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Submission to the Constitutional Review

1. Background

The issue of land rights, specifically the right to restitution or equitable redress is an important human rights concern and it is one that must be addressed…..**Urgently**. This right is contained within Section 25 of the Constitution. However, after several decades of attempting land reform, there has been little to show in the form of progress. Complex issues have arisen and there is enough evidence to propel a conviction that a review of legislation is necessary, with the intention to beef up the applicable legislation in the interests of expediting the pace of land reform.

Whilst legislation exists to guide and order social behaviour, law reform must be possible where it is clear that current provisions are out of sync with the desired outcome of empowering the country to advance its national development and social cohesion agenda. Civil society organisations, and government have wrestled with the complexity of issues relating to land reform and land restitution in particular; and it is clear that the problems are deep and may result in a general feeling that the system is failing the nation in its promise of redress. Essentially, land reform is a human rights issue that, if not addressed, could hold serious implications for South Africa, through which our future generations will judge us very harshly.

It is in this regard, that the JLD Institute, presents its opinions on this matter – based on its own experiences in dealing with Land Claims applications and the backlog that has accumulated since the initial lodgement date of 31 December 1998.

The 54th National Conference of the African National Congress

The Resolution adopted by the ANC during its 54th National Conference and its proposed amendment to the EFF motion in Parliament is correctly premised in that it clearly recognises the historical facts that land was stolen from African people by European settlers from as far back as the colonial era (i.e. the mid 1600's). The governing party therefore, resolved to enact legislation to facilitate expropriation without compensation

It is simply not true that the current quagmire of the slow pace and quality land reform are due in large part to ***"our lack of farming and settlement support"*** as postulated by many pundits and analysts . This view completely ignores the following facts:

- African people have been catering for their communal needs *ab initio* and for many generations, from tilling the land. What they really need is productive land as opposed to the dry, rocky, arid and Mimosa–ridden reserves to which they were relegated by the colonial and apartheid regimes. The above statement is thus patronizing and insulting to the wisdom and capabilities of African farmers.
- The model of land reform that has been currently applied was enshrined in the Expropriation Act no. 63 of 1975 which predates the current Constitution and the spirit of democratic transformation. In a nutshell, it placed land owners in an advantageous position to demand excessively inflated compensation for their land, which frustrated the "public interest and purpose" intent. This has resulted in a massive obstacle to the land reform agenda as land claims are frequently subjected to laborious, costly and lengthy court challenges.

2. The Constitution as a blockage to Land Reform

Section 5(1) of the Constitution and the Expropriation Bill [B4-2015] call for expropriation in terms of the law of general application for a public purpose or in the public interest, but which ensures the balancing of public interest and the interest of those affected by taking into account *"all relevant circumstances"*. These circumstances include the current use of the property, the history of acquisition of the property, the market value of the property, the extent of direct State investment and subsidy in acquiring the property and the purpose of the expropriation.

The ANC needs to present a persuasive, yet scholarly argument to show that the wholesale dispossession of African land by the Europeans occurred long before the constitutionally entrenched 19 June 1913, set out in Section 25(7). The Zulu Annexation Act of 1897 was one of the last pieces of legislation that formalised dispossession into law in South Africa. The Constitution is, therefore, wrongly premised and presents a stumbling block in the quest to achieve social and economic transformation. The 19 June 1913 cut-off date is arbitrary because the Natives Land Act of 1913 simply entrenched a practice that had taken place over the previous 250 years. The cut-off date was chosen only because there had to be a cut-off date. The full history of South Africa shows that there have been waves of dispossession over the centuries since 1652. Tying this dispossession down to a single date is fallacious at best.

Any action that is taken to correct the wrongs of the past must be informed by a clear understanding of the scheme of section 25 of the Constitution and if necessary, Government must seek a clear legal opinion on the proper meaning of section 25. On its face it appears to:

(a) protect property rights, but, makes an exception when land is required for public purposes or in the public interest, in which event property may be expropriated with compensation;
(b) provide for land redistribution by imposing an obligation on the state to *"take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis"*.(Section 25(5));
(c) guarantee security of tenure to all people who have insecure titles to land by reason of racially discriminatory laws. Thus, people who occupy land under permissions to occupy or deeds of grant, which are insecure titles, are entitled to have these converted into secure titles such as title deeds; and
(d) guarantee restoration of land to individuals or communities who were dispossessed of their land as a result of racially discriminatory laws. Restoration of land would seem to require that land taken away must be restored as section 25 (7) says these individuals or communities are "entitled to restitution of that property".

