**SUBMISSION ON MOTION TO EXPROPRIATE LAND WITHOUT COMPENSATION**

**AFRICAN CHRISTIAN DEMOCRATIC PARTY**

**14 JUNE 2018**

The African Christian Democratic Party (ACDP) is on record that it does not support expropriation without compensation as proposed in the parliamentary motion of earlier this year. We consequently do not support any amendment of the Constitution in this regard.

The ACDP appreciates, however, that the land issue is a very sensitive and potentially divisive issue, given the history of the land dispossession in the country, particularly following the Land Act of 1913 and subsequent legislation. While we believe that justice must be done, we also strongly believe in reconciliation and nation-building. Biblical justice can be achieved through a process of restitution. It is for this reason that we support land reform and the restitution of land in an orderly and lawful manner.

**Constitutional Framework**

Section 25 (1) of the Constitution prohibits the arbitrary or discriminatory deprivation of land. This is a key provision protecting property rights. Section 25(8) states, however, 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 address 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).*"

Section 25(2) allows for property to be expropriated "*for a public interest or in the public interest, and subject to compensation"* and section 25(3) requires that the amount of compensation must be "*just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all the circumstances, including:*

*(1) The current use of the property;*
*(2) The history of the acquisition and use of the property;*
*(3) The market value of the property;*
*(4) The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
*(5) The purpose of the expropriation".*

Section 25(5) states that, "*the state must 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*."

It is important to note that the meaning of section 25(5) has not been interpreted judicially. In other words, while other provisions, such as the right to restitution and to secure tenure, have been extensively challenged and adjudicated in the courts, what constitutes adequate measures to "*enable citizens to gain access to land on an equitable basis*' has not.

It is for this reason that the ACDP recommends that the Constitutional Court be approached by political parties represented in Parliament (and interested parties) to provide clarity on the judicial meaning and ambit of sections 25(2), (3), (5) and (8) when balanced against section 25(1).

In this regard, section 80 of the Constitution provides that members of the National Assembly may apply to court for an order declaring that all or part of an Act of Parliament is unconstitutional. While this provision is not strictly applicable to an application seeking a declaratory order on the ambit of section 25, it does give guidance as to the possibility of political parties approaching the Constitutional Court.

Former Constitutional Court Judge, Albie Sachs, has stated that "*far from being a barrier to radical land redistribution, the Constitution in fact requires and facilitates extensive and progressive programmes of land reform. It provides for constitutional and judicial control to ensure equitable access and prevent abuse. It contains no willing seller, willing buyer principle, the application of which could make expropriation unaffordable*." (Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (the Motlanthe Panel Report), p 206).

**The Restitution of Land Rights Act**

The ACDP supported the Restitution of Land Rights Act of 1994. The Act gives content to the provisions set out in section 25(7) and allowed a person or community dispossessed of land rights after 19 June 1913 as a result of past racially discriminatory laws or practices, to lodge a claim for the return of that property or for equitable redress. The Land Claims Commission and Land Claims Court were set up to implement the programme of land restitution.

The Restitution of Land Rights Amendment Act 15 of 2014, signed into law on 30 June 2014, provided for the reopening of the lodging of land claims for a further 5 years (1 July 2014 to 30 June 2019). Following a Constitutional Court challenge, the court declared the Amendment Act invalid, ruling that the public participation process had been inadequate. The court further ordered that all old order claims need to be finalised before new claims can be settled, and before land claims can be opened again. Should the proposed Restitution of Land Rights Bill (a private member's Bill) be passed to reopen land claims until 2021, this will still mean that old order claims will have to be finalised.

Sadly, due to a lack of capacity, lack of sufficient budget, inflated prices and corrupt practices, there are still approximately 7400 old order claims outstanding. It is estimated that it will take between 35 and 43 years to finalise all these claims. It is thus imperative that an expedited system is implemented to finalise these and possible further claims. It is also noteworthy that the Motlanthe Panel does not support changes to the 1913 cut-off date (Motlanthe Panel Report, p 237).

Additionally, few guidelines were provided for the Land Claims Commission to determine "*just and equitable*" settlement and feasibility.

*"Many restitution awards are inconsistent and do not provide real redress, particularly when claimants are compelled to take smaller cash settlements, or the emphasis on keeping land*

*productive compels claimants to enter strategic partnerships against the wishes of some. The resultant confusion and dissatisfaction has led to the Land Claims Court becoming overwhelmed with cases. Despite the enormous volume of very complex cases, there are no permanent judges of the Land Claims Court"* (Motlanthe Panel Report, p234).

