



EQUAL  
EDUCATION  
LAW CENTRE



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**SUBMISSION RELATING TO THE REVIEW OF SECTION 25 OF THE CONSTITUTION IN  
THE CONTEXT OF EXPROPRIATION OF LAND WITHOUT COMPENSATION**

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**A. INTRODUCTION AND EE AND THE EELC’S INTEREST IN THE EXPROPRIATION WITHOUT COMPENSATION DEBATE**

1. This a joint submission made by Equal Education (“EE”) and the Equal Education Law Centre (“EELC”) in relation to the Joint Constitutional Review Committee’s examination of, amongst others, section 25 of the Constitution in the context of land expropriation by the State without compensation. EE and the EELC intend to make oral submissions on the relevant date advertised.
2. EE is a membership-based, democratic movement of learners, parents, teachers and community members, with the core objective of working and campaigning for quality and equality in education in South Africa. EE conducts a broad range of activities in order to advance this objective, including research and policy development, public campaigns and activism, and where appropriate, litigation.
3. The EELC is a public interest law centre specialising in education law and works closely with EE in pursuit of an equal education system and quality education for all.
4. In this submission, EE and the EELC will address the broad question put forward by the Chairperson of the Parliamentary Committee reviewing section 25, Vincent Smith; namely, whether or not section 25 of the Constitution, in its current form, “*is an impediment to the land reform programme*” and requires amendment.<sup>1</sup> In so doing, we will also specifically consider whether section 25 of the Constitution requires amendment in order to facilitate expropriation without compensation.
5. At the outset, it is important to note that EE and the EELC are in favour of the principle of expropriation without compensation and recognise that, in light of our apartheid history and the need to address the slow and ineffective pace of land reform, circumstances indeed exist which necessitate this. Having said that, it is useful to note the findings of the High Level Panel (HLP) on the Assessment of Key Legislation and the Acceleration of Fundamental Change, which was tasked with assessing South Africa’s legislative output since democratisation. In the report prepared by the HLP<sup>2</sup>, Mr Kgalema Motlanthe noted the views of land reform experts who found that:

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<sup>1</sup> People’s Assembly blogpost, *Strong arguments will trump numbers in land debate*, accessed from <https://www.pa.org.za/blog/parliament-says-strong-arguments-will-trump-numbers> 25 May 2018.

<sup>2</sup> Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, November 2017.

*“the need to pay compensation has not been the most serious constraint on land reform in South Africa to date – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity, have proved more serious blocks to land reform”.*<sup>3</sup>

6. We therefore acknowledge that there are a multiplicity of impediments facing land reform in South Africa. We also assume and accept for purposes of this submission, that compensation may be one such impediment. However, we are of the view that these impediments, in whichever form they may manifest, are not perpetuated through the wording of the Constitution and that the Constitution need not be amended. Instead, it is suggested that what is required is to properly understand the purpose and potential of the Constitution and to exploit its “transformative thrust”,<sup>4</sup> for example, by giving effect to sections 25(5), 25(8) and 25(9) of the Constitution, which provide for much needed legislative or other measures of intervention.
7. As organisations committed to achieving equal and quality education, our specific interest in making this submission also arises from the link between the right to education, and the tenure security of schools located on private (often rural) land. “Tenure reform”, a component of South Africa’s land reform programme, as articulated in section 25 of the Constitution,<sup>5</sup> refers to the upgrading or strengthening of legally insecure and weak rights of access to property.<sup>6</sup>
8. In 2012, the EELC represented EE in the matter of *Jacobus Du Plessis Botha NO and Others v Member of the Executive Council for Education, Western Cape and Others (“Grootkraal”)*,<sup>7</sup> where EE was admitted as *amicus curiae* (friend of the court). The matter involved a quintile 1 public school operating on privately-owned rural land in Oudtshoorn, subject to a lease agreement entered into between the landowner and the Western Cape Education Department (WCED). In May 2011, following a change in

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<sup>3</sup> *Ibid* at page 51.

<sup>4</sup> Pienaar, JM 2015. “Land Reform Embedded in the Constitution: Legal Contextualisation” *Scriptura* 1-20, at page 10.

<sup>5</sup> See section 25(6) of the Constitution. We recognise that South Africa’s land reform programme consists of three separate, but interconnected sub-programmes; namely, redistribution, restitution and tenure reform. Due to the nature of EE and the EELC’s work and our observation of the intersection between access to education and secure tenure, this submission will focus predominantly on the tenure reform aspect of the land reform programme.