The issue of compensation in restoring land taken away without compensation does not arise. However, compensation may be payable for improvements to the land but this will depend on the circumstances under which the occupier of the land came to be in possession of the land. These are questions that the governing party needs to debate.

3. The Constitution and Land Expropriation

The ANC-led Government should shift its focus from the current overemphasis on private property rights at the expense of the State's social responsibilities for radical social and economic transformation. The Freedom Charter, the Constitution and the National Development Plan (NDP) embody a vision of a South Africa in which development is progressive and inclusive, where prospects and prosperity is shared. Poverty, unemployment and inequality that affects the dispossessed and poorest of the poor, poses a serious threat to the goal of achieving substantive democracy in South Africa which makes the case for the interdependence between democracy (the act of voting and holding free and fair elections) and human rights.

The land reform process is thus an issue of justice; one that holds consequences for the future and quality of democracy as well as one that has far reaching implications for the promotion and protection of human rights. **The mounting and increasingly militant discontent of the dispossessed majority in South Africa can no longer be ignored.** The Institute is of the view that urgent interventions are required if the country is to avert the inevitable scenario where society is plunged into an abyss of mass uprisings, public disorder and lawlessness associated with unlawful land grabs.

4. Expropriation

Expropriation is essentially the compulsory acquisition of property. It has been in practice in South Africa since the colonial era. The following case studies lend credence to this fact:

a. Mr. Barras Baker (RLCC reference – KRN6/2/2/E/36/0/0/24) had his farm Sweethome 254 expropriated by the South African Development Trust in 1991 and was paid a sum of R420,000 and R30,000 in compensation

b. Mr A.H. Harper (RLCC reference – KRN6/2/2/E/16/0/0/156 had his farm Sub 2 of Lot HH Umgodi and Sub 4 of Lot DW No. 8777 expropriated by the South African Development Trust in 1981 and was paid R335,498.

c. The Mathulini people under Inkosi Mnini were removed from their land in Bluff, Durban to make way for the establishment of the Durban harbour in 1858. They were allocated alternative land around the Umgababa area south of Durban.

d. The communities under Chief Dube and Chief Mkhwanazi in Reserve number 10 near Richards Bay were removed in order to establish the Township of Esikhawini. Each of the families were paid a compensation of R36,000 and a township house in which to settle.

e. Another significant case in point is the Abathuyi community whose land was expropriated by the eThekwini Metro. They used to live in the area currently occupied by the Dube Trade Port and the King Shaka International Airport, approximately 35km north of Durban. Mr. Mathole Chili and his family originally came from the KwaZulu in the 1800's. Paul Chili was the chief of the Abathuyi clan which included the Zulu, Cele, Nkwanyana, Ngcamu, Mthethwa and Mbokazi families.

   White settlers arrived in the area at around 1850 and they initially settled in and among the Abathuyi community. After the promulgation of the Natives Land Act of 1913 the settlers started claiming the land as their own, using the racial laws of the national government of the time. They began to remove/expropriate without compensation the Native Africans from their land and relocated them to Hambanathi Township which was built exclusively for the families of Chief Paul Chili. Unsurprisingly there were a lot of objections to the removals, including the Chili family members. Regardless of their protestations, the Tongaat Group in collaboration with the Tongaat Town Board used apartheid laws of the time and the armed police force to forcefully remove the community from their land. Their housing structures were demolished and livestock looted.

The above events show that compensation for expropriation has always been heavily skewed to benefit the white landowners who had previously acquired their land through generous grants by the colonial and apartheid governments. **Government would do well to consider**

determining compensation benchmarks that take into account the manner of acquisition of the properties that are earmarked for expropriation.

There are many other instances of expropriation (with or without compensation) that occurred during the apartheid era where the creation of self-governing homelands necessitated the expropriation of land and relocation of both black and white people in the interests of establishing the so-called betterment schemes. **Expropriation is, therefore, neither a new nor foreign concept in South Africa's history.** Its application in a transparent and equitable manner in line with the Expropriation Bill, will be the key in fast tracking social and economic transformation of poor and marginalised societies.

