



INVESTORS' GUIDE

TO PRESIDENT CYRIL RAMAPHOSA'S
LAND REFORM REPORT

2019





This guide was compiled and published with the goal of informing foreign investors in South Africa of the economic and investment situation in the country. It also aims to empower foreign investors with information to apply pressure to the South African government to ensure that investors will be protected in South Africa. It is not AfriForum's goal to discourage investors from investing in South Africa; it is precisely the contrary. South Africa's economy is currently under tremendous pressure, which is why South Africa needs foreign investors more than ever.

INTRODUCTION

South Africa has been in the news lately for the wrong reasons. One of these is the push by the ruling African National Congress (ANC) to have the property rights clause in the South African Constitution eroded in order to empower the state to expropriate private property without compensation. President Cyril Ramaphosa has said repeatedly that the right to own private property would be eroded in a way that would boost food security and economic growth, but no practical plan has been provided as to how this would be achieved. In June 2019, Ramaphosa said during the State of the Nation Address that his dream for South Africa had been fuelled by his conversations with the Chinese President, Xi Jinping. Ramaphosa reiterated in his 2020 State of the Nation Address that the ANC is committed to expropriation without compensation.

In July 2019, the so-called advisory panel convened by Ramaphosa published its report with proposals on land reform and agriculture. In his 2020 State of the Nation Address, Ramaphosa stated that this report would be implemented and its findings used in government's attempts to amend Section 25 of the Constitution (which guarantees private property rights). While the report has been applauded by land reform activists and certain ideologically-inclined academics and political commentators, it appears that the flowery language of the report has obscured the intent to target private property to such an extent that many who read it fail to grasp the potential consequences of what is proposed in the report. The purpose of this *Investors' Guide* is to highlight the major problems with the President's report, which can be seen as a summary of the South African government's position on expropriation without compensation.

Please note that this guide is only a high-level summary of the many criticisms that could be raised with regard to the report. The purpose of this guide is to sift through the flowery language of the presidential report and to highlight the serious problems that sprout from it. Investors are encouraged to read the full report.

BRIEF CONTEXT

South Africa is governed by the ANC, a self-described liberation movement that purports to promote African (i.e. "black" in this context) nationalism and socialism.

Following the adoption of the parliamentary motion for expropriation of private property without compensation, a parliamentary committee was established with the task of receiving public input on the matter. After holding public hearings across the country, receiving hundreds of thousands of written submissions and listening to oral presentations by experts and representatives of civil society,

the committee discovered that the majority of people who participated were opposed to amending the Constitution to empower the state to expropriate private property. The committee, however, discarded these hundreds of thousands of written submissions and oral presentations that opposed amending the Constitution and recommended nonetheless that the Constitution be amended.

Meanwhile, President Ramaphosa initiated a Presidential Advisory Panel on Land Reform, but mostly included people who agreed with his views. However, once the panel's report had been finalised, even some of the President's supporters representing commercial farmers were unable to agree with the content of the report, so they submitted a dissenting minority report.

WHAT THE REPORT RECOMMENDS

Given the totalitarian nature of the report, it contains a long list of recommendations with regard to different steps that the South African government should take in order to regulate property ownership more comprehensively. For convenience sake, a summary of the recommendations is included as an addendum to this document.

FUNDAMENTAL PROBLEMS WITH THE PANEL'S REPORT

There are various overarching problems with the report, only the most significant of which are listed below.

1. Predetermined outcome

During the time in which this panel was convened and in which the panel was preparing its report, President Ramaphosa had already made several public announcements in which he stated what the outcome would be, namely that expropriation of private property would happen. The panel thus had no other option but to draft its findings in line with what the President had announced the outcome would be.

2. One-sided input

The report was compiled exclusively by so-called experts who already supported the ideological predispositions of the ruling party in broad terms. While certain important differences among panel members came to the fore in the execution of its work – especially regarding the role of the private sector – all but two of the panel members supported the notion of expropriation of private property without compensation in principle. While it is claimed that there was a consultation process, major stakeholders who disagree with the political and ideological predispositions of the ruling party (such as the oldest agricultural union and the largest civil rights organisation) were simply excluded from the process.

3. Fabricated statistics to push a political narrative

The report contains various statistics, some of which are questionable and others are simply fabricated – and grotesquely so. The report makes the startling claim, for example, that there is not a single black, coloured or Indian individual in South Africa that owns any land* and that this has to be “corrected” through more aggressive land reform (i.e. expropriation of private property without compensation).

4. Breach of the negotiated settlement

The report tacitly concedes that certain of the current realities in South Africa are the result of the negotiated settlement that was reached in the early 1990s in order to achieve a peaceful transition to a new political dispensation, but it then continues by calling for this settlement to be breached. Two issues stand out in particular. The first was the agreement reached with representatives of minorities that property rights would be protected in the “new South Africa”. The second was the agreement reached with the Zulu community regarding the establishment and protection of the Ingonyama Trust in order to preserve Zulu self-determination. The report proposes, however, to erode private property rights and to dissolve the Ingonyama Trust.

