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To: Mr Livhuwani Ndou
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Re: **Invitation for comments on the DRAFT EXPROPRIATION BILL, 2019**

Date: 20 February 2019 (**Deadline for comment: 22 February 2019**)

INTRODUCTION:

1. We refer to the invitation by the Department of Public Works (“the Department”) for comments on the Draft Expropriation Bill, 2019 (“the Bill”).
2. We hereby submit our concerns relating to sections 1 and 12(3) of the Bill.
3. In a nutshell, our submissions are as follows:
 - 3.1. The definition of “property” is not limited to land and no exceptions for certain types of land, specifically land used for religious purposes, are provided. Without this limitation, property will mean anything from land, to the clothes on a person’s back, or even their intellectual property.
 - 3.2. The Constitution protects the fundamental right to religious freedom,¹ which includes the right to practise one’s faith in a community – a right one may not be denied.²
 - 3.3. While we applaud the criteria included for consideration before expropriation without compensation (“EWC”) can occur, we object to the list not being a closed list and/or that no exceptions to property that cannot be expropriated, are provided for.

¹ Section 15 of the Constitution of the Republic of South Africa, 1996.

² Section 31(1) The Constitution of the Republic of South Africa, 1996.

3.4. Although well-intended, the broad definition of “property”, the open list for EWC and the absence of any exceptions will have unintended and potentially disastrous consequences, including the potential expropriation of church land / land used for religious purposes.

4. In the circumstances, we propose that:

4.1. The proposed sections of the Bill be more narrowly drafted: i.e. that “property” be limited to land only, and the criteria for EWC be a closed list;

Alternatively, that a clause containing land which is exempt from EWC be inserted. Here we specifically propose: “***Land that is owned and used in connection with the exercise of the constitutional right to religious freedom and the rights of religious communities, is hereby exempted from the applicability of section 12(3).***”

5. We request an opportunity to make verbal submissions in this regard during any (further) consultations that may be held in relation to the Bill.

ABOUT FOR SA, AND OUR INTEREST IN THE BILL:

6. *Freedom of Religion SA NPC (2014/099286/08) (FOR SA)* is a non-profit organisation, working to protect and promote the constitutional right to religious freedom in South Africa.
7. *FOR SA* currently has an endorsement base of religious leaders representing 6 million+ people in South Africa. Its constituency spans across various denominations, churches and faith groups in South Africa.
8. *FOR SA's* interest in the Bill lies therein that millions of believers in South Africa (across different denominations, churches and faith groups), meet together in buildings located on land in the exercise of their constitutional rights to religious freedom (sections 15 and 31).
9. The State has a duty to respect and protect the religious convictions and beliefs of those believers who choose to meet together to practise their faith.
10. As such, and because the constitutional right to freedom of religion, belief and opinion (section 15) and the constitutional right of religious communities (section 31) are directly affected by any proposed amendment which would possibly result in church land being expropriated (without compensation), we (and indeed our constituency) have a direct interest in this matter.

PROCEDURAL CONCERNS:

11. Due to the vast impact of this proposed legislation, *FOR SA* urges the Department to undertake in-depth provincial consultations with the public to ensure that every citizen's concerns, irrespective of demographic and/or social class, are given the opportunity to be listened to and considered.
12. A distinct, but parallel process by the Constitutional Review Committee ("CRC") regarding whether the Constitution itself should be amended to allow for EWC, is still underway. *FOR SA* therefore urges the Department to apply for a declaratory order to the Constitutional Court whether EWC would qualify as "*just and equitable*"³ payment and thus, whether EWC is constitutional⁴ under section 25(8).⁵
13. Given that the State's responsibility to foster conditions which enable citizens to gain access to land on an equitable basis⁶ has not yet been interpreted judicially, *FOR SA* is concerned that the first port of call, when the Department is about to employ a legislative measure, should be to ascertain from the Constitutional Court what this responsibility entails and means. To do otherwise would be putting the cart in front of the horse and risk falling short of said responsibility.

SUBSTANTIVE OBJECTIONS:

SECTION 1 OF THE BILL - Vague and uncertain:

14. Section 1 – Definition of "property":

- 14.1. "Property" is defined as being property contemplated in section 25 of the Constitution.
- 14.2. Section 25(4)(b) states that "property" is not limited to land. Legal theorists have suggested that it means **property rights** – i.e. the legal relationship to a thing (e.g. ownership, mortgage, lease, mineral rights, liens or servitude).⁷

15. The Bill currently fails to define what would qualify as "property".

16. As a result of this failure, all property – from immovable to trademarks – becomes encompassed by the Bill and subject to possible State expropriation.

³ Section 25(3) of the Constitution.

⁴ It has been the traditional view of legal scholars that the Constitution does not allow for EWC – see *Currie and de Waal's The Bill of Rights Handbook* 5ed (2005) page 536.

⁵ Section 25(8) states that any departure from the provisions of section 25 must be in accordance with section 36.

⁶ Section 25(5) of the Constitution.

⁷ *Currie and de Waal* pages 537-8.

17. *FOR SA* is of the view that this definition should be specifically limited in the Expropriation Bill as the Bill clearly intends to deal with, and relate to, immovable property - not intellectual property or shares.

18. Section 1 – Definition of “public purpose”:

18.1. Currently the Bill defines “*public purpose*” merely as “*includ[ing] any purposes connected with the administration of provisions of any law by an organ of state*”.

18.2. Surely public purpose should also mean that the property should be expropriated for public use, i.e. to meet the public need for land reform and redistribution? *FOR SA* submits that this should be clearly included in the definition.

18.3. Given the finding of the High Level Panel (HLP) that corruption has played a big role in the slow pace of land reform, *FOR SA* also advocates that the definition of “public purpose” should include a specific prohibition against arbitrariness with a list factors that should be met to show it is for a “public purpose” and that due process has been followed.