5. Labour Tenants

It should be noted that racial laws and practices of the colonial era had the effect of turning African people into labour tenants on their ancestral land. **It is therefore incorrect to label all dispossessed individuals/families/communities as labour tenants**. The land rights that were lost by the originally dispossessed people are those of unregistered customary ownership granted to them by their Chiefs or Traditional Authorities whilst immigration of non-resident people onto dispossessed "private" land in search for employment opportunities qualified them as immigrant labour tenants. During the era of forced removals post 1913, two categories of people lost rights in land, namely:

a. The Originally Dispossessed Individuals (ODI), who lost unregistered ownership rights, and
b. Immigrant Labour Tenants (ILT), who lost a combination of beneficial occupancy for a period not less than 10 years as well as rights granted in line with the labour tenancy legislation.

Although both the groups lost rights in land at the time of dispossession, it should be noted that their interests are different. The unintended consequence of not distinguishing between **ODI's** and **ILT's** is that the restoration model of the land reform process imposes the same status on these groups, or at worst, applies settlement to one group, to the exclusion of the other. This has resulted in unnecessary and avoidable dissatisfaction, which frequently turned violent and even resulted in fatalities.

Recommended Interventions

a. The State should use a comprehensive land audit to identify all unused State land that is not earmarked for particular developments. This includes land that belongs to the National, Provincial and Local Governments. There are large tracts of land that can immediately be re-distributed for this purpose.

b. Private land can be expropriated in terms of the Expropriation Act for redistribution in the public interest without having to go through the limitations of the Restitution of Land Rights Act.

c. The State should also consider the expropriation of land that is owned by absentee landowners who have shown no inclination or intent to put their land holdings into beneficial occupation, but who are holding it purely for speculation purposes. This is particularly prevalent in the KwaZulu-Natal Midlands and North of the Coastal Metro of Durban. The land should then be redistributed to the landless people to alleviate poverty and inequality.

d. The State should also consider expropriating land that was acquired by wealthy landowners with financial assistance of the State or under apartheid laws or situations of inequality, and where there is a compelling public interest so that clear precedents are created to limit the compensation paid out when taking into account all relevant factors.

All of the above can be achieved through the application of section 25(5) of the Constitution and the soon to be finalised Expropriation Act.

6. Policy Development and evaluation of Land Reform to date

Land claims research has up to now been conducted in the absence of a proper land audit, thus making it near impossible to accurately determine the progress of the Land Reform Programme against the Commission's stated objectives. The State land Audit provides a useful overview of land ownership by the State but it points out that some 7% of land (in extent 8 million Ha) still remains unaccounted for[1], thereby indicating a need for further work to accurately establish the ownership of all the land of South Africa. This land re-distribution could contribute significantly to the alleviation of the triple demons of unemployment, poverty and inequality in South Africa.

[1] The State Land Audit report Booklet, 1913 p9.

7. Land Rights Act

The ownership of Reserve land by the Ingonyama Trust, established through the Ingonyama Trust Act of 1994 is a political hot potato. This was the brainchild of the erstwhile KwaZulu legislature which entrusted 3,000,000 hectares of land to the custodianship of King Zwelithini kaBhekuzulu, as the sole trustee of the Ingonyama Trust. People living on this land have no tangible security of tenure and have recently been converted to rent paying tenants, again with no tangible benefits to themselves whilst growing the financial coffers of the Ingonyama Trust Board. It is, therefore, a valid point raised by the report of the High Level Panel that this Act needs to be reviewed for the benefit of the people living on Trust land. This recommendation proposes that the land be transferred to the custodianship of the Department of Land Affairs. Recent suggestions of repealing this Act have drawn strong criticism and threats of legal action from the Zulu monarch. **This is a matter that requires extensive public consultation.**

8. Recommended Solutions

The JLD Institute applauds the resolution taken at the ANC's 54th national conference as it clearly shows the ANC's intent on championing radical social and economic transformation in our country. The Institute also wishes to contribute to the ongoing public engagements on land matters by making the following opinions:

