

What Does South Africa's Constitutional Project Entail?

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Recent statements made by a senior advocate, Tembeka Ngcukaitobi, who is currently serving in an acting capacity as a judge in the South African Land Claims Court, raise a number of considerations and serious questions about what constitutes South Africa's *constitutional project* – particularly when considering the possibility of expropriation of property without compensation (EWC).

According to reports in *Business Day*¹ and *Legalbrief*² Ngcukaitobi recently stated that “it is an exaggeration to say that expropriation without compensation will collapse the banking sector” and that “banks seemed reluctant to play a role in correcting structural inequalities”.

The reports indicate that Ngcukaitobi made these and other statements during a webinar organised by the Wits School of Governance to discuss his new book, *Land Matters: SA's Failed Land Reforms and the Road Ahead*.

It is reported that Ngcukaitobi said “banks must think seriously about their involvement in the constitutional project at the heart of which is reparation, the restoration and creation of an equitable society”.

Ngcukaitobi is the author of a book titled *The Land is Ours* which was released in 2018 and also served on an advisory panel (appointed by President Cyril Ramaphosa in September 2018) on land reform in South Africa as part of South Africa's ongoing land reform process.

According to the reports “banks have an estimated R1.6trn in property loans that include land, commercial property as well as home loans” and further that the “Banking Association of South Africa (BASA) has recently warned that expropriation without compensation (EWC) could spark an economic crisis in South Africa if implemented, much like the 2007/2008 global recession that started with the downturn in land-based property in the United States”.

The above refers to BASA's submission to parliament on 30 January 2020 regarding the amendment of Section 25 of the Constitution in which it warned that land reform should take place in an orderly manner that does not dilute property rights.

According to BASA -

“A marked decrease in the value of land-based property, caused by either an amendment to legislation and/or market uncertainty, and the resultant reduced appetite from property buyer could destabilize the banking sector and have a negative impact on the credit rating of the sector and the country.”

BASA added that its exposure to land based property was R1,613 trillion – and cautioned that –

“many banking crises around the world have their starting point in the decline in land-based property and the impact that this has on market confidence.”³

¹ [Expropriation without compensation will not collapse banks, says Ngcukaitobi \(businesslive.co.za\)](https://www.businesslive.co.za)

² [Legalbrief Today Home Page](#)

The reports further indicate that Ngcukaitobi stated “if you think of how they (banks) have been opposed to any model of justice and equity, not just expropriation without compensation, what it simply means is that the banks want to be excluded from the risk of addressing historical disadvantages”.

The reports indicate lastly that Ngcukaitobi stated “if you put all the numbers together – their own claims and the impact of expropriation without compensation – largely the claims are vastly exaggerated. It is not as if introducing expropriation without compensation on a targeted basis for specific classes of property will bring down the entire banking industry”.

Ngcukaitobi’s comments as reported raise a number of considerations and also serious questions about what constitutes South Africa’s ‘constitutional project’?

Firstly – South Africa’s ‘constitutional project’ and its’ goals are set out very clearly, and in unambiguous terms, in section 1 of the Constitution stating that South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism as well as supremacy of the constitution and the rule of law.

As regards property rights the Constitution is also very clear: Section 25(1) states that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Further, property may be expropriated only in terms of law of general application for a public purpose or in the public interest; and subject to compensation. The amount of the compensation and the time and manner of payment must be just and equitable.

Land reform and the expansion of property rights to all South Africans to address our past, is of the *utmost significance* – it remains an emotive issue that most certainly forms part of South Africa’s constitutional project.

It is however, not the *only* building block of our constitutional project.

To want to introduce EWC as a ‘silver bullet’ to address land reform is ill-informed and South Africa can only learn from countries where similar, targeted policies were implemented – such as Venezuela, Syria and Zimbabwe.

Secondly - the present formulation of section 25 of the Constitution constitutes a proper legislative framework and should be used to speed up the land reform process and extend property rights to all. The failure of effective land reform in South Africa cannot be ascribed to the payment or not of compensation - instead it must be ascribed primarily to the incapability of the government departments involved in the administration of land reform as well as corruption – this was confirmed and reiterated by the 2017 High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (the “High Level Panel Report”) which was chaired by former president Kgalema Motlanthe.⁴

³ PUBLIC SUBMISSION TO THE AD HOC COMMITTEE ON THE AMENDMENT OF SECTION 25 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (CONSTITUTION EIGHTEENTH AMENDMENT BILL); Banking Association of South Africa, 30 January 2020.

⁴ [HLP report.pdf \(parliament.gov.za\)](#)

Indeed, Ngcukaitobi's recent comments stand in sharp contrast to statements he made on EWC during 2018 when his book ('The Land is Ours') was launched when he conceded that the payment of compensation was not the problem facing effective land reform - in an interview at the time with Eyewitness News (EWN) Ngcukaitobi stated that *"compensation is not the stumbling block to land reform, the lack of political commitment from government, corruption and weak institutions are"*.⁵

The ongoing politicized narrative -driven by the ANC's policy of radical economic transformation- that EWC is needed to speed up land reform to redress the wrongs of apartheid, is incorrect.

Section 25, in its current format, deals specifically with land reform and places a positive obligation on the government to indeed take positive action in expanding and entrenching property rights for all South Africans – including previously disadvantaged South Africans.

The narrative that has been created which inaccurately advocates that section 25 in its current form serves as an *impediment* to accelerated land reform in South Africa, and for this reason EWC is needed as encapsulated in the Expropriation Bill, is fallacious – ultimately, blaming the Constitution (specifically section 25 in its current format) and seeking to introduce EWC through the Expropriation Bill as redress for the failures of government, is inappropriate as success with land reform, *as part of South Africa's constitutional project*, depends on not only compliance, but also adherence, by government.

* Want to know more? Listen to the FW de Klerk Foundation's recent Podcast on EWC and the Expropriation Bill [here](#)

⁵ [Ngcukaitobi: ANC-led govt has failed on land reform, not best suited to lead it \(ewn.co.za\)](#)