The following statement contained in the Motlanthe Panel Report, following extensive public hearings over two years, is significant:

*"Much of what was said in the public hearings points to deep divisions sown through land restitution, as a consequence of overlapping and competing claims, and dysfunctional CPAs (Community Property Associations). But some speakers said that the government actively encourages people to blame other groups for problems that the government in fact has caused. Specifically, speakers pointed out that the government was trying to exacerbate racial divisions between whites and blacks, and to blame traditional leaders, when in fact government officials are themselves capturing the benefits of land restitution at the expense of claimants, and government has given some traditional leaders 'unaccounted for powers'"* (p 241).

*Implementation has been poor at every level. While the budget has been criticised for not being enough to cover the costs of restitution (for example purchasing land required) the Commission has consistently underspent the budget, suggesting that the fundamental problems lie with capacity and systems. Choices around spending have been poor. There has been political meddling in land restitution, both in terms of unreasonable targets for redistribution, as well as in terms of individual restitution awards, which has damaged the integrity of the process*"(p 245).

The Motlantha Panel Report Recommendation 3.2 sets out several steps to improve and speed up the land restitution process. **The ACDP believes that serious consideration should be given to implement these recommendations before considering expropriating land without compensation.**

**Accurate Land Audit is required**

It is also unclear who owns the land in South Africa, with various land audits giving different figures. While land ownership is skewed, it is significant that 14% of registered land is state land, and a further 7% is further unregistered state land. Expropriation should begin with this state land.

**Expropriation Bill and the Mineral and Petroleum Resources Development Act**

The Expropriation of Land Bill (B4 – 2015) should also be finalised. This Bill allows for the expropriation of land needed for the "public purpose" or "public interest". The Bill was passed by both houses in 2016, but referred back to Parliament by the President for further consultation. Unlike the Expropriation Act of 1975, this Bill allows for expropriation in the "*public interest*" and with *"just and equitable*" compensation, as provided for in section 25.

There is also conflict between this Bill and the Mineral and Petroleum Resources Development Act, which empowers the minister to expropriate any land for mining. The

current Expropriation Bill does not require mining companies or the state to meaningfully negotiate with the communities about communal land. Tensions are, as a result, running extremely high in areas where mining is taking place on communal land.

**CORRUPTION AND ABUSE**

The key problem with the legal framework around land reform is that the policy allows narrow interests to dominate the land reform programme. The ACDP is deeply concerned with the possibility of corruption and abuse, given the widespread allegations of these practices by government officials. We are just emerging from state capture – the economic effect of which will take years to repair.

It is highly doubtful whether we as citizens can entrust the government with additional powers to expropriate land without compensation, given the corrupt practices of the land restitution process as referred to in the Motlanthe Panel Report and other documents.

Professor Ruth Hall, an associate at Plaas (Financial Mail, Jan 25, 2018) states the following, "*So if we have a programme where it says: the minister may use money and buy farms and give them to people , on what basis are these decisions made…Even in the wider redistribution process, the minister Nkwinti was able to buy a R97 million farm in Limpopo and give it to a friend who worked at Luthuli House (the ANC headquarters) and there is nothing in the policy that says you can't do that*."

The potential for abuse and corruption is vast. This is one reason why the ACDP will not support any proposal to expropriate land without compensation.

**Opposition to State custodianship of property**

The ACDP is strongly opposed to any proposal that the state will be the custodian of all property. We believe that private property ownership should be protected and extended within our existing constitutional framework. In addition, given the deep corruption and abuses that we have witnessed with state capture and which is prevalent in many departments, how can one entrust the state with custodianship of all property. This would in effect mean that all property, including that of black, Indian and coloured people, would effectively be expropriated.

The Motlanthe Panel has already expressed its concerns in this regard:

*"The current government policy is that people do not get ownership of redistributed land – beneficiaries receive leases or 'conditional rights'. Research indicates that in practice, in many cases, they get no recorded rights to land whatsoever. This makes it very difficult to develop the land or protect their right to it"* (p 204).

There are an estimated 4000 farms in state hands – the full ownership of which has not been handed over to emerging farmers who are obliged to lease those farms.