<sup>6</sup> Pienaar, JM, note 4, at page 10.

<sup>7</sup> Case No. 24611/11, Western Cape High Court.

ownership of the property, and the unwillingness of the new land owner to extend the WCED lease, the school was informed that the school would be closed by the end of June 2011, and that the 160 learners attending the school would be accommodated in “mobile units” at a small farm school nearly 20 kilometres away.

9. In *Grootkraal*, EE argued that the matter must be considered in the light of the important nexus between the right of access to education and access to schools (and the land on which schools are located) particularly having regard to past injustices and the effect of historical tenure insecurity.
10. Drawing on our submissions in *Grootkraal*, and having regard to the arguments espoused in response to the general question posed by Vincent Smith regarding the amendment of section 25 of Constitution, this submission also offers the following arguments in relation to land reform in the school context in particular:
  - 10.1 that in light of our unique and devastating apartheid past, the issues of tenure insecurity and tenuous access to schools are inextricably linked and critical to the realisation of the right to basic education, and that this interconnectedness must be borne in mind when giving effect to tenure reform mechanisms in the school context;
  - 10.2 that whilst mechanisms for tenure reform in the school context exist, such as those provided for in section 14 and section 58 of the South African Schools Act (“**SASA**”),<sup>8</sup> there appears to be a consistent failure to utilise these mechanisms; and
  - 10.3 that such failure can be attributed to a multiplicity of factors, including, amongst others, a lack of political conviction and will, the lack of capacity to implement, and the failure to fully exploit the so-called “transformative thrust” or transformative capacity of the Constitution.

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<sup>8</sup> Act 84 of 1996.

## B. THE CURRENT DEBATE - SECTION 25 OF THE CONSTITUTION

### Understanding the purpose and potential of section 25 of the Constitution

11. In *Agri South Africa v Minister for Minerals and Energy and Others*,<sup>9</sup> Chief Justice Mogoeng Mogoeng stated that when interpreting section 25 with particular reference to expropriation, consideration must be given to the “*special role that this section has to play in facilitating the fulfilment of our country’s nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all South Africans*”.<sup>10</sup> Section 25 is reproduced below in its entirety for ease of reference:

#### **“25 Property**

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

(2) *Property may be expropriated only in terms of law of general application:*

*(a) for a public purpose or in the public interest; and*

*(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*

(3) *The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:*

*(a) the current use of the property;*

*(b) the history of the acquisition and use of the property;*

*(c) the market value of the property;*

*(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*

*(e) the purpose of the expropriation.*

(4) *For the purposes of this section:*

*(a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and*

*(b) property is not limited to land.*

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<sup>9</sup> 2013 (4) SA 1 (CC).

<sup>10</sup> *Ibid* at para 61.

*(5) 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.*

*(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*

*(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*

*(8) 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 redress 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).*

*(9) Parliament must enact the legislation referred to in subsection (6)".*

*[Emphasis Added]*

12. As stated above, whilst we acknowledge that compensation is not the only (or even the most significant) impediment to land reform, we have focused part of our analysis on the compensation element of expropriation in light of the debate at hand.
13. Sections 25(2) allows for expropriation in terms of a law of general application, for a public purpose or in the public interest, *“subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court”*.
14. Section 25(3) details that the amount of such compensation and the time and manner of its payment must be *“just and equitable”* and must *“balance the public interest with those of the affected parties”*, having regard to *“all relevant factors”*, some of which are listed in section 25(3); including, but not limited to, current use of the property, historical acquisition and use of the property, market value of the property, and the purpose of the expropriation.
15. ‘Market value’ is therefore only one of the factors to be considered alongside all other relevant factors when determining compensation, and the weight that each factor carries should be determined by the facts and the circumstances of each case. In fact, it is submitted, that on the current reading of section 25(3), having regard to the

transformative purpose of expropriation, and balancing the public interest against the interests of property owners, circumstances may arise in terms of which it is 'just and equitable' to pay compensation below market value, nominal compensation or, in fact, no compensation at all.

