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TO: DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM

**ATTENTION: MINISTER GUGILE NKWINTI
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DELIVERED: VIA EMAIL

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**COMMENT ON THE REGULATION OF AGRICULTURAL LAND HOLDINGS BILL, 2017
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1. Purpose and overview

Dear Sirs,

My name is _____ with Identity Number: _____, and as an affected party and South African citizen I wish to make the following submission to the Department of Rural Development and Land Reform regarding the Regulation of Agricultural Land Holdings Bill.

The Bill in its current form appears to be inconsistent with the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”). If passed into law, the Bill will have draconic and dire economic and social consequences. The intention is to comment on the Bill and relevant sections thereof chronologically. Although I focus on specific aspects mentioned herein, it should be noted that I object to the Bill in its entirety.

2. Section 1 – Definitions

2.1 Foreign person

The definition of a *foreign person* is too broad since it includes a *natural person not ordinarily resident in South Africa*. This would imply that a person who is a South African citizen and who is working abroad for a few years will be deemed as a foreign person; this will in turn affect their ability to own and/or acquire land simply because they are predominantly residing/working abroad, and possibly only for a measurable period of time.

2.2 *Redistribution agricultural land*

A further definition that is bound to cause confusion and hardship is the definition of *redistribution agricultural land*. As per the Bill it:

means all agricultural land that falls between or exceeds any category of agricultural land holdings contemplated in section 25.

The difficulty with this definition is that *redistribution of agricultural land* would mean all agricultural land owned by a person, even if that land is not in excess of the threshold to be established by the Bill. The definition is thus too broad for the Bill's intended purpose.

2.3 *Black, Indian, Coloured, White or Other*

There is no definition in the Bill of when a person, for purposes of the application of the Bill, will be deemed to be either *black, Indian, coloured, white or other*.

3. **Section 2 – Objects of the Act**

With respect, it appears that the Bill will not achieve its purported purposes. Food security will be jeopardised if focus shifts to small scale farmers as these farmers simply cannot provide food security to the nation. Certainty regarding the ownership of public and private land will be jeopardised by the Bill (if passed) and will definitely not be promoted.

4. **Section 3 – Application of the Act**

Section 3(2) of the Bill reads as follows:

Any provision in any agreement to acquire or dispose of agricultural land is void in so far as it purports to exclude, or to limit any provision of this act.

Section 35, which reads as follows, should be read together with this section:

Any acquisition of land in any manner which is inconsistent with or contrary to the provisions of this Act, is unlawful and a court may make an order for the forfeiture of such land to the State.

These two sections indicate that any agreement to acquire or dispose of agricultural land in contravention with the Bill will be void and could see the land concerned being forfeited to the State. This measure is inconsistent with section 25(1) of the Constitution as it amounts to

arbitrary expropriation, especially if, for instance, the agreement in question contravenes the Bill whilst the parties act in a bona fide manner. For the purposes of being thorough section 25(1) reads as follows:

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

5. Sections 4 to 8 – The Land Commission

The fear is that the creation of a Land Commission will lead to further unnecessary State expenditure. The Department of Rural Development and Land Reform (hereinafter referred to as the “Department”) is already strained financially in having to acquire land and/or pay the legal fees of persons who stand to be evicted from agricultural land where the Extension of Security of Tenure Act (No. 62 of 1997) or Land Reform (Labour Tenants) Act (No. 3 of 1996) applies.

The provision for remuneration for members of the Commission is too generous and can easily be exploited. There is also no indication in the Bill that the remuneration of members of the Commission will be made public; this should be contained in the Bill.

6. Section 9 – Powers of the Commission

Section 9 of the Bill states as follows:

...the Commission may do all that is necessary or expedient to perform its functions effectively in order to give effect to the objects of the Act...

