



PROPERTY RIGHTS AND LAND REFORM IN THE STATE OF THE NATION ADDRESS

The FW de Klerk Foundation, through its Centres for Constitutional Rights (CFCR) and Unity in Diversity (CUD) decided to make property and land a focus for 2017 - in addition to a number of other constitutional issues. Hence this analysis of these two important themes as per the recent SONA, and its subsequent discussion in Parliament.

It is important to state at the outset that the FW de Klerk Foundation believes in the need for proper land reform and the extension of property rights to all South Africans, in line with the prescripts of section 25 of the Constitution. However, in the absence of facts on who owns what and who the real beneficiaries will be, as well government's poor track record in this sphere, we cannot but be very sceptical about the latest government policy of radical economic transformation.

President Zuma was very clear that two important aspects of the government's "new" policy of radical socio-economic transformation were property and land. This involved "fundamental change in the structure, systems, institutions and patterns of ownership, management and control of the economy in favour of all South Africans, especially the poor, the majority of whom are African and female..."

In the context of property and land, he cited three examples:

- That, according to him (quoting statistics from the National Empowerment Fund) "only 10% of the top 100 companies on the Johannesburg Stock Exchange are owned by black South Africans..."
- That "less than 5% of the (property) sector is owned or managed by black people and Africans in particular".
- That "only eight million hectares of arable land have been transferred to black people, which is only 9.8% of the 82 million hectares of arable land in South Africa. There has also been a 19% decline in households involved in agriculture, from 2.9 million in 2011 to 2.3 million households in 2016".

The statistics provided above are either unproven or come from a biased source (like the Empowerment Fund). The fact is that there are no statistics available on the racial composition of the shareholders of the listed companies on the Johannesburg Stock Exchange (JSE). The fact that empowerment deals created 10 such companies surely cannot mean that the others do not have significant black ownership through shareholding, such as the Public Investment Corporation (PIC)? The same is true of the 5% ownership and management of the property sector. Statistics about land ownership, in the absence of a proper land audit, can only be speculative.

During his address, President Zuma also appealed to land claimants to "accept land instead of financial compensation. Over 90% of claims are currently settled through financial



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compensation, which does not help the process at all. It perpetuates dispossession. It also undermines economic empowerment". It must be said that the Constitution does allow claimants to accept reasonable compensation and not necessarily the land itself.

Importantly, he pointed out that he has decided to refer the *Expropriation Bill* back to Parliament for "reconsideration on the basis that it might not pass constitutional muster (sic)". The objectives of this act were "to pursue land reform and land redistribution, *in line with the Constitution*" (our emphasis).

In the debate of the SONA, the Minister of Rural Development and Land Reform, Gugile Nkwinti, made a more ominous remark. He stated that a "pre-colonial" audit of land ownership, use and occupation should be done, and this should be followed by the development of a single law "to address the issue of land restitution without compensation. The necessary constitutional amendments should be undertaken to affect this process".

The FW de Klerk Foundation has long argued that our Constitution is indeed the embodiment of the historical accord reached in the period 1993 - 1996 between opposing political parties. With regard to property and land reform, section 25 of the Bill of Rights is the cornerstone of our property, and indeed, economic, dispensation. For a Minister to make a statement that the Constitution should be changed on this crucial point is not only politically irresponsible, but also economically reckless.

In addition - and many South Africans may have forgotten this - the Interim Constitution, negotiated and agreed at Kempton Park among the major political parties, contained 34 constitutional principles. It was agreed that the final Constitution of 1996 should not violate any of these principles. The so-called property clause in section 25 that Minister Nkwinti wants to change, is based upon those constitutional principles, which the courts have interpreted to be included as part of fundamental human rights. The ANC, as a party to the Interim Constitution, as well as the final 1996 Constitution, has at least a moral duty to honour this principle. If not for their own sake, then for the sake of the economy and the country.

