not. In the recent past statements were made, including by the Minister for Land Reform and Rural development to the effect that the Constitution does allow expropriation of property without compensation.

28. These utterances are ill conceived and irresponsible, have no basis in fact and in law. If the government believes in this and goes ahead to expropriate land without compensation without amendment to the Constitution, that may lead to protracted Constitutional litigation which the government will eventually lose. This will cause further delays in the Land

Reform programme resulting in anger amongst the population and possible violent reaction. It will not be prudent to amend the Constitution to effect land expropriation without compensation because in reality there may be very few cases or none at all, that may legally justify expropriation of property without compensation.

## RECOMMENDATIONS

29. I am of the view that the question that must be asked should not be whether or not the Constitution should be amended in order to allow for the expropriation of land without compensation. The question should rather be what should be done to speed up land redistribution to the majority of the people previously dispossessed of their land and thereafter precluded from owning land by past racially discriminatory laws. Failure by the democratically elected government to implement policies that are able to achieve land redress in the last 24 years since assuming power must not lead to irrational decisions.

30. Note should also be taken of the fact that the same government in its land reform policies excluded expropriation even though Section 25(2)-(3) of the Constitution specifically provides for land expropriation to redress the land question in South Africa. Further, notwithstanding the fact that we have a valid Expropriation Act, Act 63 of 1975. Two Constitutional case decisions namely **Haffejee v eThekweni Municipality and Arum Development (Pty) Ltd** and the High Court decision in **Harvey v uMhlatuze Municipality** are unanimous in endorsing the Expropriation Act, Act 63 of 1975 as having passed the Constitutional muster for land expropriation. Under these circumstances I recommend that the government implement the following, rather than seek to amend Section 25 of the Constitution:

- a. With immediate effect relinquish the willing buyer willing seller principle and replace it with land expropriation using the relevant Sections of the Constitution and Expropriation Act, Act 63 of 1975.
- b. Amend the Expropriation Act, Act 63 of 1975 to answer specifically among other things, the following questions:
  - i. From whom will the land be expropriated?
  - ii. What criteria are going to be used to decide from whom will the land be expropriated?
  - iii. For what purpose is land going to be expropriated?
  - iv. For whose benefit is land going to be expropriated?
  - v. What will be the procedure to identify beneficiaries?
  - vi. What will be the system of tenure going to be for those who will be the recipients of expropriated land especially agricultural land?
- c. Implement one farmer one farm principle. Under this system a White commercial farmer with multiple agricultural landholdings is given an opportunity to decide which one he/she wishes to retain, the rest are put up for

expropriation. This will make land immediately available for distribution without having to worry by identifying excess land for redistribution. This was the basis of land reform in Tanzania after independence in that country which worked very well there. We cannot afford to have one farmer from the minority group having multiple agricultural land holdings while the majority of the Indigenous people who are willing and able to farm have nothing.

- d. Establish a purpose built finance institution aimed at financing land redistribution beneficiaries through a system of grants and extension of credit.
- e. Establish a new Post Settlement Support programme that allows beneficiaries to farm on their own instead of through faceless service providers that the government rely on in the current land Recapitalisation system.
- f. Allow beneficiaries to take ownership of the land distributed to them. The current system is discriminatory against Black farmers who are beneficiaries of land reform in that the government keep ownership of the land and does not transfer it to beneficiaries, while their White counterparts have ownership of their land.

Yours faithfully



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