This section includes a long list of competencies that are worded too widely and therefore makes this section open to abuse. If the Bill is adopted in current form and the Commission may *do all that is necessary or expedient*, a situation can easily occur where the Commission, for instance, trespasses on land without alerting the landowner or respecting their property rights. This section is therefore inconsistent with section 25 of the Constitution, as well as the Trespass Act (No. 6 of 1959).

It further appears that section 9(a) is discriminatory in nature as it is invasive to enquire into a person’s nationality, race and/or gender, which will polarise society. In terms of section 9(f) it also appears that the resources of the Department will further be exploited whenever the Commission cannot perform its duties, or do so properly.

7. Section 11 – Delegation of powers

This section is also too widely worded. We contend that the Minister may not delegate powers, such as his power to appoint the Commission or to make regulations, to the Director-General or to any other suitably qualified official. Section 11(5) dictates that the Minister can undo the acts of his delegates simply if he so chooses. This creates a situation where responsibility and blame can easily be shifted and one can simply undo a decision if the shoe pinches.

8. Sections 12 and 14 – Register of private agricultural land

The keeping of a register can cause various difficulties for both the Commission and the Department. It undoubtedly will place a further financial burden on the Commission. Furthermore, section 12(1)(b) and section 12(3) contradict each other on the keeping of a register:

12(1)(b)...The register must be open for inspection at such place and time as may be prescribed.

12(3) The Commission may destroy any part of the register that has been microfilmed or copied in accordance with subsection (2) and such microfilm or copy must be...

Section 12(1)(b) dictates that the record must be kept open for inspection whilst section 12(3) dictates that the record may be destroyed if it is microfilmed or copied. We suggest that this creates a risk and that the record should never be destroyed, irrespective of a copy existing on microfilm or any other medium.

The provision of section 14(1)(c) places a further burden on the Commission to provide statistical information within a mere 14 days after receiving such request. It is our respectful submission that the Commission (consisting of five to nine members) will never be able to adhere to this timeline, which will lead to frustration and/or restriction of the constitutional right of access to information as enunciated in section 32 of the Constitution.

Section 14(2) imposes a further duty on the Commission that they simply will not be equipped to deal with. The information in the register will have to be analysed to dictate what should be protected in terms of the Promotion of Access to Information Act (No. 2 of 2000). An information officer will have to be appointed for the Commission. This information officer will have to constantly communicate with third parties, as well as with all individuals whose

information is specifically requested, on the various procedures of the Promotion of Access to Information Act.

9. Section 15 – Disclosure of present ownership

This section is inconsistent with section 10 of the Constitution since forcing any individual to provide information to the State regarding landownership, including the race, gender and nationality of the owner, under the threat of criminal sanctions erodes the right to human dignity. The provision also discriminates directly against individuals on the grounds mentioned above.

It also imposes an unnecessary burden on landowners to investigate all real rights registered against, and licenses allocated in respect of the agricultural land in question. Legal representatives may have to be engaged by land owners at huge cost for this purpose. The State itself is in a better position than land owners to verify the existence of rights such as mining rights and water rights. Section 33, read with section 7(2) of the Constitution, dictates that the State must ensure that administrative action adheres to certain principles. This duty is now shifted to private landowners.

Section 15(4) indicates that the requirements of race and gender do not apply to an owner who is a foreign person. This is unlawful discrimination based on origin and is inconsistent with section 9 of the Constitution.

10. Section 16 – Disclosure of acquisition of ownership

This section discriminates on a similar basis as section 15. The period of 90 days within which to file a notice is insufficient. It is also an invasive measure to order that the Registrar of Deeds may not execute a Deed of Transfer unless the notification of ownership has been lodged. This affects the constitutional right of freedom of trade in terms of section 22 of the Constitution.

11. Section 19 – Prohibition on acquisition of ownership of agricultural land by a foreign person

This section dictates that a foreign person shall not acquire land, which is inconsistent with the Constitution. The only exception in this regard is if a piece of land is acquired where a

black person, as defined in the Employment Equity Act (No. 55 of 1998), has a controlling interest along with a foreign person. This will force a foreign person who wishes to acquire land after the commencement of the Bill, to buy it in conjunction with a black person with a majority stake.

