



FW de Klerk
FOUNDATION

**SPEECH AT THE FW DE KLERK FOUNDATION CONFERENCE
ON PROPERTY RIGHTS AND LAND REFORM
4 JULY 2018
JOHANNESBURG**

**THEUNS ELOFF
EXECUTIVE DIRECTOR**

1. Introduction

Thank you Mr Suhr, for your introduction and the perspective of KAS on our important conference. Former President De Klerk has set the scene further by his astute analysis and comments about the possible change of section 25 of the Constitution.

My task is to take that further and proverbially lay the table for our conference, its speakers and its audience. I will do this by, firstly, reiterating the position of the Foundation on property rights and land reform, and secondly, by pointing to three conditions for constitutional land reform and extending property rights to all South Africans.

In today's first session, we will hear from a range of experts on the crucial importance of property rights for any economy and democracy. In the following sessions we have asked experts to share with us their views on what needs to be done to extend property rights to all South Africans, using accelerated land reform. We focus on three areas: agricultural land, urban land and communal land. In the last session we also asked a member of the High Level Panel led by former President Motlanthe to share with us what that Report says should be done. We will have two panel discussions with ample time for the audience to become involved in the discussion.

2. The Position of the Foundation on Property Rights and Land Reform

In general, it is the Foundation's view that changing section 25 is not necessary to achieve effective land reform. In this, we agree with the Motlanthe Report. Effective and accelerated land reform is possible with the present wording of section 25.

We also believe strongly that changing section 25 to allow expropriation without compensation (EWC) is very dangerous and will have extremely negative political, economic and legal-constitutional consequences. Among the political consequences are that it would lead to political instability and even anarchy. It would be a free for all. It would also all but break the national accord that we as a nation agreed on in 1994.

In terms of the economic consequences, we believe - with many others - that it is impossible to implement EWC in any form without causing irreparable harm to the agricultural sector, food security, other sectors of the economy and future investment in the economy. And these four conditions are those specifically mentioned in the ANC's Nasrec resolution. To quote a self-acknowledged communist, Deputy Minister Jeremy Cronin, it would be like fitting a square peg into a round hole. In addition, the test for



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economic harm is not an objective one, determined by Parliament or politicians. It is a highly subjective one, decided by farmers, business people and property owners. It is actually quite simple: if they perceive EWC as harmful, it will be harmful - because they will stop farming, investing and buying and selling.

May I also point out that business people and investors hate and fear nothing more than uncertainty. With the section 25 process in progress and its end not in sight, we can already see that the economy is being hurt by economic actors (including many farmers) playing a waiting game and not committing to new investment. This should be a lesson to all concerned.

The legal-constitutional implications would be as serious. In changing section 25 to allow EWC, and targeting a specific group of South Africa's population, the law no longer becomes a law of general application and would be running contrary to the values of section 36. In allowing EWC, the section 25 reference to just and equitable compensation would have to be removed, detracting from the principles of legality, which undergird the Rule of Law. And finally, taking out the jurisdiction of the court to approve the compensation, would transgress all known legal principles and run contrary to established legal norms.

But having stated all of that strongly, the FW de Klerk Foundation is also fully supportive of extending property rights to all South Africans and of accelerated land reform as section 25 stipulates. In our parliamentary submission we therefore went beyond saying "no" to a change; we actually made constructive proposals how to achieve effective land reform and extend property rights to all South Africans. We support this, as we do an effective state addressing the triple issues of poverty, inequality and unemployment, as well as other important issues such as quality education and healthcare.

I will now deal with what we believe to be three conditions for constitutional land reform and extending property rights to all South Africans.

3. Towards Constitutional Land Reform: Three Conditions

3.1 A proper, trustworthy and legitimate land audit

At present we have access to three land audits: the Department of Rural Development and Land Reform conducted an audit in 2013, and another in 2017. Both of these are by and large unhelpful, with glaring inaccuracies and inconsistencies. Agri Development Solutions did an audit of agricultural land that was also published in 2017. It gives a much clearer and credible picture of ownership of agricultural land, but it obviously does not go further than agricultural land.

Another study on state land was published recently by Burgert Gildenhuys in *Business Day*. It was done by mapping state land and state-controlled land and comes to significant conclusions by using 2013 spatial data sets. According to this,



state land stands at 13.4 million hectares or 11% of total land. This includes land used for agriculture and fisheries by the state, residential purposes, conservation and leisure, and undeveloped land. Importantly, the study points out that traditional or tribal land is not included in state-land data, is not available on the open market nor is freehold ownership allowed. This type of land equates to 13.6 million hectares or 11.1%.

A third element is the portion of former homelands not included in the above, land that was designated and/or expropriated for incorporation into the homelands. This land was transferred to homeland governments prior to 1994. A total of 17.0 million hectares (or 14%) must then be added to state-controlled land. The last category that does not appear in any land audit is formal protected areas, which include national parks and nature reserves under the control of provincial governments. These areas are protected by law and are obviously not designated for private ownership or control and must be removed from the land pool. These areas add another 8.0 million hectares or 6.6% to the equation.

