AfriForum

AFRIFORUM SUBMISSION

ON NATIONAL POLICY FOR BENEFICIARY SELECTION AND LAND ALLOCATION

Part of the Solidarity Movement

INTRODUCTION

This submission will address three concerns with the policy.

1. Firstly, the policy's explicit exclusion of beneficiaries on the grounds of race. This flies in the face of the foundational values in the Constitution of non-racialism and equality before the law.

2. Secondly, the policy perpetuates state control over land instead of ensuring that beneficiaries become true owners of the land by receiving title deeds.

3. Thirdly, the policy recognises that genuine land reform requires beneficiaries to have the necessary skills to run successful farms.

However, the policy should also require the Department of Agriculture, Land Reform and Rural Development to diagnose the reasons why prior land reform efforts have failed and to ensure that similar mistakes are avoided.

RACE BASED BENEFITS

4. AfriForum favours a land reform policy that serves to assist poor and vulnerable South Africans. The proposed policy uses the following definitions:

> **"Vulnerable person"**: A person whose survival, care, protection or development may be compromised, due to a particular condition, situation or circumstance and which prevents the fulfilment of his or her rights.
>
> **"Vulnerable Groups"**: In this policy will include: youth, women, persons with disabilities, and orphans and "Vulnerable person" shall be used interchangeably.

5. However, the policy also uses the following race based definition:

> **"Previously Disadvantaged South African Citizens"** means a Black Person (Africans, Coloureds and Indians) who is 18 years or older and who holds a valid South African Identity document and is a bona fide citizen of South Africa and "Land Reform Farmers" shall have a corresponding meaning.

6. The policy requires the reintroduction of race classification measures to decide who would be eligible to receive land from the State. Furthermore, it would exclude those determined by the State as belonging to "disfavoured" racial groups from receiving benefits.

7. Race was used to allocate burdens and benefits during Apartheid. Racialism was the source of many of the problems we face as nation. For that reason, it cannot be part of our solutions.

8. The following section provides a brief history of the use of racial classification in South Africa.

RACIAL CLASSIFICATION DURING APARTHEID

9. Before the first non-racial national elections in South Africa and the onset of the current constitutional order, racial classifications and racial set-asides were common. Race based legislation like the Population Registration Act (29 of 1950), the Group Areas Act (41 of 1950) and the Prohibition of Mixed Marriages Act (55 of 1949) deprived people of the opportunity to marry those they loved, work in professions of their choosing and/or live where they wanted.

10. In 1950 the Population Registration Act was passed into law.

11. The Act classified South Africans based on race in the following manner:

> "white person" means a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a coloured person.
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> "coloured person" means a person who is not a white person or a native.
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> "native" means a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa

12. A census was to be taken and the director of the census would classify people according to race. Provision was made for people to object to their classification.[1]

13. A series of proclamations were issued in 1959, 1961 and 1967 which further defined the term coloured person.

14. Seven subcategories were listed which created the following groups; Cape coloured, Malay, Griqua, Chinese, Indian, other Asiatic and other coloured.

15. An example of the arbitrary, irrational, and indeterminable definition of the Indian group is evident in the 1961 proclamation:

> INDIAN GROUP
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> In the Indian group shall be included —
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> (a) (i) any person who in fact is or is generally accepted as a member of a race or tribe whose national home is in India or Pakistan; and
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> (ii) any person who in fact is or is generally accepted as a member of the race or tribe known as the Zanzibari Arabs (also known as Zanzibari or Kiwas), other than a woman between whom and a person (other than a white man) who is not, in terms of this paragraph, a member of the Indian group, there exists a marriage or who cohabits with such a person; and

[1] S5(1) and S11(1) of the Population Registration Act (29 of 1950)

(b) any woman, to whatever race, tribe or class she may belong, between who and a person who is, in terms of paragraph (a), a member of the Indian group there exists a marriage or who cohabits with such a person; and

(c) any white man between whom and a woman who is, in terms of paragraph (a), a member of the Indian group, there exists a marriage or who cohabits with such a woman.

16. This definition shows that a person's racial classification depended on arbitrary factors that included which country they were born in, whether they were a man or a woman, whether others accepted them as being part of a racial group or whether they married or lived with someone of a particular racial group.