It is totally impossible for the same foreign person to buy the same land along with a white South African. This provision makes it virtually impossible for white South Africans to do business with foreign persons if land must be acquired. This is clearly inconsistent with section 9 of the Constitution. It also impedes the right to freedom of trade in terms of section 22 and the right to freedom of association in terms of section 18 thereof.

12. Section 20 – Lease of agricultural land holdings

The period of 90 days for submission of the documents concerned is insufficient. If the lease is not registered it will be void. This may even lead to the arbitrary forfeiture of the agricultural land concerned.

13. Section 21 – Disposal by foreign persons of agricultural land holdings

This section impedes the right to property in terms of section 25 of the Constitution. It is also vague on the aspect of whether the foreign person can dictate the price at which the land is offered to the Minister and if the land may thereafter be sold for a lesser price to anyone. Sections 21(2)(a) and 21(2)(b)(ii) dictate the following:

- | | |
|--------------|---|
| 21(2)(a) | The Minister must, within 90 days or less of the offer contemplated in subsection (1), indicate whether he or she intends acquiring the agricultural land holdings; and |
| 21(2)(b)(ii) | If the Minister does indicate that he or she does not intend acquiring the agricultural land holdings, within the period referred to in paragraph (a), the foreign person <u>must</u> make the land available for acquisition to the citizens |

It therefore appears that foreign persons cannot refuse to sell land after they have placed it in the market and offered it to the Minister. This severely hampers property rights. The owner should be allowed to have a change of heart. It is also not clear how the land will be *made available* to citizens. This could imply that the land must be advertised in a newspaper or that certain requirements must be met. The Bill is vague in this regard.

14. Section 22 – Notification of disposal of ownership of agricultural land holdings

This section imposes hardship on owners. The prescribed form is also currently not available for inspection.

15. Sections 23 and 24 – Notification upon ceasing to be a foreign person/ becoming a foreign person

These sections realise the possibility that a South African citizen can possibly become a foreign person or cease to be a foreign person and even continue altering their state backward and forward. This creates great legal uncertainty as the position of a foreign person and a person who is not foreign substantially differs in terms of the Bill. It will lead to a multitude of disputes and possibly litigation on the main dispute point, being the status of the person concerned and what his rights were at the time of disposing or acquiring land.

16. Section 25 – Categories of ceilings for agricultural land holdings

It is contended that the setting of ceilings for agricultural land holdings is inconsistent with section 25 of the Constitution. This section is also open to abuse in that certain categories of land/ceilings may be exempt from the provisions of section 25 by the Minister. A period of 30 days, as contemplated in section 25(3), for commenting on the proposed ceiling in any relevant area is insufficient considering the impact of such ceiling on property ownership.

The danger of this section is that the capability of establishing ceilings is created without having any idea what the established ceiling in any relevant area will be set at in future. This section is a major threat to food security and stability within the country.

17. Section 26 – Redistribution agricultural land

This is the most draconic section in the Bill and will not pass constitutional muster. The definition of *redistribution agricultural land* is broad enough to include all land falling within a ceiling and in excess thereof. This entails that all land must be offered to black people as defined in the Employment Equity Act (No. 55 of 1998), with the right of first refusal. This completely excludes prospective white landowners from the land market.

The Bill is also not clear on what *the right of first refusal* entails and how the land should be offered to black people in general. This could possibly entail advertisement of the land having to be placed in the media at additional cost to the owner. Section 26(2)(b) dictates that if no black person acquires the land within the prescribed period (the period is not defined) the land shall be acquired by the Minister.

