



FW de Klerk
FOUNDATION

TOWARDS A POSITION ON THE EXPROPRIATION OF PROPERTY (INCLUDING LAND) WITHOUT COMPENSATION

Introduction

The FW de Klerk Foundation (FWDKF) was established to protect and promote the Constitution. This we do through the work of two Centres: the Centre for Constitutional Rights (CFCR) and the Centre for Unity in Diversity (CUD). For 2017 and 2018, the general theme of our work is Property Rights and Land Reform.

The choice of theme by the Foundation preceded the current debate on Expropriation Without Compensation (EWC), sparked by the resolution tabled in Parliament in February 2018. This is in fact testimony of the commitment of the Foundation to land reform and the institutionalisation of property rights for all South Africans. Furthermore, we believe that the Constitution offers sufficient means and measures to effect land reform within the precepts of section 25 and we remain studiously committed to its implementation as it stands.

As a Foundation with its two Centres, we offer this position on EWC as a contribution to the essential and ongoing debate in this regard. This position will be extended as the debate continues.

Section 25 and its Proposed Review

Section 25 of the Constitution has two distinct parts. In subsections (1) to (4) the protection against arbitrary deprivation of property rights and the modalities of expropriation are stipulated. In subsections (5) to (9) the State's obligation to ensure equitable access to land, land reform and redress is described. The FWDKF firmly supports the letter and spirit of section 25, and strongly believes that both components of section 25 should be implemented and upheld to ensure effective and sustainable land reform that responds to economic growth and the aspirations of many South Africans.

We do not believe that to achieve the twofold goals of section 25, there is a need for any constitutional amendment. We strongly assert that the Constitution is not an impediment to land reform. We also believe that section 25 has so far not been properly implemented with regard to land reform, redress and equitable access to land for disadvantaged South Africans. There is ample evidence for this view, the most important of which is the Report of the High Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change (High Level Panel Report), appointed by Parliament and led by former President Kgalema Motlanthe. As former Constitutional Court Judge Albie Sachs stated in evidence to the High Level Panel, section 25 has not been constitutionally tested and in the absence of testing current provisions, Parliament should be cautious of advocating for a constitutional amendment. The same argument can be extended to the fact that the High Level Panel Report laid the blame for the lack of progress with land reform in terms of section 25, almost fully on Government and the lack of political will.



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We therefore believe that in the absence of evidence that section 25 is an impediment to land reform and redress, our position is reinforced that an amendment is unnecessary. An amendment will not address the absence of both the will to test the provisions of section 25 and the general lack of progress of the land reform programme. The latter offers recourse through restitution of land rights, the redistribution option and finally the prospect of tenure upgrade.

Evidence of progress and a comprehensive land audit are vital mechanisms to balance an increasingly populist sentiment about the best recourse for land reform in South Africa. EWC is at once unconstitutional and will destroy the economic fabric of the country, thus rendering the discourse about food security, livelihoods and growth, null and void. Important to note that in its economic forecast for the last quarter of 2017, agriculture was a net contributor to GDP and contributed to an upward tick in the economy, with the prospect of revised growth figures for the near future. An amendment to section 25 is not correct and will not solve the present lack of progress.

Expropriation Without Compensation

The parliamentary motion on EWC mirrors in essence the resolution of the ANC at its elective conference in December 2017. Especially relevant are the two conditions for such expropriation without compensation: *“implemented in a manner that increases agricultural production and improves food security”*. This moves away from the essence of the original EFF motion that the State should be the custodian of all South African land. It is, however, significant that the original ANC resolution (according to the statement released on 20 December 2017) has additional conditions: EWC should be pursued *“without destabilising the agricultural sector, without endangering food security in our country and without undermining economic growth and job creation”*. Then ANC president Cyril Ramaphosa in this regard stated that this process should be managed in a way that would not *“undermine the economy, agricultural production and food security”*. There are subtle differences here: the aspect of undermining the economy does not appear in the parliamentary motion. Close scrutiny of the process is therefore warranted.

The ANC government itself put in place a set of comprehensive policies and infrastructure for land reform but did not effectively implement it - as the High Level Panel Report shows. This lack of progress was seized upon by the EFF in the last few months, notably in its motion to Parliament in February 2018. While the EFF message is seductive to a disenfranchised electorate, the risks to all South Africans of nationalisation of all land is enormous. By any other name, this would be asset stripping, and the negative implications for upward mobility are enormous. The dangers of stymieing the middle classes are well documented. The philosophical but real question arises of what long-term damage to democracies can be done when anarchy is allowed to prevail. Today it may be property rights and tomorrow the threats escalate to other sectors and other constitutional protections. The attempt by the EFF to play political brinkmanship must be exposed for what it is. The initial EFF resolution called for *“the necessity of the state being a custodian of all South African land”*. Placing all land into the custody of the State is not in the interest of any



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South African, given the well-documented lack of State capacity to optimally administer land for land reform purposes. The undermining of property rights will impact all equally.

We believe that the debate and possible solutions should be evidence-based. It is therefore imperative that the facts about who owns what land and what has happened since 1994, be put on the table. In this regard, the recently released government land audit is not helpful. To say, as has been repeated in the motion, that black South Africans only own 2% of rural and 7% of urban land, is a far cry from reality. Another land audit, done by AgriSA, shows that more progress has been made with commercial transfer of land, (i.e. on the open market), but some may argue that this audit lacks political legitimacy due to suspicions about the source of the audit. A comparison of the two land audits shows glaring differences and inconsistencies. There is need for a process to agree on the facts.

We also believe that the High Level Panel Report contains some excellent suggestions, most of which we support, including the imperative to focus immediate attention on extending private property ownership to black South Africans, including millions in urban areas and people living on communal land. The reality globally - and South Africa is no exception - is that urbanisation has rapidly taken root and is a growing phenomenon, and this reality must inform policy. For people who want to farm and engage in the agricultural economy, resources - including financial and infrastructural - must be made available to set them up for success.

We should also highlight that any attempt to destroy the system of property rights will impact those with insecure tenure, as they will be victims of no compensation when their land is expropriated (labour tenants, communal land dwellers etc.). Any abolishment of private ownership of land has proven again and again that it is an equal opportunity destroyer.

The decision to give this task to the Constitutional Review Committee is to be welcomed in respect of eliciting a variety of views and findings to inform the discourse on land reform in South Africa. Implicit in the discussion and outcomes must be a consideration of the existing constitutional and legal mechanisms to effect change - without threatening the foundations of our constitutional democracy and the economy. Economic statistics released recently demonstrate a slight but positive change upward, driven largely (and ironically) by the agricultural sector. Growth is in the interest of every South African, and inclusive growth more so.

Conclusion

The FWDFK will continue to oppose any amendment to section 25 of the Constitution. At the same time, we will continue to look for and propose creative yet realistic means to further extend ownership of land to all South Africans.

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