



FW de Klerk
FOUNDATION

STATEMENT ON SUBMISSION TO CONSTITUTIONAL REVIEW COMMITTEE ON POSSIBLE AMENDMENT TO SECTION 25 OF CONSTITUTION TO ALLOW EXPROPRIATION WITHOUT COMPENSATION

The FW de Klerk Foundation, like thousands of other organisations and individual South Africans, submitted its views on the amendment to section 25 of the Constitution to allow expropriation without compensation (EWC) to the Parliamentary Constitutional Review Committee. The Foundation regards this question as being of central importance to the future of South Africa - not only with regard to the essential requirement for a successful process of land reform, but also for the future of property rights and hence the future prospects for the economy, as well as for the future of race relations in South Africa.

Together with numerous respected jurists, including the late Arthur Chaskalson CJ, as well as the High Level Panel appointed by Parliament, the Foundation believes that it is not necessary to change section 25 of the Constitution to achieve land reform and extend property rights to all South Africans.

Contrary to the view expressed in the Parliamentary motion, “the current policy instruments, including the willing seller policy, and other provisions of section 25 of the Constitution” (sic) have *not* been the main factors hindering effective land reform. According to the High Level Panel Report, the failure of land reform thus far may instead be ascribed primarily to the incapacity of the relevant government departments, and to corruption. The present formulation of section 25 and a proper legislative framework can and should be used to speed up the land reform process and extend property rights to all. Section 25 has not been properly utilised to do that, as the High Level Panel Report states.

Importantly, we further believe that an amendment of section 25 to allow EWC would have extremely negative political implications for the country, including political instability and even anarchy. It would all but destroy the national accord reached in 1994 and 1996. An amendment to section 25 to allow EWC will surely harm agricultural production and food security and will also negatively affect future investment and other sectors of the economy - contrary to what the parliamentary motion and the ANC’s resolution at Nasrec expressly intended.

From a legal point of view, an amendment to section 25 that removed the term “law of general application”, would run contrary to the limitation clause at section 36(1)(a). In targeting a specific group of South Africa’s population, the law no longer becomes a law of general application and would run contrary to the values of section 36, specifically that of equality. In addition, should the amendment remove the reference to just and equitable compensation, and instead make provision for zero compensation, it infringes upon the foundational values of the Constitution, which establish South Africa as a nation based on the Rule of Law. Taking away the just and equitable requirement for compensation, detracts from the principles of legality, which undergird the Rule of Law. Finally, ousting the



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jurisdiction of the court in the finalisation of compensation transgresses all known legal principles, given that courts are the upper guardians of the law and the Constitution.

The Foundation's strong views in this regard do not mean that we support the *status quo* on property rights and land reform. Therefore, the Foundation's submission further made a number of recommendations on how to extend property rights to all South Africans and effect meaningful land reform. In this regard, we believe that there is a need for policy coherence and a proper legislative framework for land reform/redistribution (including a proper definition of land reform); that tenure reform laws provide inadequate legal protection and need to be amended; and that there is a need for secure informal land rights in both urban and rural areas (including redistributed and restored land). The Foundation also makes the point that there is urgent need for a full-scale and accurate land audit. In implementing land reform, we believe that a special purpose vehicle (SPV) must be established by law to extend property rights to all South Africans and implement land reform effectively.

The Foundation will make itself available to make oral representations to the public hearings of the Constitutional Review Committee.

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