This dictates that should no black person buy the land offered, the Minister must acquire it. White individuals are thus excluded from purchasing the land, even if the right of first refusal is exercised. Section 26(2)(c) dictates that although the Minister shall acquire the land, the Minister may expropriate the land. The Minister is thus under a duty to acquire the land but does not have to expropriate it. This will easily lead to a stalemate situation. Section 26(1) further forces all owners of agricultural land (because of the broad definition) to notify the Commission that all land owned by them constitutes *redistribution agricultural land*.

Section 26(3)(b) and (c) indicate that an arbitrator, who is not independent, will adjudicate if land constitutes *redistribution agricultural land*. This section clearly discriminates on race (section 9 of the Constitution), freedom of association (section 18 of the Constitution), freedom of trade and occupation (section 22 of the Constitution) and even dignity (section 10 of the Constitution). The arbitrator being appointed and not being objective, and the fact that there is no right of appeal against any decision made, also violates the right to access to courts in section 34 of the Constitution.

18. Section 27 – Investigation by the Commission

This section can easily be abused by the Commission in the light of their wide powers, as already commented upon. If the Commission suspects that information provided to it may be false, it may conduct an investigation, *subpoena* persons and even retain documents handed over by witnesses.

19. Section 31 – Certificate as evidence

This section is also inconsistent with the Constitution. Any criminal prosecution under the Bill will violate the right to be presumed innocent until proven guilty, as contemplated in section 35 of the Constitution, if a certificate, signed by the Commission or the Minister certifying that an owner has not complied with the provisions of the Bill, shall *prima facie* be deemed proof of the conduct alleged. This would then shift the onus to the landowner to prove his/her

innocence while he/she should in fact be presumed to be innocent if the Constitution is respected and adhered to.

20. Section 34 – Limitation of liability

This section excludes liability of the Commission for all acts performed in good faith. This can easily be abused in conjunction with the wide powers of the Commission. If the Commission can aver that they had good intentions, they will not be liable for any damages caused. This restricts the right of access to courts as contemplated in terms of section 34 of the Constitution.

21. Section 35 – Unlawful acquisition of land

This section provides for forfeiture of land that is acquired in a manner inconsistent with the Bill. It also amounts to arbitrary expropriation and contradicts section 25 of the Constitution. This will especially be the case if a *bona fide* transaction contravenes the Act.

22. Section 36 – Offences and penalties

It is troubling that criminal sanctions of imprisonment for a period of up to three months or a fine is applicable whenever a person does not dispatch a notice as required by the Bill or provides false information or refuses to appear before the Commission. It is submitted that it is inappropriate to strong-arm landowners in this way with criminal sanctions.

23. Section 37 – Regulations

The powers regarding regulations are too wide. We have already dealt with the delegation aspect in our discussion of section 11. It is submitted that sections 37(2) and 37(3) do not provide for sufficient public participation as 30 days is not enough for comment. It also does not suffice to state that, after comments were received and draft regulations were published for a second time, the second draft will not be published before the regulations are adopted. This is inconsistent with section 33 of the Constitution pertaining to just administrative action. The second draft of any regulation should therefore also be open to public scrutiny.

24. General remarks and conclusion

The Bill purports to attempt to exclude especially white individuals from the property market. The Bill, in several of the aspects mentioned, does not comply with the Constitution. It is also silent on aspects such as when there is already a claim on land in terms of the Restitution of Land Rights Act (No. 22 of 1994). The question arises whether preference will be given to such a land claim or if the right of first refusal will take preference.

Further public comment on this Bill is required. It is therefore submitted that the period for comment should be extended and that the Bill should also be tabled in the National Council of Provinces and by the relevant authorities involving traditional leaders. It is respectfully submitted that the Bill cannot and should not be passed in its current format as it will not pass Constitutional muster. The Bill should be scrapped in its entirety as it will only lead to hardship, wasted expenditure, discrimination, retraction of foreign investment and a deterioration of food security.

I trust that you will consider my submissions favourably and kindly request that you will inform me of the outcome of your decision once it has been made.

Yours truly,

SENT ELECTRONICALLY

Therefore deemed signed electronically