

THE NEW SOUTH AFRICA 2018

TRYING TO FIND OUR WAY...THROUGH LAND REFORM

THE JOURNEY: CODESA and DEMOCRACY 1994

- Negotiated settlement of a war
- Historic compromise: White political and military power handed to Democratic Government
- Property rights protected (Section 25 of the Constitution)
- Rejected by left and right wings – Mandela and De Klerk called sell-outs
- Interim Constitution and then Final Constitution Act 108 of 1996
- New Dispensation embraced by the Constitutional Court
- New South Africa embraced by the World
- New South Africa embraced by overwhelming majority of all South Africans

Constitutional Mandate for Land Reform is found in the Property Clause – Section 25

Section 25 of the Constitution: - THE PROPERTY CLAUSE

- 25 (1)....
- (5) The state **must** take reasonable legislative and other measures, within its available resources, to foster conditions which **enable citizens to gain access to land on an equitable basis.**
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices **is entitled**, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices **is entitled**, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
- (9) Parliament **must** enact the legislation referred to in subsection (6).

THE PROPERTY CLAUSE: Section 25 (1)

25 **Property**

- (1) No one may be **deprived** of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

WHY HAVE A PROPERTY CLAUSE IN A CONSTITUTIONAL DEMOCRACY?

Protection for all citizens against arbitrary, abusive, unjustified, severely prejudicial or unfairly discriminatory expropriation or deprivation of rights in property

DEMOCRACY IS NOT PERFECT? THE WILL OF THE MAJORITY IS CORRECT AND JUST?

Benjamin Franklin:

*'Democracy is two **wolves** and a **lamb** voting on what to have for lunch. Liberty is a well-armed lamb contesting the vote!'*

The Property clause arms the lamb and protects against the shortcomings of Democracy

INTERNATIONAL PROTECTION OF PROPERTY RIGHTS

- Universal Declaration of Human Rights – 1948

“Article 17

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.”

- African Charter of Human and People’s Rights

“Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

THE COMPENSATION CLAUSES: 25 (2) – (4)

25

- (2) Property may be expropriated only in terms of law of general application-
- (a) for a public purpose or in the public interest; **and**
 - (b) **subject to compensation**, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

How Compensation is determined:

- (3) The amount of the compensation and the time and manner of payment must be **just and equitable**, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.
- (4) For the purposes of this section-
 - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;
and
 - (b) property is not limited to land.

How other jurisdictions determine compensation:

Full compensation – Denmark, Norway, Russia, Kenya, Seychelles, Lesotho

Fair compensation (balancing test)- USA, Poland, Japan, Egypt, Namibia, Congo, Mozambique

Equitable compensation – France, Rwanda, Madagascar, Tanzania

Adequate compensation – Botswana, Uganda, Zambia

PROPERTY CLAUSE AND COMPENSATION: THE PRICE OF THE SETTLEMENT?

- The perfect settlement is give and take
- Both parties will be unhappy about compromises
- What compromises were made in 1994? Proof?
- Should they be honoured?
- What happens if they are not honoured?

The effect of an agreement in law

- Binding on all parties and their successors in title
- Gives certainty on the rights and duties of all parties
- People conduct themselves on the basis of the terms of the agreement
- Parties can move on

Land Reform Process 1994 - 2018

THREE TIER PROCESS

- **FIRST TIER: Security of Tenure:**

The Development Facilitation Act- 1995, the Housing Act 1997, The Land Reform (Labour Tenants) Act 1996, The Extension of Security of Tenure Act 1997 (ESTA), the Prevention of Illegal Eviction Act 1998 (PIE) and the Communal Land Rights Act - 2004

- **SECOND TIER: Land Restitution:**

Restitution of Land Rights Act 22 of 1994

- **THIRD TIER: Land Redistribution:**

Expropriation – compensation (to date: willing buyer /willing seller)

How the Constitution envisages Land Redistribution:

- **State resources:** access to land on an **equitable basis**. (Section 25 (5))
- Land dispossessed in terms of the Native Land Act of 1913 – **land dispossessed after 19 June 1913**: (Section 25 (7))
- Other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination (Section 25 (8))
- Expropriation with compensation (Section 25 (2) - (4))

FAILURES IN LAND REFORM

- ANC target of 30% of white owned land to be redistributed by 2014 (NDP set target at 20% by 2030). Possibly 12% achieved
- Slow rate of purchases
- Kick-backs and corruption
- Inflated prices
- Failed farms: loss of productivity
- Lack of capacity in State to drive the process
- Very little attention to Urban land reform
- 5000 farms not allocated

Successes in Land Reform

- **Security of Tenure** comprehensively provided for and enforced by Courts –still insecure in certain classes of land
- **Land Restitution and Redistribution:** 3.32 million hectares purchased and transferred by State
- **Private land purchases:** 4.3 million hectares purchased by Black persons (market prices) – Access to land purchases (Land Bank Assistance and private funding)
- 20% transfer target of NDP will be achieved by 2030
- High Level Report on Land Reform – comprehensive and honest

Statistics:

What is the truth currently about property ownership?