17. In 1958 the South African Institute of Race Relations produced a fact paper entitled "RACE CLASSIFICATION IN SOUTH AFRICA – Its Effects on Human Beings". The paper details the ill effects of race classification after South Africa became a Union in 1910 and during the first few years of Apartheid and illustrates several cases where a person's race was determined in contradictory ways, causing great hardship. The following is recounted:

> It may be impossible to establish to which racial group certain individuals belong. A man in the Cape Peninsula, for example, was prosecuted under the Mixed Marriage Act on the charge that, being a coloured man, he had married a European. In terms of this legislation the onus of proof lies on the Crown, and the case was dismissed, the judge ruling that the Crown had not proved that the man was coloured.
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> The name of this man's mother was removed from the voter's roll by the Electoral Officer on the ground that she was coloured. She took the matter to court and in this case the appeal was dismissed because she was unable to prove to the court's satisfaction that she was white.
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> In the Appellate Division case Rex vs. Ormonde and Another, in which the accused was charged under the Mixed Marriages Act, the judge said, "The definition is so framed that there must be a great number of people who cannot be proved to be either European or Non-European for the purposes of the Act. No doubt that position was intentional, taking due note of the fact that there is a doubtful class with one foot on each side of the colour line, in respect of whom a rigid classification or a compulsory choice would be artificial and unreal and therefore likely to cause grave injustice. Indeed, cases are quite conceivable in which a person may according to one branch of the definition (that of obvious appearance) fall in the one group and according to the other (that of general acceptance and repute) in the other."
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> But the officials concerned with the implementation of the Population Registration Act are attempting rigid classifications, which are indeed often artificial and unreal, causing grave injustice.
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> Many people are, as a result of all this, left in a continual state of anxiety. In its issue of 19 February 1958, the *Cape Times* told of one such case. Mr. B, it reported, fell in love with a European girl but could not marry her because his birth certificate was "not in order". The only way he could get his birth certificate changed was through the Population Registration Office in Cape Town. The officials there scrutinized him and noted the colour of his hair, eyes and skin. They sent the details to Pretoria for a decision, but nothing happened. In desperation, Mr. B went to Pretoria himself. "I was desperate and humiliated and I can't tell you the misery I and my fiancée have been through", he said. "Finally I managed to get an affidavit from an influential man to the effect that I was a European. They changed my birth certificate and now we can get married."
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> "But I am afraid to say anything because something might happen. They told me that if any complaint was made against me they could reconsider my case and change their decision."

18. Once a person was classified by the State, it was possible to appeal this decision and be reclassified. However, the process was burdensome and fraught with uncertainty.

> The worst feature of the Population Registration Act is that, instead of placing the onus on officials to prove that a person is not of the racial group he claims, the onus of proving that an allegation by an official is unfounded has in effect been placed on the individual concerned. It would cost the Department of the Interior nothing to institute a legal enquiry; but in some cases it may cost an individual citizen hundreds of pounds to prove his case. He may be doubly penalized for he stands to lose not only his money, but also his status in the South African hierarchy of race and it must also be remembered that, because of the lack of clarity in the definitions, it may be very difficult, if not impossible, for a man to prove to which racial group he does belong.
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> The procedure at the Population Registration Office is highly secret. No observer is in any circumstances allowed to attend. Legal representation is permitted but as an inquiry by the Board is not analogous to a lawsuit, the ordinary rules of court do not apply. The officials may ask any questions they wish. It is pointless for the legal representative to object, since he may succeed only in raising a doubt in the official's mind, or in antagonizing him -this would be highly undesirable as the official's opinion carries so much weight.
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> It is said that detailed questions are asked about the ancestry, friends and mode of living of the person concerned, the schools he attended and the jobs in which he has been employed. His complexion, eyes, hair, features and bone structure are examined. The official may summon any living relative, including grandparents, and question them in a similar way.
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> The recommendations by the local officials are sent to the Director of Census in Pretoria, who makes the decision. The person whose classification is being considered is not given a copy of the recommendations and has no opportunity of refuting any statement made. One attorney asked whether it would assist his client if he obtained a sworn affidavit of association; but was informed that the official was uncertain whether or not the Director of Census would require such a document.
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> It may take months or even years before the matter is settled - and meanwhile the person concerned is left in grave anxiety, and often also in acute difficulty should he wish to marry or to buy, lease or sell property.