- The ANC-led Government should provide a definitive distinction in so far as addressing expropriation in the context of the three pillars of land reform, i.e. land restitution, redistribution and security of tenure. In this regard the Government should narrow down to one aspect, which is expropriation (with or without compensation), so as to ensure that all possible questions and arguments that emanate from this discussion are addressed.
- The Government should unpack the distinction between the originally dispossessed of ownership rights in land from the occupancy and land use rights enjoyed by labour tenants. This has been strong bone of contention when settlement of land claims are effected and has often led to violent conflict which has resulted in the loss of lives

In preparing this document, we considered the findings of the High Level Panel of former president Kgalema Motlanthe. The panel's report on *"The assessment of key legislation and the acceleration of fundamental change"* was released in November 2017. The Institute has some fundamental differences with both its composition as well as some of its findings. The main observations include the following:

- Whilst the panel was drawn from diverse fields of expertise, it however, lacked panelists with an in-depth knowledge of the history of dispossession in South Africa. In this regard it should have consulted extensively with academic as well as organic historians such as Amakhosi and Traditional Authorities, under whose custodianship the land was taken.
- There was an inordinate representation of minority interests in the composition of the panel.
- The panel also lacked legal scholars who have a knowledge of the key statutes that were used to dispossess Africans of their land. This panel seemed to be more concerned with issues of security of tenure whereas the substantive issues should be to return the stolen land to its original owners. It is only through a thorough unpacking and repealing of the discriminatory statutes (which still persist in our post-1994 legislative regime) that the injustices of the past can be reversed and substantive democracy attained.

9. Awareness and Educational Campaign

It is vitally important to remind and educate South Africans of the realities of our painful and sad history of land dispossession which resulted in the triple challenges of poverty, unemployment and inequality. History reveals that a country that falls short of adequately resolving racial and unequal distribution of land creates grounds for serious problems in the future. The education message must be for all and not just the down trodden. Systems of tenure that are embracive of sharing, communality and respect must form part of the message so that people are not excluded because of their grouping in order to gain access to land.

10. Restitution - progress to date

The legal basis for the restitution of land rights was originally provided for in Sections 121 - 123 of the interim Constitution of 1993, which was assented to in January 1994. One of the first and main pieces of legislation passed by the First Democratic Parliament was the Restitution of Land Rights Act 22 of 1994 (Restitution Act). The proper context of the Land Reform Programme was later ratified by Section 25 of the Constitution.

The clear intention of the Restitution Act is to return the dispossessed land to its original African owners; whether this land was acquired by its current owners through theft, violent conquest or it was acquired by previous Governments through racial laws and practices, thus forcing people off their land.

The successful application of this law was heavily dependent on the effective functioning of the Commission on Restitution of Land Rights (CRLR), whose establishment is provided for in Chapter 2 of the Act. The mandate of the CRLR is to perform the following functions:

(a) Soliciting and investigating the merits of land claims that qualify in terms of Section 2 (1) (a–e) of the Act;

(b) Resolving through negotiations, and mediation any disputes arising from such claims;

(c) Where claims cannot be resolved through the above processes, refer them to the Land Claims Court for adjudication

(d) Drawing up reports on unsettled claims for submission as evidence to the courts of law and to present any other relevant evidence to the courts;

(e) Exercising and performing any such other powers and functions as may be provided for in the said Act.

The above functions of the Commission call for highly competent personnel who have the capacity to conduct in-depth research and analysis, as well as generate reports and recommendations that can stand the test of legal scrutiny.

Having assented to the Restitution Act, the post-1994 government set itself a target of delivering 30% of commercial agricultural land to previously dispossessed individuals and communities by 2014 and settling all land claims lodged in 1998 by 2015.