16. It is therefore submitted that in its current form, the expropriation framework provided by sections 25(2) and (3) of the Constitution allows for expropriation without compensation, and the wording of section 25 need not be amended and does not present an impediment to the implementation of the land reform programme.
17. The issue of expropriation without compensation was addressed in the Land Claims Court in *Nhlabathi v Fick*.<sup>11</sup> The court, referring to the decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,<sup>12</sup> found that “*there can be circumstances where the absence of a right to compensation on expropriation is reasonable and justifiable, and in the public interest (which includes the nation’s commitment to land reform)*”,<sup>13</sup> particularly where there is minimal infringement to the owner’s rights when weighed against the public interest.<sup>14</sup>
18. The court embarked on a section 36 limitation analysis and considered whether the absence of a statutory requirement for compensation on expropriation was justifiable under section 36(1) of the Constitution.<sup>15</sup> In particular, the court noted that the general limitation provisions of section 36 must be applied cumulatively with the limitations contained in section 25(2) and (3). Put differently, the limitations which are contained in section 25(2) and (3), particularly with regard to the purpose of the expropriation and the factors relevant to payment of compensation, are important when deciding whether a statutory right to expropriate outside of those limits (i.e. to expropriate without

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<sup>11</sup> 2003 7 BCLR 806 (LCC). This case involved the rights of an occupier to bury deceased family members on farmland in terms of section 6(2)(dA) of ESTA. The court assumed, without deciding the point, that a burial could be a *de facto* servitude, and therefore an expropriation, according to the reasoning set out in *Serole v Pienaar* 2000 1 SA 328 (LCC).

<sup>12</sup> 2002 (4) SA 768 (CC) at para 110.

<sup>13</sup> *Nhlabathi* note 11, at para 33.

<sup>14</sup> *Ibid* at paras 32-35.

<sup>15</sup> Section 36(1) reads as follows: “*The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.*”

compensation) can be justified under section 36.<sup>16</sup> The court also noted with interest that both section 36 and section 25(3) required a balancing of interests between affected parties.<sup>17</sup>

19. Importantly, section 25(8) of the Constitution expressly makes the section 36 limitation applicable to land reform measures and provides that no provision of section 25 may impede the state from:

*“taking legislative or other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from this section is in accordance with the provisions of section 36(1)”. [Emphasis Added]*

20. Section 25(8) therefore provides a powerful mechanism in terms of which legislation may limit the right to compensation in light of an expropriation, and whereby specific circumstances in which expropriation may take place without compensation may be legislated.
21. It is our submission that the failure to exploit the powerful mechanisms provided by the Constitution, including section 25(8), or the failure to leverage the “transformative thrust” of the Constitution is in fact one of the most glaring obstacles facing land reform in this country. We discuss the transformative capability of the Constitution below and expropriation as a mechanism of unlocking such capability.

### **Using the transformative thrust of the Constitution**

22. In a televised interview following the recent ANC Land Summit, Advocate Tembeka Ngcukaitobi, a lawyer, public speaker, author, political activist and key contributor to the land debate, suggested that the land question be approached in an “*expansive way*”. He also cautioned that it is a mistake to think about expropriation (with or without compensation) as a means to achieve land reform in and of itself. Rather, he suggested that steps be taken to “*exploit the constitutional space*” and the “*transformative impulse of the Constitution*”.<sup>18</sup>

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<sup>16</sup> *Ibid* at para 33.

<sup>17</sup> *Ibid*.

<sup>18</sup> Interview with eNCA on 21 May 2018, accessed from <https://www.youtube.com/watch?v=IZLSMsehk-Q> on 24 May 2018.

23. It is submitted that in order to exploit the transformative capacity of the Constitution, the legislature must use its powers to legislate. As already mentioned, such powers are embodied in section 25(8) of the Constitution; however, they are also specifically provided for in section 25(5), which provides that the state must take reasonable legislative and other measures to achieve land redistribution; and in section 25(9), which states that Parliament must enact legislation in order to facilitate tenure reform.
24. The HLP Report makes various recommendations with regard to amending various laws, including the Extension of Security of Tenure Act, the Labour Tenants Act and the Mineral and Petroleum Resources Development Act, to name a few. Moreover, some of the outcomes of the ANC Land Summit included a call to *“immediately pass the Expropriation Bill and Land Redistribution Bill to bring greater clarity to the transformative intent and impact of the Constitution”*.<sup>19</sup>
25. It is worth noting that the Expropriation Bill has been through various iterations. It was first published in 2008,<sup>20</sup> but subsequently shelved in 2009 due to backlash. A draft Expropriation Bill was published in March 2013 and has not yet been finalised.<sup>21</sup> It is our view that the immediate finalisation of the Expropriation Bill is imperative and represents a crucial opportunity for the state to outline the circumstances under which property may be expropriated without compensation.

### C. EDUCATION JUSTICE AND LAND JUSTICE

26. We now turn to our arguments in relation to land reform in the school context, where we will illustrate that expropriation as a standalone tool has been unsuccessful at achieving land reform in the absence of sufficient legislative guidance and implementation.
27. First, we sketch the historical backdrop against which to assess land reform in the school context.