These four categories bring the total land under state control (and not available for redistribution or restitution) to 52.1 million hectares or 42.7% of all land in South Africa (121.9 million hectares). Contrary to this, the government audits maintain that state land amounts to 14% (according to the 2013 audit) or 22.9% (according to 2017 audit).

We cannot reform or redistribute what we do not know. It is therefore imperative for the President to commission a proper, comprehensive and legitimate land audit - executed by a task team consisting of public and private sector staff and using all resources at the state's disposal. It shouldn't take more than 12 months to do this.

3.2 A comprehensive legislative framework

The second condition for effective and accelerated land reform, is a comprehensive legislative framework. It is clear from the Motlanthe Report that Parliament has not done its constitutional duty in this regard.

There is no legal definition of land reform - even though it is mentioned in section 25, together with security of tenure and restitution. There is currently also no law that governs access to land on an equitable basis. There is therefore firstly, a need for an act on land reform. As any legislation, it should entail at least the following:

- A definition of land reform and its constitutional necessity in terms of section 25;
- The nature of land reform, following the Constitution's elements of redistribution, restitution and security of tenure;
- The scope of land reform, in terms of agricultural land, urban land and communal land, including a comprehensive rural strategy, as well as an urban development strategy;



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- Prescribed procedures of how land reform processes in the areas of agricultural land, urban land and communal land should take place, and the alignment of these processes, where necessary;
- Transparency in how the beneficiaries of land reform are determined;
- Accountability of the officials mandated to manage land reform processes, including proper and regular reporting on targets reached;
- Processes to ensure that land reform beneficiaries receive full title of their land, thereby extending property rights to more and more South Africans;
- The right to state support in post land reform circumstances;
- Measures to prevent any possible threats to food insecurity;
- A guarantee of skills transfer to ensure the re-emergence of African farmers;
- Possible indicators (signaling a sunset clause) of successful land redistribution, namely improved food security, more income, increased wellbeing, reduced vulnerability and improved agricultural sustainability.

It is only with such a comprehensive framework that land reform could be effectively, transparently implemented - in line with section 25 of the Constitution.

In addition to the comprehensive legislative framework, it is also necessary to amend existing legislation to bring it in line with the Constitution and the legislative framework. This legislation includes the *Interim Protection of Informal Land Rights Act* 31 of 1996 (IPILRA), the *Land Reform (Labour Tenants) Act* 3 of 1996, the *Extension of Security of Tenure Act* 62 of 1997 (ESTA) and the outdated *Expropriation Act* 63 of 1975 (Expropriation Act). The latter was meant to be replaced by the *Expropriation Bill* [B4D-2015] but was returned by the President to the National Assembly due to reservations about inadequate public participation.

3.3 An effective and capable agency to implement land reform

It is clear from regular media reports that the capacity in the public service generally is, to put it mildly, not what it should be. This is, according to the Motlanthe Report, also true of the Department of Rural Development and Land Reform, and provincial and municipal sectors involved in land reform. In fact, the Motlanthe Report identifies a lack of capacity and corruption as one of the three reasons why land reform in South has faltered in the last two decades.

The inescapable conclusion is that, even with a proper land audit and a legislative framework in place, it will not be possible to accelerate land reform in an effective manner with the lack of capacity and corruption in the relevant departments.

The third condition is therefore the creation of a capable and efficient land reform implementation institution.

The private sector is well known for what is called “special purpose vehicles” (SPVs).



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These provide a framework for raising funds, linking participants legally and assuring supply, production and marketing of products. The National Treasury has developed a Public-Private Sector Partnership (PPP) Manual for a typical PPP structure to provide the mechanism for soliciting sources of funding for a specific project, delivered by an SPV. The Department of Trade and Industry is using SPVs representing industry, academia and government to support demand-led growth in specific sectors. The Department currently supports 12 SPVs across a range of manufacturing, service and agri-business sectors.

It is obvious that land reform differs from the above examples. But the creation of an SPV for land reform along the principles of a public-private partnership could yield the mechanism to achieve land reform. Agri SA has also raised this possibility, concentrating on the evaluation of land reform models, promoting the implementation of viable options, being responsible for facilitating the mobilisation of funds and for securing incentives for land reform. In Columbia's land reform programme, an SPV was created with the help of the Food and Agriculture Organisation of the United Nations, consisting of government and civil society organisations, and providing policy advice on three important new institutions: a national land registry, a rural development agency and a territorial renovation agency.

Our recommendation goes further. We suggest the creation of an SPV in terms of legislation as an implementing agency for land reform. Such an SPV should consist of a Board and an Executive made up of the best the public, private and NGO sectors can offer. It should be located in the Presidency and have a specific mandate to be able to work across departments and provincial and municipal borders. It should also work actively to establish partnerships with existing organisations in the land reform arena, such as Agri SA and the Vumelana Advisory Fund.

The Land Reform SPV should receive a mandate for a specific and limited period only (for example 10 years) and be given specific targets to be achieved during that time.

This may be an unusual solution, but land reform and the extension of property rights to all South Africans demands nothing less. And nothing less will achieve that goal.

4. Conclusion

I hope that this has helped to set the background for our conference today. And that we will be able to do justice to the two aspects of section 25: property rights for all South Africans, through effective land reform.

I thank you.