Both targets have not been met, less than 10% of land has been delivered as of 31 March 2017. Many complicated rural land claims (e.g. Zululand – Babanango area) remain unresolved. The main challenges confronting the Commission in executing its mandate timeously seems to be a combination of the following:

- Lack of Research Capacity: This includes the constant referral of land claims to the Land claims court and the number of rulings against the Commission due to the poor standard of research conducted.
- Reported corruption within the Commission's Regional Offices: This has resulted in the stalling of settlement to legitimate beneficiaries of land claims as the SAPS, SIU and AFU have to intervene and freeze the accounts of Trusts and CPA's pending fraud investigations.
- Policy Uncertainty: The poor performance in the Land Reform process can also be ascribed to the fluctuating and sometimes conflicting policy messages from Government since 1994. Historically, the language of the Reconstruction and Development Programme in land reform originally sought to secure community use access and some ownership of land and other agricultural resources, mostly for poverty alleviation. Recently, the language has changed towards lending support for emerging black farmers with clearly defined market objectives.
- The barrier of the Natives Land Act of 1913: The Constitution and the Restitution Act are wrongly premised when determining the cut-off date for land claims to be 19 June 1913. The cut-off date should be rolled back to include the land confiscations of the Colonial era and should also take in consideration the role of the missionaries in this dispossession.[2]

[2] Ms T Ngcobo: Submission to Parliament of RSA calling for the review of Section 25 (7) of the Constitution of RSA, p20

A key consideration in the "Fixing of State Institutions" especially the Commission for the Restitution of Land Rights should be its composition which should include the following critical skills:

1. High calibre researchers
2. Knowledgeable legal scholars,
3. Academic and organic historians and,
4. Representation of Traditional Authorities under whose custodianship the land was dispossessed

11. Redistribution

Redistribution is often hailed as the most important component of Land Reform in South Africa in that it is a measure through which the State buys land from willing sellers (owners) and then redistributes it in order to foster justice and political stability. Redistribution is also a measure that Government should use diligently to ensure that Section 25(5) of the Constitution is rapidly realised without getting entangled in lengthy and costly delays due to court challenges.

One of the main obstacles to the successful implementation of redistribution is the fact that South Africa has yet to conduct a comprehensive **land audit** which shows accurate patterns of land ownership in the country. This land audit will reveal the extent of land that belongs to the National Provincial and Local Government that is either unaccounted for or unused. This is the first land that can be redistributed to poor and landless people and on which community development projects can be immediately implemented

12. Expropriation

Expropriation is described as the *"compulsory acquisition of property by an expropriating authority or organ of state upon request to an expropriating authority"*[3]. This concept should be understood to mean the provision of the means for the government to acquire property needed for public purpose, or in the interest of the public, as well as, to provide fair and transparent guidelines on how to do so properly

The above mentioned Land Audit will also reveal the extent of land that is owned by absentee landowners who have shown neither inclination nor intent to put the land holdings into beneficial occupation but are holding it purely for speculation purposes. This is particularly prevalent in the KwaZulu-Natal Midlands and North of the Coastal Metro of Durban.

Expropriation of these lands as priority areas, through the above model would show an immediate and tangible effect on the advancement of Land Reform and community development in South Africa.

13. Summation of the effects of the Restitution Act on Community Development

Based on the above discussion it is clear that although the Restitution Act was promulgated with the best of intentions of addressing the injustices of the past, its main shortcoming stems from the fact that it was formulated in the absence of an extensive and thorough consultation with interested and affected parties. Also, the CRLR as Implementing Authority was beset with numerous challenges which drastically slowed down the pace of land restitution which, in turn, had an adverse effect on the implementation of community development projects for deserving communities. Two case studies are cited below to illustrate the point

⇒ **The Mathulini Community Land Claim (Ref. no. KRN6/2/2/E/47/0/0/74)**

This claim was lodged by one Simon Mnikelwa Mlotshwa on behalf of the Luthuli Tribe in the Mzumbe-Mthwalume area in the South Coast. This claim had been previously researched and approved for settlement amounting to R268,000,000 in 3 phases. The first phase of the settlement (R90,000,000) was disbursed for payment to the landowners

- At the time of the disbursement of the Phase 2 payment, issues of corruption emerged with regard to the approval of such a high settlement figure (R268m).
- Additional issues of equity in the agreement between the outgoing landowners and the community raised concern as this was heavily skewed in favour of the landowners.
- At about the same time, further questions emerged as the legitimacy of the Communal Property Association (CPA) was disputed by a group of "Concerned" individuals who claimed to be the originally dispossessed (ODI). The CPA was the entity recognised by the Commission. It was comprised of a significant number of the Chief's family to

[3] Expropriation Bill: Definitions and Application of the Act

the exclusion of representation from the ODI's. Ongoing conflict between the ODIs and the Concerned Group resulted in the account of the beneficiaries being frozen

The seriousness of the above challenges resulted in the Regional Land Claims Commission freezing the bank account of the CPA, thus causing the associated community development to come to a grinding halt.