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<sup>19</sup> “ANC statement on the outcomes of the Land Summit”, Politicsweb, 21 May 2018, accessed from <http://www.politicsweb.co.za/news-and-analysis/land-a-comprehensive-and-multipronged-approach-sug>, 27 May 2018.

<sup>20</sup> Expropriation Bill B16-2008.

<sup>21</sup> Draft Expropriation Bill, 2013 (GN 234 in GG 36269 of 20 March 2013).

## Access to schools as a component of the right to basic education

28. The Constitutional Court has clearly and consistently affirmed the paramountcy of the right to education, stating that it is “*the engine of equal opportunity*”,<sup>22</sup> and acknowledging it not only as a right in itself, but also as “*an indispensable means of realising other human rights*”.<sup>23</sup>
29. In the matter of *Juma Masjid Primary School and Others v Essay NO and Others*,<sup>24</sup> which involved a private property owner seeking to evict a public school operating on its property, the Constitutional Court was required to consider circumstances in which learners’ rights to basic education were tested against the rights of the private landowner. Nkabinde J, who penned the judgment on behalf of a unanimous court, noted that the right to basic education, which unlike other socio-economic rights, is immediately realisable,<sup>25</sup> is critical to the advancement of transformation and addressing socio-economic injustices prevailing in South Africa.<sup>26</sup> Importantly, Nkabinde J also identified “*access to school [as] an important component of the right to a basic education... [and] a necessary condition for the achievement of this right*” [Emphasis added].<sup>27</sup>
30. The *Juma Masjid* case therefore highlights the issues which often arise in South Africa when public schools are located on privately-owned land. The ability of these schools to operate on private land is often dependent on the decision of land owners and may potentially stand in tension with the rights of private landowners to use their property as they choose. To this extent, access to these schools, and in particular, schools which have a legacy of tenure insecurity and insufficient resources, may be threatened, leaving learners vulnerable to the decisions of land owners.

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<sup>22</sup> *MEC for Education: Kwa-Zulu Natal and Others v Pillay* 2008 (2) BCLR 99 (CC) at paras 123-124.

<sup>23</sup> In *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) at para 41, the Constitutional Court referred to Article 13(1) of the International Covenant on Economic, Social and Cultural Rights.

<sup>24</sup> 2011 (8) BCLR 761 (CC).

<sup>25</sup> *Ibid* at para 37.

<sup>26</sup> *Ibid* at para 42.

<sup>27</sup> *Ibid* at para 43.

## The unique nature of farm schools

31. Whilst it is acknowledged that not all public schools operating on privately owned land are located in rural or traditional areas,<sup>28</sup> it is important to note that unlike their urban counterparts, rural schools, such as Grootkraal UCC Primary School, face a number significant and unique challenges relating to, amongst other things, transport, safety and the supply of necessary learning materials and school infrastructure.
32. The nature of the problems experienced by farm schools are outlined in a report by the international human rights organisation Human Rights Watch, which investigated conditions at farm schools in three South African provinces. The Human Rights Watch report found that as a result of “*the historical, social and economic conditions on commercial farms inherited from years of an undemocratic minority government*”, public schools on private commercial farms were amongst the poorest in the country in terms of financial resources, physical infrastructure and quality of education.<sup>29</sup> As previously mentioned, Grootkraal UCC Primary School itself is categorised as “national quintile 1” in term of SASA. This places it among the very poorest schools in the country.
33. In the *Grootkraal* matter, education sector consultant, Dr Adele Gordon, an expert for EE in its capacity as *amicus curiae*, noted in her expert affidavit another unique, and often ignored, paradox regarding rural schools. That is, that on the one hand, there is a view that rural education, defined by geography (which is in turn defined by apartheid spatial distribution) and deprivation, is a signifier of poor performance in the schooling system; whilst on the other hand, there is a broader view which highlights the assets that exist in rural communities and which can be harnessed to enrich teaching and learning in rural schools.<sup>30</sup>
34. In light of this paradox, Dr Gordon suggests that the approach which rural education policies and provincial education departments must adopt with respect to farm schools, is to emphasise the role of the community and connectedness among stakeholders in enhancing educational opportunities. Moreover, provincial education departments must pay special attention when advocating for the relocation of a farm school simply for convenience, particularly where the existence of a school is often integral to the

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<sup>28</sup> Schools on farms, as well as schools located in traditional areas, together constitute “rural schools” as defined in the Report of the Ministerial Committee on Rural Education, Department of Education, May 2005, at page 48.