- 87 / 13% black white ownership split?
- 2017 State land audit (All land in SA): Direct Ownership (Rural)- 24% privately owned

	White	Black
Rural	23.6	1.2 (4?)
Urban	11.4	7

Balance owned by: The State, Trusts, Traditional Authorities, churches, community organisations (no racial profile provided)

- ADS /AGRI SA audit – Only focused on farmland (excluding State held land in former homelands (25% of land)), national parks etc):
26% owned by State and Black persons (73% (76%?)of former white farmland still white owned)

State and Black ownership by province (ADS / AGRI SA)%: **HOW FAR HAVE WE ACTUALLY COME?**

	1994	2016
Limpopo	38,5	52
Gauteng	0. ?	39.1
Mpumalanga	10.4	38.7
North West	34.5	45.3
Free State	1.6	7.9
KwaZulu-Natal	45.4	73.5
Eastern Cape	28	48.3
Northern Cape	0?	6.4
Western Cape	0?	4.9

NEW ISSUES IN LAND REFORM

- Aggressive urbanisation – 10 million moved to cities since 1994 (estimate of 70% urbanisation by 2030, 80% by 2050?)
- Huge pressure on Agriculture to produce more food for those in cities
- Bigger and more competitive farms (smaller units not economically viable) have developed to meet demand (economy of scale)
- Only 25 000 commercial farming units left in South Africa (from 120 000 in 1952)
- Very little State support for Commercial Agriculture
- Very few youth (all races) committing to farming as a career -why?
- Shortage of skilled farmers looming
- Rural areas facing negative population growth rate
- Negative growth rate of white population – particularly in Rural areas (white farming skills dying out)

Other challenges to Land Reform: Myths and Realities about Farming

- Anyone can farm?
- Everyone wants to farm?
- No land immediately available? 5000 farms not allocated
- 1 hectare 1 person? The sums don't work:
 - a) Dryland maize per annum on 1 hectare = 4 tons
@ R2200 per ton = R8800 p/a
Less input costs: R2500 per hectare = R 6300 p/a
 - b) Carrying capacity of veld is 3 hectares per large animal unit (1 cow) in good areas (high rainfall eg KZN Midlands)
1 hectare = 1/3 of a cow????
- Land = income - lots of it! (You can't eat the soil...)
- We can become an agrarian society again? (The green dream?)
- Title deeds will solve everything?

AND THEN....

THE RISE OF THE LEFT WING: 2013 - 2018

3 BIG AGENDAS:

1. Zuma must go
2. Fees must fall
3. Nationalisation of land via Land expropriation without compensation (the same rejection by the Left Wing of the compromise of 1994)

AND THE ANC HIT BACK

1. Fees must fall was victorious (Zuma's last dance)
2. Zuma went
3. And the land debate was taken back to the ANC

With the result.....

THE JOINT CONSTITUTIONAL REVIEW COMMITTEE - 2018

- **REVIEW OF SECTION 25 OF THE CONSTITUTION ON EXPROPRIATION OF LAND IN PUBLIC INTEREST WITHOUT COMPENSATION**

A simple legal question:

Is it necessary to amend Section 25 of the Constitution (“the property clause”) to provide for expropriation without compensation?

Public Hearings –

An unusual way to answer a legal question

RESPONSE OF THE LEGAL FRATERNITY

- Retired Constitutional Judge Sachs states in his submissions to the Committee opposing an amendment:
“Far from being a barrier to radical land redistribution, the Constitution in fact requires and facilitates extensive and progressive programs of land reform.”
- Retired Deputy Chief Justice Moseneke- Amendment not necessary
- Mr Jeremy Cronin, Deputy Minister of Public Works- Amendment not necessary
- Ronald Lamola (lawyer) ANC NEC: Sections 25 (3) – (4) pave the way for expropriation with compensation in certain cases
- **AGRI South Africa and others v Minister of Minerals and Energy**, Agri SA v Minister for Minerals and Energy and others, Case CCT 51/12 [\[2013\] ZACC 9](#), 18 April 2013 – deprivation case (No compensation in certain cases)
- AND now ANC Senior Leadership seem to be accepting it is not necessary (before the Committee gives feedback!)