"*It is of great concern to the Panel that recent policy shifts appear to default to some of the key repertoires that were used to justify the denial of political and property rights for black people during colonialism and apartheid. These repertoires include the assumption that*

*customary and de facto land tenure systems do not constitute property rights for the poor. The State Land Lease and Disposal policy, and the CPA Amendment Bill default to the model of state trusteeship put in place by the Development Trust and Land Act 1936 as the most appropriate form of land rights for beneficiaries of land reform. This model previously applied only in the former homelands, but now appears to have been extended to all land made available through restitution and distribution"(p 303).*

The ANC has repeatedly claimed that expropriation without compensation will "return" the land to "the people". However, as the Institute for Race Relations points out in its submission (p 5), "***this is fundamentally misleading. Land expropriated without compensation will be owned by the state, not by individual black South Africans. Nor will it be transferred to them thereafter, for the ANC's policy is to keep land in state ownership. Land acquired via EWC will be held by the state as a patronage tool and used by it to deepen dependency on the ruling party. This is the fraud at the heart of the EWC idea*.**"

Black farmers are also not given sufficient technical support. Besides speaking about access to land, one must talk about support that is need after the land is acquired. The lack of support after farm redistribution is also a major failing.

**Giving full title to property**

If the government wants real land reform, it should start with the land that is in state hands, or unaccounted for. Title deeds should be handed to current inhabitants of land for them to properly harness its power and pull themselves out of poverty. The existing practice of giving limited leases of 3 to 5 years is totally insufficient, as highlighted by the Landbank. Questions have even been posed about 30 year leases.

If beneficiaries are given full titles to property, this will unlock wealth, particularly in urban areas. One example is the following: "*The Centre for Affordable Housing Finance estimates that about 1.8 million or 29 % of the 6.2 million formal properties on the deeds registry were financed by the public housing programme. This reflects assets to the estimated value of R326 billion. About R1million state-subsidised properties still need to be registered for title deeds. Eradicating this backlog would increase the proportion of state-subsidised properties on the deeds registry to 39 % of the formal housing market, unlocking R180 billion of estimated value for low-income households"* (2018 Budget Review, National Treasury, p73).

**Conclusion**

The 2016 Finance and Fiscal Commission report on national land reform reveals that despite the R60 billion spent on land reform initiatives, economic development in rural areas has not been stimulated, unemployment and poverty levels have risen, and food security has not increased.

It is thus misleading that the failure of land reform is due to the Constitution, which purportedly now must be amended to give government more power to expropriate land without compensation. Government has never used the powers it has under the Constitution's property clause, which already allows it to expropriate land for land reform.

Weak institutions, corruption and shoddy implementation are the real reasons for the lack of progress with land reform.

Economists have also warned that if one set of property rights is to be affected, others could be affected as well. This, besides the devastating impact that expropriation without compensation will have on food security, agricultural production and the economy.

What is to prevent government expropriating any person's land without compensation once that power has been given without necessary checks and balances? Today land in the hands of white people may be targeted, tomorrow that of Indian people, or coloured people, or even land held in black hands, such as Ingonyama Trust.

There is a real danger of property rights of black people being systematically undermined. The current policy is that new black beneficiaries will lose the land if they don't perform to the satisfaction of state officials. During the public hearings of the Motlanthe High Level Panel which took place over two years, many spoke scathingly about the role of state officials and politicians in land reform, describing them as vultures who steal the little people have left after decades of oppression and forced removals. They named people on camera and gave detailed descriptions of the problems they face, including the violent attacks suffered by land activists in mineral rich areas (Business Day April 5, 2018, "*Elections trump land reform as panel report is put on the back burner"*).

This aspect was highlighted in an interview by Mr Valli Moosa, the former Minister of Constitutional Development, who explained that at the time of the drafting of the Constitution, the property clause was of great importance to both white and black people: "*Sometimes people think only white people wanted their property rights protected…But it's a much bigger issue for black people. Can you imagine what it would feel like to finally own property again and then live with the fear that it could be taken from you again* (Banker SA, Edition 21, p17)?*"*

Why, also, have the findings of the Motlanthe Panel been shelved? Perhaps its statements about state failure and increasing corruption does not sit well with the governing party in the run-up to the elections in 2019.

It is disingenuous to talk of "*expropriation without compensation*" without first acknowledging and dealing with the deep problems of corruption and abuse within the land reform system. We hope that the public hearings about possibly amending the Constitution will also focus on these issues.

The ACDP remains committed to finding solutions to the land issue in the country that are informed by principles of justice, reconciliation, good stewardship (as opposed to corrupt and abusive practices), restitution and restoration.

**The ACDP would like to make an oral submission at the public hearings. We also reserve the right to supplement this submission should the need arise.**