<sup>29</sup> Human Rights Watch, *Forgotten Schools: Right to Basic Education for Children on Farms in South Africa*, 2004, at pages 269-277.

<sup>30</sup> Expert Affidavit of Dr A. Gordon, at paras 56-66.

community in terms of its ability to positively influence socio-economic spaces of inequality, and to promote societal development.

35. In *Minister of Home Affairs v Fourie*,<sup>31</sup> Sachs J stated that "*ignoring the context, once convenient, is no longer possible in our current constitutional democracy which deals with the real lives as lived by real people today*".<sup>32</sup>
36. In light of the above, it is submitted that security of tenure for schools must be understood in relation to its inextricable link to the realisation of the right to basic education, and must be considered in the context of the deep inequalities in our educational system that are a legacy of our apartheid history.
37. In particular, the tenure reform mechanisms provided for in sections 14 and 58 of SASA must be understood and applied keeping the above-mentioned link and context in mind. In fact, having regard to the legislative genesis of these provisions, it is clear that they were intended to address the negative consequences of insecure tenure.

#### **D. EXPROPRIATION AS A MECHANISM OF ACHIEVING SCHOOL TENURE SECURITY- CURRENT LEGISLATIVE PROVISIONS**

##### **The legislative backdrop to the duty to consider expropriation under the South African Schools Act**

38. Section 14 of SASA regulates the existence and management of public schools on private land by way of a lease agreement, whilst section 58 relates to the expropriation of land for educational purposes.
39. In her expert affidavit in the *Grootkraal* matter, Dr Adele Gordon provides some insight into the likely development of sections 14 and 58 of SASA.<sup>33</sup> Dr Gordon provides details of the establishment of the Hunter Committee, on which she served as a specialist in relation to farm schools. The Hunter Committee was mandated to inquire into a new national framework for school organisation, ownership, governance and funding, and to suggest policy changes that would result in an equitable system of educational provision from all South African learners.

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<sup>31</sup> 2003 (10) BCLR 1092 (CC).

<sup>32</sup> *Ibid* at para 151. The Constitutional Court has recognised the importance of this historical context in a number of other cases dealing with the right to education, including in *Pillay* note 5 at paras 123-124 and in *Juma Musjid* note 7 at para 42.

<sup>33</sup> Expert affidavit of Dr A. Gordon, at paras 23-37.

40. One of the principal recommendations of the Hunter Committee was to ensure that this new system be rid of, or be able to rid itself of, the racial and spatial inequalities associated with the provision of schooling under apartheid. Further, the Hunter Committee was required to recommend the approach to be taken by the new government in relation to farm schools. The recommendations of the Hunter Committee were presented in the 'Hunter Report'<sup>34</sup>, published in August 1995.
41. The Hunter Report recognised that one of the key difficulties the new government would have to face with regard to farm schools, was that these schools were often located on private land, and that this could hinder the State's ability to access these schools, to improve facilities and to provide adequate resources and infrastructure. The question naturally arose as to how the tenure of these farm schools would be secured.
42. In light of, amongst other things, the historical under-provisioning of farm schools, the Hunter Report concluded that it be "*preferable for arrangements to be made to effect the transfer of land and assets of farm schools to the State*",<sup>35</sup> and that if the land on which the farm school is operated cannot be transferred to the State, that a lease (likely for a nominal amount) be awarded in perpetuity.<sup>36</sup> It is worth emphasising that the possibility of entering into a lease agreement is recommended as an alternative by the Hunter Committee, suggesting that mechanisms which provide for state ownership, such as expropriation, be preferred and prioritised.
43. In February 2006, *Education White Paper 2 on the Organisation, Governance and Funding of Schools* ("**White Paper 2**") was published, nine months prior to the enactment of SASA.
44. White Paper 2 expressed agreement with the Hunter Committee's proposal that the transfer of the land and assets of farm schools to the state be the preferred mechanism for ensuring tenure security. White Paper 2 considered the expropriation of farm school land as "essential" to ensuring that these schools remained accessible to the children they serve, stating that:

*"In order to guarantee the control, access to and use of farm schools for educational purposes, for the benefit of the community at large, the Ministry has been advised that it will be essential to expropriate*

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<sup>34</sup> Department of Education, Report of the Committee to Review the Organisation, Governance and Funding of Schools (Hunter Report), 1995.

<sup>35</sup> The Hunter Report, 1995, at para 8.24.