19. In 1967, Helen Suzman gave a speech in parliament about the latest amendment to the Population Registration Act. The following extracts are a chilling reminder of the unjust nature of race classification by a state, but they also stand as a warning against repeating those mistakes:

> A person can be white under the Population Registration Act and the very same person can be classified as coloured under the Group Areas Act. Sir, there is nothing easy about classification in this country and there never will be. I want to point out just how hopeless is this new attempt in this amending bill to define the indefinable.
>
> As I mentioned earlier the reason why people want to be classified in a notch up, and I have to say “up” in terms of our law because it is going a notch up if one is an African to be classified as coloured and if coloured to be classified as white, is because race is the make or break factor in South Africa on whether one is treated as a first class, second class or third class citizen. That is why people try to get themselves reclassified by one notch. People say that this is not true but I wonder how many hon. members here would not faint in their desks if they thought that there was any chance of their being reclassified as coloured people. They would faint at the thought of it and I do not blame them because they would be suffering disabilities as a result of such a reclassification.

> I say that all this will achieve is to reveal once again our sick obsession in South Africa in regard to race and colour. It is a sick obsession that we have in this country. It is the sort of thing that rules out any possibility of our being accepted as a mature or civilised country by the rest of the world. In terms of 1967 this is a sick obsession.

20. In 1967, the South African Institute of Race Relations produced a survey paper which detailed the latest developments regarding racial classification. The following extracts demonstrate the arbitrariness of racial classification:

> There have been differences of opinion between appeal boards and courts of law over both of the criteria adopted in 1962. Three examples are given relating to appearance. A woman in Cape Town was considered by the board to be obviously non-white in looks, but a judge found her to be obviously white. There was similar disagreement over the appearance of a man who was sunburned from working in the open. A Durban man won an appeal against his classification as coloured when a judge decided that he was "a white of the Mediterranean type".
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> If, as in cases like these, no clear-cut decision can be reached about a person's appearance, then his associations became the criterion. Appeal boards have frequently insisted that an appellant must satisfy them on every point. A man who looks white, and is readily accepted by the community as being white, for example, could be refused registration as such if many years previously he attended a coloured school, or if a large proportion of his friends were coloured, or if he had not rejected and forsaken all family members who were not classified as white.
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> In a Press Statement the Director of the Institute of Race Relations said that the Bill was an attempt to set up a rigid colour caste society. The principle was repugnant. "However benign, sympathetic and understanding the race classification board may be, the procedures it has to adopt submit applicants for re-classification to a humiliating experience. The affront to human dignity is enormous. This attempt to obtain clearer definition will not obviate the human tragedies that the Act has already brought about," he said.

21. The injustice (and absurdity) of allowing administrators an arbitrary discretion to dictate their own grounds for determining racial lines is illustrated by the calling of barbers as expert witnesses to testify as to the texture of a man’s hair.

22. Hansard lists the number of people that applied to be reclassified and how many were successful. People successfully applied to be reclassified from Cape coloured to white, from white to Chinese, from Indian to Malay and from black to Indian. In 1989, 1142 people applied to be reclassified of which 275 were unsuccessful.

23. In 1991, the Population Registration Act was repealed.[2]

[2] Repeal Act (Act 114 of 1991).

NON-RACIALISM

"I have a dream that my four little children will one day live in a nation where they will not be judged by the colour of their skin but by the content of their character."

– Marin Luther King Jr

24. The principle of non-racialism was a potent rallying cry against racial classification by the state. It permeates the text of the Freedom Charter, which includes the following proclamations:

> "South Africa belongs to all who live in it, black and white..."; "The rights of the people shall be the same, regardless of race..."; "ALL NATIONAL GROUPS SHALL HAVE EQUAL RIGHTS!"; "All national groups shall be protected by law against insults to their race and national pride"; "ALL SHALL BE EQUAL BEFORE THE LAW!"; and "All laws which discriminate on grounds of race...shall be repealed".[3]

25. In 1991 the ANC produced a document entitled "Constitutional Principles for a Democratic South Africa", which proclaimed that:

> The African National Congress envisages a united, democratic, non-racial and non-sexist South Africa, a unitary State where a Bill of Rights guarantees fundamental rights and freedoms for all on an equal basis, where our people live in an open and tolerant society, where the organs of Government are representative, competent and fair in their functioning, and where opportunities are progressively and rapidly expanded to ensure that all may live under conditions of dignity and equality.
>
> A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination, are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all.
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> It presupposes a South Africa in which every individual has an equal chance, irrespective of his or her birth or colour. It recognises the worth of every individual.

26. The value of non-racialism was finally legally crystallised in the first section of our Constitution.

> **Republic of South Africa**
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> 1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
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> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the Constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic Government, to ensure accountability, responsiveness and openness.

