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TERMS OF REFERENCE (TORs)

LEGAL RESEARCHER TO DO ASSESSMENT OF AND RESEARCH ON CONSTITUTIONAL IMPERATIVES WITH RESPECT TO THE OVERALL AND SPECIFIC SECTIONS OF THE REGULATION OF AGRICULTURAL LAND HOLDINGS BILL (RALHB).

1. BACKGROUND

The Department of Rural Development and Land Reform (DRDLR) has introduced the Regulations of Agricultural Landholdings Policy and accompanying Bill (RALHB) with the aim of reversing the legacy of colonialism and apartheid, and to ensure a “*just and equitable*” distribution of agricultural land among those who live in, and work, it. The proposed reforms seek to ensure progressive realisation of the objectives and principles enshrined in the Constitution, particularly section 25(5), (7) and (8) as well as Section 27, on equitable access to land by citizens and redress for those who lost tenure and land as well as local and household food security. The RLHB/RLHP stem from the 2011 Green Paper on Land Reform’s unitary and integrated 4-tier tenure system, particularly the tiers on Privately-owned land (freehold with limited extent) and Foreign-owned land (combination of freehold with limited extent). The Regulations of Agricultural Land Holdings Bill (RALHB) was published for public comments on 17th of March, 2017 and closed on 17 May 2017. The DRDLR has been collecting and analysing submissions/public comments as they come in.

This Bill has attracted different reactions from different stakeholders and interest groups in the public. Some respondents considered it to be:

- unconstitutional, particularly its provisions concerning: prohibition on acquisition of and regulation of lease of agricultural land by foreign persons; compulsory disclosures of private land holdings detailing the landowner’s race, gender and nationality as well as the current size and use of the land; ceilings for agricultural land; and, the redistribution of agricultural land.
- discriminatory and in violation of the Bill of Rights and various other sections of the Constitution, as well as certain declarations and conventions of the United Nations. One of the most commonly cited arguments against the constitutionality of the RALHB is its violation of Section 25(1) of the Constitution (the property clause).
- Some have argued that Parliament does not have the right to enact laws that arbitrarily interfere with property rights, or which grant the State the authority to arbitrarily interfere with property rights.

- Others have contended that Sections 15 and 16 (Disclosures of present ownership and acquisition of ownership of private agricultural landholdings) contradict several sections of the Constitution.
- Certain sub-sections are deemed to be racist, and inconsistent with various constitutional rights (including freedom of trade), as well as a breach to Article 17 of the UN's Universal Declaration for Human Rights.
- Request for clarity surrounding certain definitions provided in Section 1 was also made. For instance, Conservation activists propose that conservation/ protected areas be excluded from the definition of agricultural land to ensure these properties are not affected by the Bill.

Given the aforementioned, the legal research is required to assess constitutional claims which have been made with respect to the overall and specific sections of the RALHB.

2. REQUIREMENT

The services of a senior case law and legal researcher specialising on constitutional law and particularly experience and interest in Section 25 is required. Land is a contentious area and so is the constitution, hence the incumbent must have an affinity towards principles of inclusive development and equitable land access and at least 8 years' experience in legal research in this area. This ought to be demonstrated by past and recent work done and/or published.

3. OBJECTIVE

The objective of the assignment is to consider and assess these public comments raised on the Constitutionality of the RALHB and conduct necessary legal research which will respond to the various legal concerns raised about the Bill, based upon Constitutional Case Law and precedents. This assessment will build on two constitutional law opinions commissioned by the DRDLR from Senior Council, feedback from the Chief State Law Advisor and draw on latest case law on the matter. A briefing for further work from Senior Council will also be required from the incumbent.

4. PROJECT DURATION

The project duration is 15 days within 1 ½ months' period, starting immediately. This work will be further used to commission a further affirmatory opinion from Senior Council.

5. SCOPE OF WORK

Granted the urgency of crafting a response, as well as the necessary legal, technical and economic matters raised, there is a need for legal assessment to be done. As indicated, this will be a 15-day assignment over 1 ½ months and will improve upon and update the legal opinions and advice the DRDLR has gathered. It will identify new streams of concern raised in public comments, craft responses, update on latest caselaw both nationally and internationally as well as prepare a briefing for affirmatory legal opinion by a Senior Council.