<sup>36</sup> *Ibid* at paras 8.19 and 8.30.

*the land upon which the farm school has been erected, and servitudes of right of way to grant access to these schools, wherever such servitudes may be necessary.*<sup>37</sup>

45. It is against this backdrop that section 14 and section 58 of SASA were drafted.

### **The duty to consider expropriation for education purposes in practice**

46. In terms of section 7(2) of the Constitution, the State is obliged to “*respect, protect, promote and fulfil the rights in the Bill of Rights*”, including the right to basic education. As previously noted, the Constitutional Court has declared the right to basic education to be immediately realisable, and to require secure access to schools. Moreover, the State is required by section 28(2) of the Constitution to promote and protect the best interests of the children in schools.

47. As explained above, sections 14 and 58 of SASA are intended to facilitate tenure security in respect of schools operating on private property.

48. Section 58 of SASA provides as follows:

#### **“58 Expropriation**

(1) *The Member of the Executive Council may, if it is in the public interest to do so, expropriate land or a real right in or over land for any purpose relating to school education in a province.*

(2) *The Member of the Executive Council must give notice in the Provincial Gazette of his or her intention to expropriate in terms of subsection (1).*

(3) *A notice contemplated in subsection (2) must*

*(a) identify the land or any real right in or over the land;*

*(b) give interested parties an opportunity to make written submissions regarding the expropriation within a period of not less than 30 days; and*

*(c) invite any person claiming compensation as a result of the expropriation to enter into negotiations with the Member of the Executive Council in that regard and draw attention to the provisions of subsection (5).*

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<sup>37</sup> General Notice Department of Education Notice 130 of 1996 [GenN130y1996] Education White Paper 2 “The Organisation, Governance and Funding of Schools” Pretoria, February 1996 at para 6.30.

(4) The Member of the Executive Council may, after considering all such written submissions, expropriate the land or any real right in or over the land referred to in subsection (3) by notice in the Provincial Gazette.

(5) Any expropriation contemplated in subsection (4) takes effect immediately even though compensation payable in respect of such land or real right in or over such land has not been finally determined or paid.

(6) If the Member of the Executive Council and an owner of the land or real right fail to reach agreement regarding the payment of compensation, either party may refer the matter to a court for determination, or they may agree to refer the dispute to an arbitrator for arbitration.

...

(12) Any claim to compensation arising from the expropriation contemplated in subsection (4) must be determined as contemplated in the Constitution and this section.”

*[Emphasis Added]*

49. Section 58 therefore provides the MEC with the discretion to expropriate land in the public interest for any purpose related to education.

50. Section 14 of SASA provides in part:

***"14 Public schools on private property***

(1) Subject to the Constitution and an expropriation in terms of section 58 of land or a real right to use the property on which the public school is situated, a public school may be provided on private property only in terms of an agreement between the Member of the Executive Council and the owner of the private property.

(2) An agreement contemplated in subsection (1) must be consistent with this Act and in particular must provide for-

(a) the provision of education and the performance of the normal functions of a public school;

(b) governance of the school, including the relationship between the governing body of the school and the owner;

(c) access by all interested parties to the property on which the school stands;

(d) security of occupation and use of the property by the school;

(e) maintenance and improvement of the school building and the property on which the school stands and the supply of necessary services;

(f) protection of the owner's rights in respect of the property occupied, affected or used by the school”

*[Emphasis added]*

51. Section 14 of SASA, subject to the Constitution and the option of expropriation in terms of section 58 being exercised, allows for public schools to be operated on private land on the basis of a lease, which *must* provide for secure occupation and use of the property by the school. In addition to ensuring secure tenure, these agreements are intended to clarify important issues, such as, the governance of the school, responsibilities for the maintenance and improvement of school buildings, as well as providing schools with the necessary services in order to operate effectively. In the absence of such agreements, it is unclear to whom these responsibilities fall.
52. As already discussed, many of the recommendations made by the Hunter Committee informed the drafting of sections 14 and 58 of SASA, the latter of which is aimed at securing the tenure and sustainability of farm schools through expropriation, and which the Hunter Committee recommended must be the *preferred* option. Moreover, education MECs are under a statutory duty not only to consider the option of expropriation, but to properly apply their minds to whether or not to exercise the statutory power and discretion conferred by section 58. In *Ulde v Minister of Home Affairs and Another*,<sup>38</sup> Cachalla JA explained that it is not enough for an administrative official to merely state that he/she considered the issue, and that it is only where *“the decision-maker has demonstrated that the discretion has been properly exercised”* that a court will not interfere.<sup>39</sup>
53. Despite this clear duty, according to the expert view of Dr Gordon, section 58 is “underutilised”. Further, the fact that no procedures have been legislated in respect of expropriation may frustrate attempts to expropriate.<sup>40</sup> Once again, this highlights the need for immediate finalisation of the Expropriation Bill as submitted in paragraph 25 above.
54. As regards the conclusion of lease agreements in terms of section 14, Dr Gordon recalls that in 2000, then Minister of Education, Kader Asmal, convened a conference on farm schools. During his keynote address, former Minister Asmal emphasised that few section 14 lease agreements, particularly in respect of farm schools, had been signed by then.<sup>41</sup> A report of the Ministerial Committee on Rural Education also noted the frustration of provincial officials who were unable to effect transformation at schools owing to land

