



**FW de Klerk**  
FOUNDATION

## **THE LAND QUESTION: BLACK UNITY AND NO COMPENSATION OR NON-RACIALISM AND CONSTITUTIONALISM?**

*By Dr Theuns Eloff: Executive Director, FW de Klerk Foundation*

In his State of the Nation (SONA) appearance, President Zuma said “we had stated our intention of using the *Expropriation Act, 1975* (Act 63 of 1975) to pursue land reform and land redistribution, *in line with the Constitution*” (my emphasis).

In debating this, the Minister of Rural Development and Land Reform, Gugile Nkwinti, on 14 February, said that the Government will undertake a pre-colonial audit of land ownership and “(o)nce the audit has been completed, a single law should be developed to address the issue of land restitution without compensation. The necessary constitutional amendments should be undertaken to effect this process”.

At the launch of Operation Phakisa’s agriculture, land reform and rural development leg on 24 February, Zuma asked the following rhetorical (and nonsensical) question: “How are we going to achieve all the goals mentioned in the State of the Nation Address and all the laws and policies that we are busy amending to enable faster land reform, *including land expropriation without compensation as provided for in the Constitution*” (my emphasis). On 3 March, in his official opening of National House of Traditional Leaders, the President repeated the Nkwinti statement almost verbatim. Land reform “in line with the Constitution” has quickly become “land restitution without compensation”.

The Economic Freedom Fighters (EFF) immediately seized upon this issue, and on 28 February Julius Malema offered the ANC the EFF’s 6% of the parliamentary vote to change section 25 of the Constitution, to make land restitution without any compensation possible. “This is a matter that can unite black people” and “isolate white monopoly capital”, he said. The motion was dismissed by a large majority, because the ANC members rejected the notion of changing the Constitution on this issue. Days later, Zuma departed from his written speech to the House of Traditional Leaders and echoed the “black parties must unite” sentiment almost verbatim.

The fact that the ANC parliamentary caucus voted against the EFF’s motion, is in a way not surprising. The governing party will not (at least in public) be prescribed to by the younger upstart. The right-thinking members of the ANC are also wary of tinkering with the Constitution for short-term gains. And, in adopting the National Development Plan (NDP), it cannot as the governing party support a policy of land reform without compensation. Its *Strategy and Tactics* document, adopted in 2012 at Mangaung, also does not state it as a policy. But if your leader departs from policy in public, there is clearly something wrong. This issue therefore has had a further polarising effect on the party, as the ANCWL and the MK veterans came out supporting the “no compensation” line. This is clearly another pro-Zuma anti-Zuma fault line. And it seems that the President is embarking on a high-risk populist road, one that he is hoping will sway the majority of ANC members his way, come December 2017. But it may also back-fire badly.



**FW de Klerk**  
FOUNDATION

Two constitutional issues also emerge from the above. The first is the property clause in section 25, and the other is the founding provision of non-racialism in section 1.

The fact that the leader of the governing party calls for a unity that is based on race, flies in the face of not only the Constitution, but also the ANC's own long-standing policy of non-racialism. Granted, this principle has been undermined regularly in affirmative action and BEE policy documents and legislation. Here the refrain that the focus of the ANC's transformation efforts are black South Africans in general and Africans in particular, can be found repeatedly. But at least it is still (sort of) its policy. And it remains a founding provision of the Constitution. But the President of the ANC and the country has clearly departed from non-racialism - at least on the land issue. And this is done in the interest of narrow party political interests at best, and selfish economic interest at worst.

The second issue is that of private ownership, regulated by law. Section 25 has two underlying objectives: to protect existing property rights, and to advance land reform and property rights extension, in a legal manner. That compensation should be paid, is at the centre of the section, and it is also central that the courts must be involved in determining a "just and equitable" compensation if the parties themselves cannot come to an agreement.

In his contribution to the EFF motion, Deputy Minister of Public Works, Jeremy Cronin, gave a number of reasons why the ANC should oppose the motion. He argued that section 25 was agreed upon at CODESA to prevent "arbitrary deprivations" in the future. It also calls for security of tenure of ownership in cases where the apartheid past has left millions of South Africans with insecure tenure or no tenure (for example women). Section 25 further makes land reform and land restitution in the public interest possible. These are good arguments, which an ANC with an existing rural support base and a growing middle-class membership cannot ignore. These are the people who will lose if land grabs without compensation are legalised.

This, however, does not undo the fact that the present land debate is highly emotive and not premised on a proper land audit based on all the facts. There is no agreement, for instance, on what percentage of South Africa's total land surface of 122 million hectares is arable. There is no distinction between privately-owned land and white-owned land, and it is presumed that all privately-owned land is in white hands. The President says it is 82 million hectares (which at 67% seems very high), AgriSA puts the figure at just over 10% (which would be 12 million hectares). They also point out that no private and commercial land transactions between black and white farmers are reflected in the eight million hectares of land that was transferred to black owners that the President spoke of. The State Land Audit, done by the Department of Rural Development and Land Reform, used 2010 data and is inadequate as a basis for discussion and decision-making - amongst others because it views communal land under traditional authorities as privately-owned land.

If an audit of the present state of land ownership could not be done successfully, how will a pre-colonial audit fare? Perhaps with "alternative facts"? Unless a credible and extensive



**FW de Klerk**  
FOUNDATION

land audit is done, the debate will never deliver concrete outcomes on how we as South Africans share the country - and the land.

We are at a stage of South Africa's history where the Constitution (and some aspects of the last 22 years) are wrongly being blamed for the woes of the country. We will have to brace ourselves and be prepared to debate and defend the principles of the Constitution on their own merit. The argument that "it is in the Constitution" may not be enough to keep our country's founding document intact.

A further problem that remains is that of which ANC is in power. Which ANC will have "their" leader elected at the end of 2017? Will opportunism and populism win the day? Will unity on the basis of race, or non-racialism be the foundation of decisions? And, will constitutionalism be able to come out on top?