⇒ **Land Claims of Zululand – Babanango, Nhlazatshe and Ngotshe areas**

The above areas were once incorporated into the New Republic (Transvaal) at the time of the final annexation of KwaZulu through the enactment of the Zulu Annexation Act of 1897. The Zulu people who occupied these areas, first lived on the privatized Boer farms as tenants and labour tenants. Although they lived under their Amakhosi and Izinduna, their landlords did not recognize these authorities and made every body work on their land regardless of stature.

After the promulgation of the Natives Land Act of 1913, the Africans were brutally evicted from the white farms and many relocated to eDumbe Location in Paulpietersburg, Mondlo and Bhekuzulu Locations in Vryheid, Simdlangentsha in Pongola as well as Mpukunyoni and Ntambanana, all of which are extremely impoverished locations in Northern Zululand.

When Government opened up the window for people who were dispossessed of their rights in land to lodge claims for restitution of the same, the claimants found themselves facing an unpleasant predicament in that the land from which they were removed is under claim from His Majesty King Zwelithini kaBhekuzulu. This is at odds with the notion that people who live according to indigenous law and customs, have derived their rights of occupation of land as families, clans or communities through inheritance over multiple generations. Whilst they may, as tribesmen and women pledge allegiance to His Majesty and his administrative functionaries such as the Tribal Authorities and the Ingonyama Trust, they still maintain strong individual/clan rights to their ancestral land[4].

The Restitution of Land Rights Act, no. 22 of 1994, recognises these rights in land and seeks to restore these rights to the originally dispossessed or their descendants, subject to their compliance with the provisions of Section 2 (1) (a-e) of the Restitution Act.

Although many claimants have been found to qualify for the restoration of their individual rights on these farms, the Zulu monarch (**who is not an ODI**) is disputing their right to lodge claims by claiming jurisdiction over the land. This poses a stalemate for the RLCC who have to apply the Restitution Act in restoring ODIs to their dispossessed land.

[4] The claimants expressed a deep reverence to King Zwelithini and his forefathers from the house of Shaka, a view that is held by a vast majority of Zulu people in Zululand and Natal (now KwaZulu-Natal)

14. Conclusion

South Africans can breathe a sigh of relief that the land question has not yet become the straw that broke the camel's back 24 years into democracy. The governing party should confront and embrace its moral obligation to promote equal access to land and property rights to all our citizens. The benefits to the country in terms of employment creation, poverty reduction as well as skills and capacity building will be immeasurable.

- Yes, it will require some sacrifice from the privileged, which we hope, will be regarded in a spirit of reconciliation, patriotism and nation building, as well as
- Concomitant realisation by the previously marginalised that they now have to double their efforts to reduce the triple scourge of unemployment, inequality and poverty.
- Yes, it will also require time, effort and government investment in terms of the empowerment of the previously disadvantaged to achieve the goals of the National Development Plan.

The Government should also pledge its commitment to look past all populist political rhetoric and minority-interest agendas in the delivery of equal access to land for our people. This is a social contract which it should pursue in all spheres of Government, regardless of whether it is between the privileged vs previously disadvantaged classes or between the various tribal factions within the disadvantaged communities.

The constant and consistent application of a progressive approach to land reform will automatically unlock the potential for municipalities and local government roll out community development programmes to deserving communities for the purpose of achieving security, stability and prosperity within their respective constituencies.

Finally, in light of the above, the JLD Institute is of the opinion that **Expropriation of property should definitely be implemented for public purpose and in the public interest in South Africa.** This is adequately provided for in Sections 25 (2), (4) and (5) of the Constitution. Section 25(3) of the same Supreme Law of the land, provides for the **enactment of legislation which will standardize a "sliding scale" from 0% to 100% market value compensation,** based on various factors to be considered in the determination of just and equitable compensation, reflecting an equitable balance between public interest and the interest of those affected. In short, **Expropriation** (with or without compensation) **does not require a review of the Constitution.** It simply requires the lawmakers of the land to adopt greater urgency in executing their mandates