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<sup>38</sup> 2009 (4) SA 522 (SCA) at para 7.

<sup>39</sup> *Ibid* at paras 7 and 8.

<sup>40</sup> Expert affidavit of Dr A. Gordon, at para 38.

<sup>41</sup> *Ibid* at para 39.

owners restricting their activities and their ability to conclude favourable long-term leases,<sup>42</sup> for instance, due to landowners demanding excessive rental.

55. Dr Gordon goes on to note that various reports emerged around the same time which recommended that national government develop guidelines according to which land is to be expropriated.<sup>43</sup>
56. Dr Gordon notes that trends reflect a reluctance to expropriate land. Whereas the recommendation of the Hunter Report (and the seeming intention of sections 14 and 58) is to preference expropriation; in practice however, the option to expropriate is often disregarded entirely. Moreover, section 14 agreements are rarely entered into. When they are concluded, provincial departments are unable to negotiate long-term, perpetual leases which were envisioned by the Hunter Report, with the effect that short-term leases are concluded to the detriment of tenure security of schools. Such insecurity may impede access to schooling, thereby violating the right to basic education, and could lead to a shortage or fragmentation of State investment in these schools, amongst other things.
57. The WCED's 2014 Norms Implementation Plan<sup>44</sup>, which details how the WCED will address infrastructure backlogs to meet the requirements set out in the Minimum Norms and Standards for School Infrastructure, explicitly excludes schools on private land from its infrastructure planning. In effect, the WCED's plan excludes 266 schools on private land from the backlog for infrastructure upgrades. In circumstances where no section 14 leases have been concluded, there is also no clear obligation on the private landowners to ensure that these buildings meet the legally required infrastructure standards.
58. Rather than expropriate, Dr Gordon notes that MECs mostly elect to allow the *status quo* to continue, to merge or close a school in circumstances not contemplated by section 33 of SASA, which regulates mergers and closures, or in the case of the Western Cape Education Department, to conclude short-term leases.<sup>45</sup>
59. Based on the facts in *Grootkraal*, it appears that the MEC failed to comply with the obligation to ensure tenure security in relation to Grootkraal UCC Primary School. In

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<sup>42</sup> Report of the Ministerial Committee on Rural Education, 2005, at page 52. Often,

<sup>43</sup> Human Rights Watch Report, 2004, at pages 3 and 52.

<sup>44</sup> WCED, The Proposed Strategy for the Elimination of Public School Infrastructure Backlogs in the Western Cape as identified through the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, Promulgated in Terms of the South African Schools Act, 1996 (Act No. 84 Of 1996), 2014.

<sup>45</sup> Expert affidavit of Dr A. Gordon, at para 43.

negotiating with the landowner, the MEC adhered to rigid policies concerning the rental formula for schools located on private land,<sup>46</sup> and often cited budgetary constraints<sup>47</sup> for the failure to conclude a suitable agreement with the landowner. The school had, until this time, been operating according to a short-term lease agreement, which failed to ensure the long-term security of the school, in seeming contravention of section 14 of SASA, which requires lease agreements to ensure long-term tenure security.

60. There appeared to be little or no attempt by the MEC to consider the important expropriation mechanism provided by SASA before deciding to “relocate” the school. If in fact the MEC did consider expropriation, it is not clear how seriously this option was considered.<sup>48</sup>

61. It was submitted by EE in its heads of argument in *Grootkraal*, and is submitted here once again, that given the general history of insecurity of tenure of rural farm schools, the centrality of the school in the community, and the positive obligation on the MEC to respect, protect and fulfil the learners right to a basic education, the MEC was under an obligation to give *due and proper* consideration to the possibility of expropriation in this case, even prior to considering the questions of closure or merger. As discussed above, the priority to be afforded to the expropriation mechanism is reflective of the apparent intention of section 58 of SASA.

