



FW de Klerk  
FOUNDATION

**THE FW DE KLERK FOUNDATION**

*Upholding South Africa's National Accord*

**The Director-General: Rural Development and Land Reform**

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**Attention:** Adv Sello Ramasala

**Per email:** [RALHBill@drdlr.gov.za](mailto:RALHBill@drdlr.gov.za) | [sello.ramasala@drdlr.gov.za](mailto:sello.ramasala@drdlr.gov.za)

10 April 2017

Dear Adv Ramasala,

***CONCISE SUBMISSION ON THE DRAFT REGULATION OF AGRICULTURAL LAND HOLDINGS BILL***

**[B - 2017]**

1. The FW de Klerk Foundation (the Foundation) is a non-profit organisation dedicated to upholding the *Constitution of the Republic of South Africa, 1996* (the Constitution). To this end, the Foundation seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa.
2. Accordingly, the Foundation endeavours to contribute positively to the promotion and protection of our constitutional democracy. This includes the achievement of real and substantive equality and equitable access to land and other resources, but with due regard for those rights concerning property and administrative action that is lawful, reasonable and procedurally fair, as provided for in the Constitution.

3. As such, the Foundation welcomes the opportunity to make a concise submission to the Department of Rural Development and Land Reform (the Department) regarding the *Draft Regulation of Agricultural Land Holdings Bill* [B - 2017] (the Draft Bill) in response to your call for submissions as published on [www.gov.za](http://www.gov.za). In this regard, please find attached our submission for the Department's attention and consideration.
  
4. We trust that our submission will be of assistance in guiding the Department in its deliberations regarding the Bill.

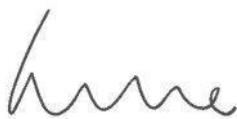
Yours Sincerely



Dr T Eloff  
Executive Director



Ms Z Dawood  
Director: Centre for Unity in Diversity



Ms P Dube  
Director: Centre for Constitutional Rights

**Constitutional and Legal Framework**

1. Section 25 of the Constitution reflects a delicate balancing act between the protection of existing property rights against unconstitutional interference, and the authority of the state to interfere with property rights for land reform or other related purposes.<sup>1</sup> However, a single provision in section 25 should not be interpreted or applied abstractly without reference to the overall structure of section 25. Moreover, section 25 should be read in context of the Constitution as a whole.<sup>2</sup>
2. Both Parliament and the nine Provincial Legislatures are granted, in terms of the Constitution, the power to enact laws, however, they cannot make laws which arbitrarily interfere with property rights. Neither can they enact laws which grant the State the authority to arbitrarily interfere with property rights. The Constitutional Court, weighing in on the extent of arbitrariness in laws concerning economic matters in *S v Lawrence; S v Negal; S v Selberg*,<sup>3</sup> stated that legislative measures are arbitrary when they bear no rational relationship to the legislative goal they are intended to achieve. It is submitted that the stated aim of the Draft Bill<sup>4</sup> “*In order to improve the national land reform programme and achieve the vision of integrated and inclusive rural areas by 2030...*” bears no congruence to two salient features of the Draft Bill - namely the ban on foreign ownership and the introduction of categories of ceilings of agricultural land holdings. This lack of congruency renders these provisions arbitrary and as such may be unconstitutional.
3. It is a long-established rule of interpreting legislation that the reader should investigate what mischief the legislation was meant to remedy. This is part of the broader legal principle that legislation must be interpreted in light of the purpose that it seeks to achieve<sup>5</sup>. It is our submission that the stated objective of improving land reform through a ban on foreign ownership, while simultaneously admitting<sup>6</sup> that “*The true extent of this large [property] portfolio and its development potential remains debateable*”, appears illogical. If the Department is unaware of how much state land there is, and by implication, how much agricultural land is owned by foreigners - the Draft Bill thus serves no purpose and its provisions become irrational. The Constitutional Court has adopted a purposive approach to the interpretation of the Bill of Rights.

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<sup>1</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at paragraphs 23 and 33.

<sup>2</sup> AJ van der Walt *Constitutional Property Law* (2011) 12-17.

<sup>3</sup> 1997 (4) SA 1176 (CC).

<sup>4</sup> See Memorandum on the Objects of the *Regulation of the Agricultural Land Holdings Bill* at 1.1.

<sup>5</sup> *Wille's Principles of South African Law* page 60.

<sup>6</sup> See Memorandum on the Objects of the *Regulation of the Agricultural Land Holdings Bill* at 1.3.

Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of “all people in our country”, and in the absence of any indication that section 25(1) is to be restricted to citizens as in other provisions, the Draft Bill may thus be unconstitutional.