5. Naivety with regard to economics

While it has been stated numerous times throughout the process and also in the report that the push for expropriation of private property would be done in a manner that would boost economic growth and that would not impair food security, no practical indication is provided on how this would be achieved. The authors of the report seem to believe that a declaration that the economy would not be impaired is sufficient for it not to happen. On the other hand, certain proposals are put forth that would undoubtedly result in negative consequences for the economy. This includes the call for abandoning the “willing buyer, willing seller” principle (i.e. the free market), higher tax rates on landowners and various infringements on property rights.

6. Conflation of restitution and redistribution

The authors of the report use the terms restitution and redistribution interchangeably and seemingly without proper understanding of the important difference between the two. Restitution is a process according to which communities who were deprived of their land without proper compensation can file claims to either get the land back or obtain financial compensation. This is a process that has to be supported. On the other hand, redistribution is a process according to which the race of the property owner is regarded as an indication with regard to the legitimacy of the ownership. In other words, according to the process of redistribution, the goal is to redistribute land owned by white people to black people, regardless of whether or not that land was obtained legitimately. This is an inherently racist process and one that has to be opposed. The report, however, seems to regard race-based redistribution as a form of restitution.

7. Racist undertones

There are alarming racist undertones to the report. The report fundamentally suggests that white ownership of land is regarded as bad, while black ownership is

regarded as good. Furthermore, it deals with history and current realities in a cherry-picked and dishonest way in order to substantiate these racist ideals. The report falsely claims that black people occupy only 2% of the land and that all land owned by white people should be redistributed by government.

8. Totalitarian thinking

The report is inundated with totalitarian-style thinking. The authors of the report make it clear – on virtually every page – that leaving people to decide for themselves is regarded as problematic and that more aggressive government control over the people should be enforced as a so-called solution. The report fundamentally proposes more power to the government and the President and an erosion of the rights of the people in general. The report claims for example that “Government should also embrace the notion of having to redistribute the country’s 72% of land which is in private ownership.” This implies that government should redistribute all land owned by white people, given that the report claims that all land held by private individuals are owned by white people.

9. Cherry-picking of facts

The report goes on to cherry-pick only certain claims which serve to support the political and ideological narrative of the ruling party, while crucially important facts that speak to the very core of the report are conveniently ignored. This is particularly true with regard to the claims made in the report regarding the so-called hunger for land. Facts that are not mentioned in the report include the following:

1. The legitimate ways in which millions of people in the private sector and white people (the report conflates white with private sector) obtained their land;
2. The disastrous failures of other state-driven land reform projects such as those in Zimbabwe, Venezuela and the Soviet Union;
3. The fact that 93% of land claimants opt for financial compensation as opposed to land, that 82% of land claims to date were filed in urban areas, that more than 95% of land claims to date have been settled; and
4. That only 2% of people in South Africa believe that more land reform would improve their lives.

10. Enforcing equality of outcome

The entire report is based on the underlying notion that equality of outcome has to be enforced through state intervention. The authors of the report make it clear that the historic injustices would only be “corrected” in their opinion once equality of outcome is achieved in this way. The yardstick in this regard is the notion of racial representativity. The report calls on government to ensure through intervention that members of different races should own land in relation to their share in the national population. In other words, the question with regard to whether ownership of land should be regarded as legitimate is not answered by determining whether that person obtained the land legally, but rather by determining the race of the owner.

* The report claims on pages 43 and 44 that 72% of land in South Africa is “held privately in freehold and leasehold”, but also claims on page 44 that 72% of land is “held by whites” and that this has to be corrected through more aggressive land reform.

11. Oblivious to agricultural realities

The report makes various far-reaching claims with regard to how agriculture should be managed by government, while indicating a clear ignorance with regard to the functioning of commercial agriculture. Several examples can be highlighted in this regard, including the following:

1. It is stated in the report that South Africa needs to shift away from feedlot production and towards grass-fed livestock production in order to increase employment in agriculture.
2. The report claims that the subdivision of large holdings, for the purpose of land reform, is essential in order to benefit the poor and to contribute to a less concentrated and unequal pattern of landholding.
3. The size of certain farms appears to be a major source of concern to the authors of the report, while they seem just as oblivious as the ruling party to the fact that certain types of farms and farms in certain geographical regions are simply not able to produce sustainably on a small scale.
4. The authors of the report do not seem to grasp that agriculture is becoming increasingly technology-driven, which often results in less employment. The hard push for more employment in agriculture would only succeed if farmers are forced to farm in less productive, more expensive ways, which would not be sustainable in the current highly competitive agricultural environment.