62. The failure of the MEC to properly consider the expropriation option in SASA therefore constitutes a failure of the MEC to meet its obligation to secure school tenure and to facilitate the immediate realisation of the right to basic education.

### **Apparent reasons for failure to exercise duty to facilitate tenure reform and to consider the expropriation option**

63. There appear to be a multiplicity of reasons for the failure to utilise the available expropriation mechanism, particularly in the school context. Based on EE’s experience in the *Grootkraal* matter, the following reasons emerge which likely contribute to the underutilisation of the provisions of SASA aimed at tenure security:

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<sup>46</sup> In *MEC for Agriculture Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA) at para. the SCA made it clear that were a policy is compatible with enabling legislation, “it must not be applied rigidly and inflexibly”.

<sup>47</sup> The Constitutional Court has clearly stated that a lack of resources is an insufficient response on the part of government for its failure to fulfil its obligations. See *City of Johannesburg Metropolitan Municipality v Blue Mountain Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC) at para 74.

<sup>48</sup> First Respondent’s answering affidavit, page 339, para 12.

- 63.1 **lack of awareness and understanding** - in *Grootkraal*, the MEC referred to expropriation as an “*aid to the process*”, but noted that it is not “*automatically invoked*” before the Minister considers a merger or closure.<sup>49</sup> The MEC’s statement indicates a misunderstanding of section 58 of SASA and the duty to ensure security of tenure for the school. The idea is not that expropriation is automatically invoked, but that, at the very least, proper consideration must be given to the option of expropriation in terms of section 58.
- 63.2 **absence of expropriation implementation guidelines** - whilst section 58 provides some details regarding notification of expropriation and the public participation process, it does not provide any further practical guidelines about how expropriation should be carried out, including when expropriation without compensation may be considered. Such details must be provided for in the finalised Expropriation Bill.
- 63.3 **lack of political will and capacity** - as highlighted in the HLP Report, one of the key impediments to implementation of the land reform programme appears to be a lack of political buy-in. It is our hope that the recent focus on the expropriation without compensation debate, along with other recommended measures, such as providing expropriation guidelines, will encourage and capacitate officials to exercise their expropriation powers where appropriate.

## E. SUMMARY OF RECOMMENDATIONS

64. EE and the EELC fully support expropriation without compensation. We recognise that the requirement to pay compensation may be one of many impediments facing land reform in South Africa. Other impediments include, amongst others, a lack of political will and a lack of capacity to implement.
65. It is our view that these impediments, in whatever form they may manifest, are not perpetuated through the current wording of section 25 of the Constitution. In other words, section 25 of the Constitution need not be amended in order to progress the land reform programme. In particular:

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<sup>49</sup> First Respondent’s Affidavit, page 337, para 7.

- 65.1 Bearing in mind the transformative purpose of expropriation as a mechanism of achieving land reform, circumstances may exist in terms of which it is just and equitable, balancing the public interest with interests of the affected parties, and having regard to all relevant factors, not to pay any compensation for expropriation.
- 65.2 Section 25(8) provides a powerful mechanism in terms of which legislation may limit the right to compensation, and whereby specific circumstances in which expropriation may take place without compensation may be legislated. Sections 25(5) and (9) also oblige the state to take legislative and other measures to achieve land distribution and tenure reform, respectively. The legislature must therefore use its powers to legislate and outline the circumstances under which property may be expropriated without compensation.
66. It is submitted that the failure to exploit the powerful mechanisms provided by the Constitution, including section 25(8), or the failure to leverage the “transformative thrust” of the Constitution is in fact one of the most glaring obstacles facing land reform in this country.
67. In the context of tenure security of public schools on private land, it is submitted that:
- 67.1 secure access to schools (security of land tenure for schools) and the realisation of the right to basic education are inextricably linked;
- 67.2 whilst mechanisms for tenure reform in the school context exist as provided for sections 14 and 58 of SASA, there is consistent reluctance and failure to use these mechanisms; and
- 67.3 such failure can be attributed to many factors, including, but not limited to, lack of political will and the lack of capacity to implement.
68. It is our view that as an immediate step towards progressive land reform, the Expropriation Bill is imperative and represents a crucial opportunity to outline the circumstances under which property may be expropriated without compensation. This will provide the necessary guidance for the implementation of existing legislative mechanisms which empower expropriation for the purpose of education.