4. The relegation of ownership rights to leasehold over agricultural land for foreigners is exclusionary and limits foreigners’ rights to equality and is unfair under section 9 of the Constitution. Furthermore, the limitation finds no justification under section 36 of the Constitution. Suffice to say, equality is a foundational value of the Constitution and must underpin constitutional interpretation. Equality in respect of property ownership is implicit in the reference to “no-one” being deprived of property in section 25(1).
5. It is also important to realise that even where the State may be able to justify the ban on foreign ownership on the grounds that this interferes with citizens’ access to land reform, the criteria upon which the State elects to limit foreign ownership of agricultural land (in this case citizenship) must be consistent with the Bill of Rights as a whole. Consequently, this means that if the way the Department chooses to give effect to the State’s obligations with regard to land reform under section 25 unreasonably limits other constitutional rights, that too must be taken into consideration.
6. We submit that for the State, it may be:

*“[N]ecessary to differentiate between people and groups of people in society by classification for the state to allocate rights, duties, immunities, privileges, benefits or even disadvantages and to provide efficient and effective delivery of social services. Nonetheless, those classifications must satisfy the constitutional requirement of ‘reasonableness’. In this case, the state has chosen to differentiate between citizens and non-citizens. That differentiation, if it is to pass constitutional muster, must not be arbitrary or irrational nor must it manifest a naked preference. There must be a rational connection between that differentiating law and the legitimate government purpose it is designed to achieve. A differentiating law or action which does not meet these standards will be in violation of... the Constitution.”*<sup>7</sup>
7. The intention to ban or limit foreign agricultural land ownership is not a uniquely South African concept, with countries including the United Arab Emirates, Argentina, Canada and Saudi Arabia

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<sup>7</sup> *Khosa and Others v Minister of Social Development and Others* 2004(6) SA 505 (CC) para 53.

having similar laws, however those countries do not have constitutions that entitle “everyone”<sup>8</sup> to enjoy the protection of rights and freedoms under the Bill of Rights.

8. The fact that the differentiation between citizens and non-citizens may have a rational basis does not mean that it is not an unfairly discriminatory criterion to use in protection and access to property rights. Should the differentiation be based on a ground listed in section 9(3)<sup>9</sup> of the Constitution, a rebuttable presumption that the discrimination is unfair is created by section 9(5).<sup>10</sup>

9. In *President of the Republic of South Africa and Another v Hugo*,<sup>11</sup> Goldstone J stated that:

*“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked...To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.”*

10. Nonetheless, citizenship is not a ground of differentiation that is specified in section 9(3) of the Constitution. The Constitutional Court in *Hoffmann v South African Airways*<sup>12</sup> held that *“at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity.”* The same Court concluded that for a characteristic to be considered a parallel ground of differentiation to those already listed in section 9(3) the classification must have an adverse effect on the dignity of the individual, or some other comparable effect.

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<sup>8</sup> See Section 7(1) of the Constitution: “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of **all people** in our country and affirms the democratic values of human dignity, equality and freedom.”

<sup>9</sup> “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

<sup>10</sup> “Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

<sup>11</sup> 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paras 41-3.

<sup>12</sup> 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 27.

11. The Constitutional Court in *Larbi-Odam*<sup>13</sup> too found that first, foreign citizens are a minority in all countries, and have little political muscle. In addition, the same Court stated that citizenship is a personal attribute which is difficult to change. Differentiation on the grounds of citizenship is evidently on a ground parallel to those listed in section 9(3) and therefore amounts to unfair discrimination.
12. It is our submission therefore that the Draft Bill's ban on foreign ownership of agricultural land is neither reasonable nor justifiable within the meaning of section 36 of the Constitution. This renders the Draft Bill unconstitutional.

### **Draft Regulation of Agricultural Land Holdings Bill [B – 2017]**

#### **Ad Preamble**

13. The second paragraph of the Preamble to the Draft Bill quotes section 25(8) of the Constitution  
*“No provision of that (Sic) section may impede the State from taking legislative and other measures to achieve land, water, and related reforms in order to redress the results of past discrimination”*

However, the provisions of the Draft Bill, which ostensibly seek to enable black South African citizens to gain access to land on an equitable basis, infringe on the provisions of section 25(1) and section 25(2) of the Constitution. In particular, the stated aim of the Draft Bill *“In order to improve the national land reform programme and achieve the vision of integrated and inclusive rural areas by 2030...”* bears no congruence to the two salient features of the Draft Bill - namely the ban on foreign ownership and the introduction of categories of ceilings of agricultural land holdings. This lack of congruency renders these provisions arbitrary and in violation of section 25(1) of the Constitution.

14. In any event, regardless of the fact that land reform is a constitutional imperative, land reform cannot be placed ahead of other provisions in section 25, the property clause. This is true too for compensation for expropriation for land reform purposes. The balance between maintaining property rights while creating access to land and other natural resources must still be reflected in the Draft Bill.