[3] Adopted at the Congress of the People at Kliptown, 1955.

27. In *Minister of Finance and Other v Van Heerden* Justice Moseneke held that:

> [T]he long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. In assessing therefore whether a measure will in the long-term promote equality, we must bear in mind this constitutional vision. In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened. [4]

Justice Sachs held that:

> Without major transformation we cannot heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. At the same time it is important to ensure that the process of achieving equity is conducted in such a way that the baby of non-racialism is not thrown out with the bath-water of remedial action. [5]

28. In *Pretoria City Council v Walker*[6] Justice Sachs held that:

> No members of a racial group should be made to feel that they do not deserve equal "concern, respect and consideration" and that the law is likely to be used against them more harshly than others belonging to other race groups.

29. In *South African Police Service v Solidarity obo Barnard*, ACJ Moseneke held that:

> Our quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.
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> We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged. The scope of this "visionary and inclusive constitutional structure" was stated in *Fourie*:
>
> "[T]he founders committed themselves to a conception of our nationhood that was both very wide and very inclusive ... It was because the majority of South Africans had experienced the humiliating legal effect of repressive colonial conceptions of race and gender that they determined that henceforth the role of the law would be different for all South Africans. Having themselves experienced the indignity and pain of legally regulated subordination, and the injustice of exclusion and humiliation through law, the majority committed this country to particularly generous constitutional protections for all South Africans."
>
> Remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society.[7]

[4] 2004 (6) SA 121 (CC), at para 44
[5] 2004 (6) SA 121 (CC), at para 137
[6] 1998 (2) SA 363 (CC), at para 81
[7] 2014 (6) SA 123 (CC), paras 30 to 32

Cameron J, Froneman J and Majiedt AJ held that:

> To achieve the magnificent breadth of the Constitution's promise of full equality and freedom from disadvantage, we must foresee a time when we can look beyond race.[8]

Justice Van der Westhuizen held that:

> Affirmative measures and their implementation are not immune from scrutiny, as is clear from the main judgment. The Constitution states that the measures must be designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. Schemes and conduct based on race, which arbitrarily benefit some and violate the rights of others, can never qualify as a legitimate measure under section 9(2).[9]

30. Non-racialism, if it is to mean anything, must imply that Government, including the Department of Agriculture, Land Reform and Rural Development, will not treat individuals of different races differently for that reason alone. The importance of this principle given South Africa's racially discriminatory history cannot be overemphasized. Discriminatory treatment at the hands of the state can and will only lead to the systematic denial of rights.

31. As its pedigree shows, non-racialism is framed as the absence of its opposite – racialism or racial prejudice. Thus, non-racialism cannot be achieved without the acknowledgment that its opposite, racialism, actually exists; that its effects should be countered, and its power neutralised. Non-racialism implies that the Constitution is founded on the imperative that a state should not racialise society by creating discreet statutory categories of identity from which there is no escape and between which there is no natural overlap.

32. Race based benefits require some form of racial classification to determine who counts as "black" or "white". Any state-imposed system of racial classification, creating as it does apparently objective and discreet categories of race, is deeply undesirable, as it requires a return to the thinking underlying the humiliating kinds of classificatory processes such as those that were used in terms of the Population Registration Act.

33. A state-imposed race-based system of preferences requires us to ask a series of repulsive questions in order to draw a clear line between those entitled to preferences and those with no such right. One question that arises, for example, is how much "blood" from a particular "race" is needed for an individual to be considered a part of that "race". Is one "black" parent, grandparent or great grandparent enough to be considered "black"? Would the same test be used to determine who is "white"?

34. The system requires administrators and employers to engage in the same kinds of repugnant classification tests as were used in the past. Race preference does this terrible thing to our communities and to ourselves; it compels us to measure people by the colour of their skin and not the content of their character.

35. Race-based benefits are at odds with the South African Constitution's commitment to non-racialism. It is impossible to define on a governmental level and by implication requires irrational and arbitrary

[8] 2014 (6) SA 123 (CC), para 81
[9] 2014 (6) SA 123 (CC), para 140

processes of classification, often as in the current case, without the knowledge or input of the classification subject.

36. Any attempt to create a free and tolerant society is hindered by race based policies. The State should not be allowed to determine the worth of a person – be it on the colour of their skin or the communities to whom they choose to belong.