19. We submit that, absent clear definitions in respect of the foregoing terms, the Bill is in danger of being open to abuse by a future political dispensation.

THE LEGAL FRAMEWORK:

INTERNATIONAL LAW:

20. In terms of section 39(1)(b) of the Constitution, a court “*must consider international law*” when interpreting the Bill of Rights. It would thus be prudent for the Department and Parliament to do so when drafting legislation that affects these rights.

TREATIES AND DECLARATIONS:

21. South Africa has signed the following international and regional treaties and declarations protecting religious freedom:

21.1. The International Covenant on Civil and Political Rights (ICCPR);⁸

⁸ Article 18 of the ICCPR provides that everyone has the right to religious freedom and that **this includes the freedom to meet in community with others** to manifest such belief in worship, observance, practice and teaching. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

- 21.2. The African Charter on Human and People's Rights (Banjul Charter);⁹
- 21.3. Universal Declaration of Human Rights;¹⁰
- 21.4. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief;¹¹ and
- 21.5. Durban Declaration and Programme for Action which promotes an inclusive society where all participate on the basis of equality.¹²

THE LEGAL POSITION IN SA:

THE CONSTITUTION:

The right to freedom of religion, belief and opinion (section 15) and rights of religious communities (section 31):

22. Every week, millions of believers (across different denominations, churches and faith groups) believe that the Scriptures command their meeting together and doing so is an integral part of practising and living out their beliefs.

23. In this regard, the Constitutional Court has repeatedly held that religious freedom includes not only "*the right to entertain such religious beliefs as a person choose, [but] the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination*"¹³. [Own emphasis.]

24. Thus, the places where such meetings happen are of central and indeed, critical importance to the living out of believers' section 15 and section 31 constitutional rights.

⁹ Article 8 guarantees that freedom of conscience, the profession and **free practice of religion** shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms. Article 14 further states that the **right to property shall be guaranteed**. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

¹⁰ Article 17 states that everyone **has the right to not be arbitrarily deprived** of his property. Article 18 states that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or **in community with** others and in public or private, **to manifest his religion** or belief in teaching, practice, worship and observance.

¹¹ Article 1 states that everyone shall have the right to freedom of thought, conscience and religion, and that this right shall include the freedom to have a religion or whatever belief of his choice, and freedom, either individually or **in community with others and in public** or private, **to manifest his religion** or belief in worship, observance, practice and teaching.

¹² Article 14 *Urges States* to recognize the particularly severe problems of religious prejudice and intolerance that many people of African descent experience and to implement policies and measures that are designed to prevent and eliminate all such discrimination on the basis of religion and belief, which, when combined with certain other forms of discrimination, constitutes a form of multiple discrimination; and Article 79 *Calls upon* States to promote and protect the exercise of the rights set out in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in its resolution 36/55 of 25 November 1981, in order to obviate religious discrimination which, when combined with certain other forms of discrimination, constitutes a form of multiple discrimination.

¹³ *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC)., para 36 citing *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC).

25. Having regard to the same definition (and guarantee), and as a matter of principle, every believer should be free to believe, and practice (within the bounds of the law), what they believe the religious texts to command and to live out their faith in community with others, meeting together to worship and teach etc.

EWC and the section 36 Limitation Analysis:

26. The question that falls to be determined, likewise, is whether it would be a reasonable and justifiable limitation, in terms of section 25(8) and section 36 of the Constitution, on the rights of believers to have church property expropriated without compensation.

27. The HLP Report concluded that lack of funding is not the cause for the slow and failed pace of land reform. Rather, it found that the causes of the bottle-neck are a lack of political will, corruption and a reverting back by the State to an apartheid-style State-stewardship that showed signs of “elite capture”.¹⁴

28. Given that EWC is the wrong remedy for the problem – and a remedy that bears with it the likely (indeed inevitable) consequences of degrading the South African economy (which is in dire straits already) even further in the eyes of international investors - *FOR SA* strongly emphasises that EWC is unlikely to meet the section 36 requirements, because it fails to meet the necessity of a relationship between the remedy and its purpose.

29. On this ground alone, we respectfully submit that it is not a reasonable and justifiable limitation.

30. Finally, but likely of most importance, we submit that in terms of the HLP – the most expensive investigation commissioned to date –the reason why redistribution goals have not been achieved, is not funding-related but rather because of a lack of political will, corruption and a reverting back to an apartheid-style State-stewardship.

31. As such, EWC is neither reasonable nor justifiable, and will not provide a solution to the problem it is seeking to resolve.

32. Given that EWC is the wrong remedy for the problem – and a remedy that bears with it the likely (indeed inevitable) consequences of degrading the South African economy (which is in dire straits already) even further in the eyes of international investors - *FOR SA* strongly emphasises that EWC is unlikely to meet the section 36 requirements, because it fails to meet the necessity of a relationship between the remedy and its purpose.

¹⁴ HLP pages 82 and 83; 208.

33. The Bill should aim to be a coherent framework law for land reform that roots out the maladministration and corruption that has happened to date. To achieve this, **surely the Bill should first and foremost be addressing what has been identified as the actual problems to land reform!**

RECOMMENDATION:

34. In the circumstances, we propose that:

34.1. The proposed sections of the Bill be more narrowly drafted: i.e. that “property” be limited to land only, that “public purpose” be clearly defined, and the list providing for EWC be a closed list;

34.2. *Alternatively*, that a clause containing land which is exempt from EWC be inserted. Here we specifically propose a clause such as the following:

“Land that is owned and used in connection with the exercise of the constitutional right to religious freedom and the rights of religious communities, is hereby exempted from the applicability of section 12(3).”

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