EXPECTED OUTPUTS

Given the aforementioned, the legal research will provide assessment of the constitutional claims made with respect to the overall and specific sections of the RALHB. The analysis should

1. Consider and assess comments raised on the Constitutionality of the RALHB
2. Base the assessments made against the background and the analysis made by the State Law Advisor, and two Senior Council Opinions secured both on the Constitutionality of the Bill and the change of tenure from freehold to long term lease hold for agricultural land.
3. Carefully assess the advice received against/as well as, the new areas raised as constitutional concerns, including misinterpretations of the constitution
4. Frame and conduct the necessary legal research in responding to the various legal concerns noted on the RALHB, based upon Constitutional case law and precedents;
5. Prepare a brief of Terms of Reference for further work by Senior Council, and
6. Deliver draft Report in 10-15 days.

6. PROJECT WORKPLAN

Please attach a project work- plan, highlighting the key project activities or milestones and their projected accomplishment dates. A budget breakdown per activity and the number of hours to be spent should be provided.

7. EXPERTISE AND COMPETENCIES REQUIRED

A Legal Researcher must fulfil the following selection criteria:

- **Education:** Post Graduate Degree in Law with specialization on Constitutional Law
- **Research:** Strong legal research background on issues of land policy and development;
- A **demonstrable interest** in Section 25 and an affinity to principles and objectives of inclusive development and transformation will be an added advantage
- **Experience:** More than 8 years of consulting experience on the topic of law/policy analysis, land reform and development.
- **Knowledge and Skills:** Project Management; Legal Research and Analysis; Senior Council Briefings and Report Writing;

8. PROJECT IMPLEMENTATION REPORTING

- The Legal researcher shall submit draft and final reports which clearly present work undertaken outlining activities and outputs thereof. Any proposed deviations from the original project implementation plan shall be explained to the UNDP in writing and be approved by the UNDP Senior Management.
- The project report (s) must be submitted in electronic formats. All such materials shall become the property of the UNDP and its development partner and no

document may be reproduced, copied or distributed without prior written consent of UNDP.

9. INSTITUTIONAL ARRANGEMENTS

- The Legal researcher will be:
 - Working with a team of experts who are also working in the project.
 - S/he will be briefed by Chief Director Policy Research & Development-DRDLR and UNDP Project Manager at the start of the assignment, and will henceforth report regularly to CD PR&D- DRDLR and UNDP Project Manager throughout the assignment.
 - Supervised by the Chief Director PR&D- DRDLR
 - UNDP Project Manager will administer the progress of the project.
- Will report progress to the Chief Director PR&D and the UNDP Project Manager
- Project monitoring, control and evaluation will be jointly done by UNDP and the DRDLR.
- The Legal Researcher will be expected to observe the highest professional and ethical standards throughout project implementation.

10. RELEVANT INFORMATION/DOCUMENTATION

- Information and related documents will be available on request from Chief Directorate: PR&D in the DRDLR and all relevant role players.
- The UNDP Senior Management will be available for consultation regarding related issues, progress briefings and any other matters related to smooth execution of the project and success thereof.

11. CONFIDENTIALITY

All information, discussions, documents and reports that arise from this project must be regarded as confidential by the Legal Researcher. Only UNDP, or its development partner, shall have the right to make public the findings of this project.

12. APPLICATION REQUIREMENTS

Interested law experts/legal researchers are invited to submit proposals to provide the above-mentioned services. The proposal should focus on addressing the consultant's ability to provide the services outlined in the Scope of Work and Expected Outputs. Please include the following:

- Cover letter
- Detailed CV(s) indicating qualifications and relevant experience
- A proposal indicating a description of the proposed approach to the scope of work, preliminary work plan with timelines and detailed budget.
- Recent work, publications that demonstrate affinity to inclusive development and transformation principles

13. CONTACT PERSON AND DETAILS

For any queries regarding the contents of these TORs, please send them to the following email address: procurement.za@undp.org