Against this background, a number of issues need to be debated and clarified.

The first is clarity on the parameters of land reform, i.e. the various aspects of *land restitution* (based on successful land claims), the reasons why more progress with *land redistribution* has not been made and the obstacles in *land tenure reform*. In the public debate, these three pillars of the land reform process are not always understood or appreciated. For instance, in the recent parliamentary SONA debate, Minister Nkwinti stated that "land restitution" should be done without compensation. Does his no compensation plan therefore exclude land redistribution?

The constitutional principle of just and equitable compensation for all land reform processes is crucial for a stable economy and country. The same is true of the constitutional principle that the courts should in the last instance be the decision-making body on what is just and



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equitable. The decisions of the Valuer-General will definitely end up in court and may be declared unconstitutional.

It has been said that through the acceptance of the *Property Valuation Act* and the establishment of the Office of Valuer-General, the government has moved away or can move away from the principle of “willing buyer, willing seller”. Criticism about this policy goes back more than 10 years. Sometimes it seems that it was designed solely by those who want to hold on to what they have and that the Constitution is somehow to blame. This is in fact a government policy and goes further than the Constitution demands. Furthermore, analysis indicates that the problems with this policy lie not (necessarily) with seemingly recalcitrant property owners but with bureaucratic processes and government capacity. Will the “new policy framework” also address these issues? The Minister unconvincingly, but not surprisingly, blamed the serious challenges facing the implementation of the land reform programme on “incoherent institutional transformation”. There is no mention of the almost total lack of state support for beneficiaries of land reform. One must also remember that the present drive to grant black South Africans title deeds for property that they have owned for years, is, by and large, a private sector initiative, sparked by examples from the World Bank.

One of the compounding problems that has arisen of late is the principle of the state holding property “in custodianship”. The Constitutional Court has interpreted this as not being the same as expropriation, notwithstanding the fact that the private owner of the property has lost his/her right over the property. This surely cannot reflect the spirit of section 25? It is also disconcerting to note that the President’s figures of 9.8% of land transferred to black South Africans probably do not include the 90% of claimants who have opted for financial compensation, leaving the state to hold the land “in custodianship” - effectively owning it. If this were true, proper figures should be made available by the state of the land it holds in trust and what the plans are with that land in terms of land redistribution.

It has long been argued that a proper land and property audit (and Minister Nkwinti has made the same statement, albeit a “pre-colonial one”) is necessary. To put it mildly, South Africans do not have a scientifically-based picture of who owns what in South Africa. This leads to wild assumptions and half-truths (including the President’s claim about only 10% of the top 100 companies on the JSE being “black-owned”). It is, for instance, not clear how much land the state owns, including municipalities and parastatals. As there is arguably at least as much an appetite for land ownership to build a house in or near cities as there is for owning a small-holding or farm, these figures need be publically available. This must include so-called traditional land that is often not taken into account as being open to land reform and private ownership. The FW de Klerk Foundation therefore calls for an urgent meeting of all stakeholders (led by the state) to design and start a process to do a proper land and property audit. Without that, land reform and empowerment measures, as envisaged in our Constitution, are simply not going to be as effective as they should be.

Finally, when viewed in the light of the recent developments in the country and in the ANC around state capture, one has a lingering (and legitimate) suspicion that all the talk about radical economic transformation is merely a way to remove all constitutionally-based checks



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and balances and other obstacles to empower only those well-placed with the Zuma administration and, in effect, to facilitate further looting of state and private resources. Assurances to the contrary are not only necessary, but should also be more convincing than mere rhetoric. The state owes it to all its citizens, especially those who are most in need of the economic opportunities that property and land could bring.

The FW de Klerk Foundation will, in the course of 2017, hone in on some of these and other relevant issues to bring clarity, promote debate and, where necessary, oppose measures that may deviate from section 25. Our commitment to our Constitution demands this.

Issued by the FW de Klerk Foundation
21 February 2017