RESPONSES AT THE HEARINGS

- Whites are thieves: They stole our land
- Colonialists must be driven off the land
- Whites must not tell blacks what to do with their own land
- Blacks can do whatever they want with the land
- We are taking back the land
- How can you negotiate with a thief about stolen goods?
- Thieves have no rights
- Whites belong in Europe – go home
- Nationalise all land

WRITTEN RESPONSES:

Majority assessment currently: Amendment not necessary

THE PROXY DEBATE?

- Minister Cronin calls it a problematic diversion and a *“proxy for a deeper challenge”*
- Journalist Max Du Preez wrote on 31 July 2018:

“The land debate is almost more about history, symbolism, redress, justice and black dignity than about land itself”

President Ramaphosa's announcement: 31 July 2018

- ANC will amend the property clause of the Constitution
- ANC will announce how they will reword the expropriation provisions
- And we wait for an answer...

President Ramaphosa's answers in Parliament on 22 August 2018

We are going ahead with this process - still figuring it out.... Watch the space....

And we are still waiting....

So, what will happen?

- Nationalising of all rural land is not on the cards (The Zulu King stopped this...)
- Probable that specific classes / types of land will be identified for expropriation without compensation. Minister Cronin has proposed a brief limitation in an Expropriation Bill that will probably be pushed into the Constitution along the following lines:

In cases of expropriation in the public interest, the state MAY withhold compensation where the property is

(a) an abandoned building;

(b) un-utilised land

(c) Property held unproductively and purely for speculative purposes;

(d) Land actively farmed by labour tenants with an absentee title holder....

HOWEVER THE DEBATE HAS EXPOSED THE RAW NERVES OF SOUTH AFRICA

- Black pain / White fears
- Inequality
- A deeply divided society
- Hatred
- Retribution
- Failed reconciliation
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The “new” Democracy argument- The trump card?

Black people are the majority therefore whatever they decide is correct?

The majority must own the majority of land? (Urban / Rural split- 70/30%) Rural dwellers will always own / possess the bulk of the land

Changing demographics: Numbers power

	Asian and other	Coloured	Black	White
1911	2.4	8.8	67.3	21.4
1960	3	9.4	68.3	19.3
2011	2.99	8.9	79	8.86

The “new” treason /breach arguments

- Amending the Constitution is “treason” / “breach”
- Right wing: Betrayed, I told you so..... (Dingaan/Piet Retief)
- Left wing: Majority must decide and are right – no breach
- For 24 years the right wing farmers have sold their land, taken the money and left South Africa – those who remain want to remain and are now to be punished by losing their investments and property?
- Property is not limited to land... where and when will it end once the box is opened?

AND THE DEBATE HAS EXPOSED THE GOLDEN CALVES OF SOUTH AFRICA

- Mammon
- The protection of Mammon – The Bill of Rights
- The lust for Mammon
- Greed
- Covetousness
- Discontent
- Personal Peace and Affluence?

CLOSED HEARTS – CLOSED MINDS

THE GREAT DIVORCE CASE

THIRD PARTY: THE GOLDEN CALVES

What does the Bible say about Land
Redistribution?

What does the Bible say about land and ownership of land?

Leviticus 25:23

“The land is not to be sold permanently because the land is mine and you reside in my land as foreigners and strangers.”

Psalm 24: 1

“The earth is the Lord’s and everything in it.”

CAN WE RECONCILE OUR VIEW OF LAND WITH THIS?

WHAT DOES JESUS SAY ABOUT LAND REDISTRIBUTION?

Nothing....

BUT he had a lot to say about our attachment to our possessions:

Luke 6:30

“Give to everyone who asks you, and if anyone takes what belongs to you, do not demand it back”

Mark 10: 17-31 (The Rich young ruler)

“You lack one thing, go, sell all that you have and give to the poor, and you will have treasure in heaven and come, follow me.”

How attached/detached are we to our possessions?

WHITE WEALTH: The hurdle we are stumbling over

Introspection:

what do I have / not have that is a stumbling block to me?

what do I have / not have that is a stumbling block to you?

what should I do about it?

Collateral Damage in the Land Debate: THE CHURCH

- A strong attack on the work of the Church in SA

Argument: The missionaries brought a gospel that pacified the black man and let the colonialist steal his land. The gospel is accordingly to be rejected. How is the Church answering this?

- We have tolerated /promoted the golden calves
- We have failed to find real reconciliation among Christians (What about the new Humanity of Ephesians 2?)
- We have been silenced and failed to bring love and light

Martin Luther King:

“Darkness cannot drive out darkness, only light can do that. Hate cannot drive out hate, only love can do that.”

THE ANSWER ?

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