12. Distorting and misuse of aboriginality

The report claims that black Africans (Nguni tribes) are the "aboriginal owners" of the land in South Africa. This is false. The ancestors of black people currently residing in South Africa gradually migrated south from the northern parts of Africa, more particularly the area that is today known as Cameroon. If the report concludes that the land should be given to the aboriginal owners of the country it should be restituted to the Khoikhoi and San – and not the Nguni tribes, as they were later immigrants to what is now South Africa.

CONSEQUENCES FOR INVESTORS

While investors are encouraged to read the entire report in full, the points alluded to above clearly indicate that South Africa under the ANC and President Cyril Ramaphosa does not provide a safe and secure environment for potential investors – even more so for investors seeking to invest in agriculture or property. The point of this *Investors' Guide* is not to discourage investors from investing in South Africa, but rather to warn about the potential consequences and to call on investors (and potential investors) to use their leverage to pressure the South African government not to continue with its tampering with the market and with property rights. Only through comprehensive and effective pressure from various sections of the local and international community can these threats be avoided.

ADDENDUM – RECOMMENDATIONS FROM THE LAND REFORM REPORT

The presidential report includes recommendations and "considers alternative land acquisition strategies and land tenure models, reviews beneficiary eligibility and selection processes, landholding entities, and notes the significance of new legal and other frameworks".

According to the report, recommendations for immediate action include the following:

- 1. Consolidated integrated planning and land information system:** An enforceable coordinated and integrated planning system is needed for alignment of strategy, planning, budgeting, and monitoring and evaluation in order to debottleneck, facilitate and coordinate across spheres of government. To shift from a transactional approach to a transformational approach of land reform, there is a need to develop a consolidated planning system with best practice guidelines for aligning planning, budgeting and implementation. An integrated land e-cadastre with all other land-based information contained in separate government registers (water rights, land claims, mineral rights etc.) should be populated. This establishes the foundation for a comprehensive land recordal and administration system, linked with a need for a reliable land audit.
- 2. Allocation of already acquired land:** The allocation of already acquired land by the state provides an opportunity of advancing land reform immediately, whilst experimenting for better and improved reform with lessons for policy and programme improvement. The targeted areas include:
 - 2.1. fast-tracking the conclusion of restitution cases and transfer of legally secure and legally registerable tenure to communities with settlement packages;
 - 2.2. the conferment of tenure rights;
 - 2.3. refining the allocation and settlement of land reform beneficiaries;
 - 2.4. creating strong and enforceable duties on departments and spheres of government to provide a full range of technical, financial, resource, administrative, accounting and other support to claimants who receive restoration of land;
 - 2.5. review and reallocation of dysfunctional farms from previous land reform schemes.
- 3. Availing land in the medium term:** The land question is not only an agricultural land problem, but also relates to urban and peri-urban land. The different sources of land to address the different demands for land will include different acquisition methods as well as (voluntary) "donations" from churches, mining houses, land expropriated from absentee landlords, municipal land and commonage, government land not under beneficial use, including land owned by state-owned enterprises, and urban landlords. The design of the conditions under which land is to be transferred to

beneficiaries should also follow beneficiary selection recommendations with revived land structures at local level. This creates space for previous owners to offer time and expertise to mentor new entrants into the farming sector, to invest in land reform bonds, or to contribute some combination of these.

- 4. Development of a proactive targeted land acquisition and allocation programme:** The proposed Proactive Targeted Land Acquisition Programme marks a shift from a reactive land acquisition approach, which has been market- and allocation-based, and colloquially referred to as "willing buyer, willing seller". It is open to different forms of land acquisition aligned with Section 25 of the Constitution as is and will also accommodate amendments (expropriation without compensation) should they materialise. The proposed targeted land acquisition and allocation strategy involves both public and private land owned by commercial farmers, agribusinesses, mining companies, churches, financial institutions and other landowners. Its outcomes will be focused on the acquisition and transfer of well-located land for specific identified individuals, groups and communities. Where feasible, negotiated acquisitions can be pursued where agreement can be reached on compensation, based on the new compensation policy (see below), and not based on market value, as this is contrary to the Constitution (which states that compensation should be "just and equitable").
- 5. Land expropriation:** Property is not limited to land. The current Constitution does mandate expropriation as the method of land acquisition, and the state should use its powers. The finalisation of the Expropriation Bill of 2019 is key to promote expropriation without compensation (EWC). EWC is one of several targeted land acquisition strategies, and it may commence immediately under specified conditions identified for "nil" compensation, including but not limited to abandoned land, hopelessly indebted land, land held purely for speculative purposes, unutilised land held by state entities, land obtained through criminal activity, land already occupied and used by labour tenants and former labour tenants, informal settlement areas, inner city buildings with absentee landlords, land donations (as a form of EWC) and farm equity schemes. The role and function of the Office of the Valuer-General (OVG) should be reviewed to ensure that the compensation determined in the event of expropriation for land reform purposes is just and equitable, and not purely market value based. The Land Claims Court, which the panel proposes be converted to a new Land Court, should adjudicate on all land related-matters, and not only restitution. The Land Claims Court (to become the Land Court) must also be strengthened to increase its capacity to deal expeditiously with restitution claims and other land matters.
- 6. Development of beneficiary selection guidelines:** There has been inadequate land redistribution legislation and the Provision of Land and Assistance Act, No 126 of 1993, has been an insufficient guide. The panel recommends that a Land Redistribution