#### **Ad Clause 2 Objects of the Act**

15. Clause 2(b) of the Draft Bill states that the objects of the Act include obtaining agricultural land for redistribution, to ensure redress for past imbalances in access to agricultural land, to promote food security and to provide certainty regarding the ownership of public and private agricultural

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<sup>13</sup> 1998 (1) SA 745.

land. The intentions thus stated appear to conflate the three constitutionally mandated tenets of land reform: redistribution, restitution and tenure reform. It is important that the three tenets be delineated since restitution and tenure reform in section 25(7) and section 25(6) respectively, are rights, whereas access to land through redistribution is not a right.

16. Clause 2 is unclear as to whether the Draft Bill is a growth strategy for a black peasantry or a livelihood income generation strategy, while 2(f) is silent on the precise policy and legislative intentions of the State. This lack of clarity, read with the conflated tenets of land reform, renders the true intention of the Draft Bill uncertain.

#### **Ad Clause 3 Application of the Act**

17. Clause 3, which posits the Draft Bill as the prime legislation in respect of all agricultural land, is however silent on existing agricultural policies and how their well-documented failings will be addressed. For example, the Redistribution and Agricultural Land Development policy failed its target of redistributing 30% of commercial farmland within five years. Key legislation pertaining to the acquisition and disposal of agricultural land, such as the *Subdivision of Agricultural Land Act* (which preserves agricultural land in the national interest) will be trumped by the Draft Bill and yet their specific provisions are not included in the Draft Bill. This creates a legislative lacuna, which has negative implications for long-term food security.

#### **Ad Clause 21 Disposal by Foreign Person of Agricultural Land Holdings**

18. In making it mandatory for foreign persons disposing ownership of land to offer the Minister the land first, this unnecessarily infringes on the land owner's entitlements of property ownership. The fact that such land must be first offered to the Department while agricultural land owned by South Africans and permanent residents can be freely traded on open markets is an unfair distinction, which could be discriminatory and therefore an infringement of constitutional principles elucidated above in points 1 - 13 above.

#### **Ad Clause 25 Categories of Ceilings for Agricultural Land Holdings**

19. Perhaps this provision is the nub of the Draft Bill. The provisions, when implemented, will provide ceilings for agricultural land holdings. While clause 25(2) lists criteria and factors to be considered in establishing the ceilings, the clause is silent on how the Department will approach whatever land exceeds those ceilings. This means that section 25 of the Constitution, with regard to expropriation and requisite compensation, must be reflected in Clause 25.

**Ad Clause 25 Categories of Ceilings for Agricultural Land Holdings read with Clause 26 Redistribution of Agricultural Land**

20. The ceilings for agricultural land holdings will negatively impact black emerging and established commercial farmers. Clause 26 specifically provides that black people, as defined in the *Employment Equity Act 1998*, must have right of first refusal with regard to the redistribution of agricultural land. This is to obviously encourage more black commercial farmers who are currently underrepresented in the sector. However, the ceilings to be introduced threaten the interests of black commercial farmers who are already in the sector. As such, the aims of the Draft Bill are at odds with its own provisions, which renders the Draft Bill irrational.
21. It is also worth mentioning that the ambit of the *Employment Equity Act* extends to designated groups who may not necessarily be black South Africans but were also disadvantaged. As such, the insistence of the Draft Bill that only black South Africans should have the right of first refusal unnecessarily narrows the focus and intention of the *Employment Equity Act*, running the risk of unfair discrimination, in violation of section 9(4) of the Constitution which prevents unfair discrimination.

**Other Considerations**

22. Land is a limited commodity in South Africa, accounting for no more than 12% of land surface but has a disproportionate presence in the construction of dispossession and loss associated with the Apartheid lexicon. As outlined above, while the post-apartheid government had designed a comprehensive programme to address land reform, this programme has been critiqued and criticised for not doing enough to overturn historic patterns of land use and ownership. Amendments to existing land reform legislation notwithstanding - to both fast-track and extend access to land ownership and use - the *Regulation of Agricultural Land Holdings Bill's* attempt at a broad sweep approach may be in breach of existing land legislation and as so robustly stated throughout this submission, in breach of the Constitution.
23. The overly broad ambit of the proposed legislation, with vague references to populist as opposed to affordable and realistic outcomes, is a matter of concern to the Foundation, at a time when the country is facing a bleak economic future. The proposal to create a supra Land Commission has not been costed nor questions about its overlapping function with the Office of the Surveyor-General, Deeds Office and existing functionaries within the Department of Agriculture, Forestry and Fisheries addressed.



**Recommendation**

As detailed above, we submit that the Draft Bill - with its aim to create more equitable access to land - is laudable, but it remains that it may not meet constitutional muster and should accordingly be withdrawn.

Furthermore, the Foundation asserts the imperative to strengthen the implementation of existing land laws, regulations and institutions to achieve, within the Constitutional framework, outcomes to extend land use and access.

**END**