STATE CONTROL OVER LAND

37. The proposed policy places the State in control of land that will be occupied but not owned by beneficiaries. AfriForum believes that genuine upliftment of the rural poor requires the transfer of title to those that benefit under the policy.

38. The Khaya Lama Land Reform Project is an excellent example of uplifting the poor and vulnerable through the provision of title deeds. They describe the problem as follows:

> **Imagine what it is like to live in perpetual insecurity**
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> Imagine living in fear for the future of your family when you die. Imagine your family being evicted from your home because you have no legal way to leave it to them in your will. This is the cruel reality faced by millions of South African families living in townships today. You have lived there for generations, yet your home could be lawfully taken away from you at any time. You may not rent or sell your house. You could lose your home if you move elsewhere to find work.
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> **Titling of properties could change the lives of at least 20 million people**
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> There are between 5 and 7 million such properties with at least 20 million South Africans living insecurely in these homes. Many are homes built by the apartheid Government in so-called “dormitory” townships across the country. Many families built their own small houses but even so hold no title.
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> **Property ownership brings dignity and security**
>
> With property ownership comes dignity, security and investment to improve and maintain one’s property. But currently most are registered in the name of municipalities. The families living in them are simply tenants.
>
> **The standard price for a title deed to a modest home is unaffordable**
>
> What is needed is the securing of fully tradable freehold title to these properties. But most of the legitimate incumbents, especially the elderly, pensioners, single parent families and the unemployed simply cannot afford the regular cost of the titling process.

39. The Khaya Lama Land Reform Project has provided almost ten thousand title deeds to people.[10] Instead of creating further dependency on the State, the proposed policy should provide beneficiaries with full title to the land they receive.

[10] https://www.freemarketfoundation.com/Khaya-Lam-Fundraiser

PAST LAND REFORM FAILURES

40. In the case of *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another*[11] the Constitutional Court held as follows:

> Over nearly two decades, and indisputably since 2006, the Department has manifested and sustained what has seemed to be obstinate misapprehension of its statutory duties. It has shown unresponsiveness plus a refusal to account to those dependent on its cooperation for the realisation of their land claims and associated constitutional rights. And, despite repeated promises, plans and undertakings, it has displayed a patent incapacity or inability to get the job done.
>
> In this, the Department has jeopardised not only the rights of land claimants, but the constitutional security and future of all. South Africans have been waiting for more than 25 years for equitable land reform. More accurately, they have been waiting for centuries before. The Department's failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform. It is not the Constitution, nor the courts, nor the laws of the country that are at fault in this. It is the institutional incapacity of the Department to do what the statute and the Constitution require of it that lies at the heart of this colossal crisis.

41. Government spent over R1.4 billion buying farms in the Eastern Cape to redistribute to aspirant farmers. Of the 265 farms purchased, only 26 remain viable.[12] In 90% of those cases, once thriving farms that produced food and employment are now in ruin. This fact was acknowledged by the Minister of Land Reform and Rural Development.[13] Being a farmer is not easy. It's a technical job that requires an enormous amount of time, expertise, and money as well as a lot of support and training if you have no background in farming. Providing someone with the land to farm is no guarantee that the farm will be successful.

42. AfriForum is pleased to note that the proposed policy states the following about the importance of beneficiaries being appropriately skilled:

> The capacity and capability of an applicant to manage the intended farming enterprise based on the farm potential is critical to the development of the farm. Applicants who possess basic farming skills, and demonstrate a willingness to acquire these, or have qualifications in the field of agriculture; and agricultural graduates of the Department's incubation programme will therefore enjoy a preferential advantage.

43. We hope that the Department will properly investigate its past failures to ensure that future projects are successful.

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[11] 2019 (6) SA 597 (CC), paras 40-41

[12] Fuzile, B. 2018, IN CASE YOU MISSED IT: 90% government farms failed. *Daily Dispatch*, 21 April.

[13] *Mail & Guardian*. 2010. Land reform: Use it or lose it, says minister. 2 March. Available at https://mg.co.za/article/2010-03-02-land-reform-use-it-or-lose-says-minister/. Accessed on 31 January 2020. See also Johnson, R. W. 2015. *How Long Will South Africa Survive?* London: Hurst & Company.

CONCLUSION

44. AfriForum supports the initiative to assist the poor and vulnerable to gain access to land. Such a policy should be done on a non-racial basis. Beneficiaries should have the requisite skills needed to run a farm and they should be given full title to the land.

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