Bill should be developed to replace Act 126 of 1993. The panel further recommends the development of beneficiary guidelines that cover both rural and urban settings across the wide spectrum of land reform, and which guidelines will assist in contributing towards a sound land redistribution programme. These guidelines should consider who should benefit, how prioritisation of beneficiaries should take place, and how rationing of public resources should take place.

7. Finalisation of the national spatial development framework and establishment of a spatial transformation fund: The National Spatial

Development Framework (NSDF) is currently being prepared in terms of the Spatial Planning and Land Use Management Act (SPLUMA). A key proposal in the National Development Plan was to create a National Spatial Fund that would direct funding in an integrated way in terms of the NSDF. The achievement of meaningful urban land reform will require dedicated resources for land acquisition and development in well-located areas. A National Spatial Fund aimed at meaningful spatial restructuring must be aimed at achieving spatial reform and integration. Its mandate must be the acquisition of well-located land that will bring the marginalised into the urban mainstream. There should be a direct prohibition on land which does not achieve this objective.

8. Establishment of a land reform fund: Finance is a key pillar and enabler of land reform outcomes. The conception of a Land Reform Fund is multidimensional and multisectoral with public and private sector contributions. The establishment of a Land Reform Fund should commence with the review and strategic consolidation of the budget, particularly land-related grants in different departments. It should also review the Land Bank's performance in financing black small-scale farmers and provide solutions. A strong focus of the proposed fund should be the development of black financial intermediaries and support of microfinance and cooperative banking for production and enterprise development. The panel recognises that the building and strengthening of alternative finance is necessary. However, this should not shift focus away from the desperate need to transform South Africa's finance sector. The panel proposes a specific drive to mobilise the private sector, namely commercial banks, asset managers and pension funds, to respond to the urgency of financing the excluded majority across sectors and mobilising land reform-related funding.

9. Review and refocusing of empowerment private partnerships: The review of empowerment private partnerships should analyse the potential of private partnerships or joint ventures as a means for land redistribution, analyse the transactional methods and link with transformational imperatives, assess benefits to targeted beneficiaries, assess enterprise performance, and analyse active participation by new partners.

10. Strengthening food systems and enhancing rural-urban linkages: Food production and trade has continued to perpetuate racial inequalities. Black farmers are insignificantly involved in commercial agriculture. The success of white farmers is based on the collateralisation of the land, a privilege and right

most black farmers do not have. A public-private food systems committee should be established to cover food production and distribution systems, as well as all processes and infrastructure involved in feeding the nation, and the alignment of public and private approaches. Preferential procurement should be employed by the state in the food sector to support access to markets by households and small-scale farmers and community enterprises.

11. Land allocation and settlement policy: The need for a land allocation and settlement policy arises as a result of inconsistency and incoherent policy and approaches from one minister to the other. The land allocation and settlement policy has to be driven by a clear redistributive agenda following the territorial approach proposed for land acquisition in sections above.

The presidential report's recommendations to refocus land reform policy include:

- 1. Tenure reform: recognising diverse tenure systems and rights:** Tenure reform must move towards rights and away from permits, to make sure rights to land are legally enforceable. Tenure security should be a priority. People should have the ability to choose the tenure system which is appropriate to their circumstances.
- 2. Urban land reform: inclusive cities with equitable and secure access to land:** Most South Africans now live in towns and cities. The panel recommends that an urban land reform policy be developed that has a dual focus on equitable access and tenure reform. Urban land redistribution should specifically be aimed at creating inclusive cities. Increased protection should be given to citizens against arbitrary evictions, as well as the decriminalisation of unlawful occupation of land by the poor.
- 3. Land administration: recorded, registered and secure land rights for all:** The state land administration system needs to be fixed. A revitalised, integrated and unified land administration system needs to be created that provides legal and institutional infrastructure for all land-related management and rights.
- 4. Institutional reform: a new agency, reformed court and changed mandates:** The institutions which facilitate and guide land reform need to be reformed. One panel recommendation is the establishment of a Land and Agrarian Reform Agency.

