

# FOCUS

# ON LAND

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**FRANCIS ANTONIE** is the Director of the Helen Suzman Foundation. He is a graduate of Wits, Leicester and Exeter Universities. He was awarded the Helen Suzman Chevening Fellowship by the UK foreign Office in 1994. From 1996 to 2006 he was senior economist at Standard Bank; thereafter he was director of the Graduate School of Public and Development Management at Wits University. He is the founding managing director of Strauss & Co.

# On Land

This edition of *Focus* provides an overview of some of the themes concerning land, expropriation and usage which have been before the broader public for the last ten months. It does not in any way purport to be a comprehensive overview of the debates nor, does it seek to intervene in any way the issues which are currently being debated in Parliament.

Ever since the EFF stole a march on the ANC in reintroducing the idea of expropriation without compensation (EWC) earlier this year, following on from the ANC's resolution at their 54th Conference – so the EFF continually reminds us – it has set the pace of land reform in South Africa. This is unfortunate for a number of reasons, not least in that it has presented a very emasculated ANC driving or not, in this case, the policy agenda. Moreover, the actual policy debate has at best been vacuous. This has been compounded by the introduction of problematic theological concepts into the debate, and here the ANC is largely responsible for introducing notions of "original sin" into the public discourse, devoid of any understanding of what "original sin" actually is.

We have no doubt that the intention to alter an important provision of the Bill of Rights (section 25) will be met with a barrage of litigation. Some of it may be as quixotic as the litigation of Afriforum's which sought to interdict the process on procedural and review grounds, this never had a chance of succeeding. Nor are we clear about the next stages in this process, but we must be mindful of the fact that we are in the run up to a national election which will in all probability take place in early May 2019. Whether the governing party with its allies in this venture will be able to maintain a two thirds majority in order to effect the changes remains to be seen, but as Parliament rises on the 2nd of April 2019 it is unlikely that the current Parliament will effect the Constitutional changes. We trust that the President will have carefully listened to his Expert Advisory Panel on this matter.

**Tom Lodge.** A seasoned researcher and commentator on the South African polity begins our discussion about South African land reform. Lodge introduces a comparative dimension into our discussion with reflections on Kenyan and Zimbabwean efforts. He concludes with the observation that "within the existing framework of laws and regulations, much more could be achieved if the government wanted to really demonstrate its commitment to land reform".

**Dyllon Nicholls** and **Mira Menell Briel**, outline certain key reflections on the public consultation process. Their inevitable conclusion is that the process left much to be desired. For this writer, the Parliamentary process was also abusive.

**Charles Simkins** forcefully and persuasively highlights that the real issue of land reform in South Africa relates to the use of urban land. This is a summary of his more extensive work on urban land reform which was presented to the Constitutional Review Committee but which unfortunately sank without trace.



**Michael Kahn** provides an historical overview of just where we have come, and how important it is that we understand the role of state capture in the sorry situation we find ourselves. In effect, we may have arrived at the return of the Bantustans.

If Kahn has taken us back to the Bantustans, **Graham Dominy** has taken us straight into the Bantustans in his review of kings, chiefs and the complexity of land restitution. As befits an eminent historian and the former state archivist, he reminds us of the problems of continuity ... and how all is rotten with continuity. We conclude with a summary of the HSF's submission to the constitutional review committee.

We conclude with a summary of the HSF's submission to the constitutional review committee. Fittingly we end with a review by Dominy of John Laband's *Eight Zulu Kings*.

# Thinking about South African Land Reform



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## HOW MIGHT LAND HOLDING BE MADE MORE EQUITABLE WITHOUT DOING ECONOMIC HARM?

This article will answer this question first by considering relevant African experience. Next, it will turn to the record of land re-distribution in South Africa. Why have South African efforts to undertake land reform failed to satisfy public expectations? And why has land-redistribution become such an urgent policy issue? Finally, what practical steps can the government take that would address effectively demands for land reform without seriously risking economic and political stability?

Two African national experiences of land reform are especially relevant for South Africans, those of Kenya and Zimbabwe. As in the case of South Africa, both countries are ex-British colonies in which a significant portion of land was alienated from the indigenous population and transferred to a white settler population, mainly between 1890 and 1910. As in South Africa, people of local descent were restricted or completely excluded from the possibility of acquiring individual land ownership, and confined to areas designated as ethnic reserves in which land was allocated to households through communal tenure arrangements administered through local chiefs.

### Kenya

Let us consider the case of Kenya first. Here the British settler population was relatively small, at 60,000 a tiny fraction of the country's eight million inhabitants at the time of independence. The alienated land the settlers occupied they held on 99 year leases. The settled land was the most fertile, relatively well-rained "highland" area, free from malaria and tsetse fly, though only a small proportion of Kenya's arable land. Much of the land held by the settlers was underused or farmed inefficiently. Kenya's independence struggle was closely tied to land rights. It mobilised Kikuyu labour tenants living on white-owned farms in a Land Freedom Army (the Mau-Mau). Political power would eventually pass from the British colonial authorities – ex-patriate officials, not local settlers – to the Kikuyu elite. The Kikuyu were the group most affected by colonial land alienation, and also the group most likely to have experienced western education and urbanization.

Independence was preceded and accompanied by a land settlement funded by the British exchequer, in which land was bought on a "willing seller, willing buyer" basis. The settlement had three types of beneficiaries: small scale "Yeoman" farmers, who would cultivate mainly for the market and employ a limited amount of help, peasant family-worked plot holders, and big farmers, often Kikuyu politicians leading the ruling party, the Kenya African National Union. This last group took over the larger colonial estates, and in effect the land settlement



preserved intact the major part of the colonial agrarian domain. Much of the land allocated to yeoman and peasant farmers was of more marginal quality.

For a time, the land settlement supplied the basis for political stability because in the short term it satisfied land hunger within the ethnic group most affected by land alienation, the Kikuyu. But it privileged ethnicity as an organising principle in Kenyan politics as the land allocations were made on the basis of ethnic group membership. Indeed it used as a starting point colonially conceived ethnic group boundaries. Simultaneously, the settlement spread the availability of inheritable and sellable private property rights – land holders under the various settlement schemes held individual titles. The state through a range of different agencies would continue to allocate to other ethnic groups remaining public land – all land not held under individual title was crown or state land. Political power and political competition in Kenya increasingly became linked to ethnically assigned land allocation. The original and subsequent settlements entrenched the social inequality that was a feature of the colonial political economy, and especially disadvantaged pastoral groups such as the Masai. Large-scale landed estates have grown proportionately.

Kenyan land reform was a success in three respects. It deflected early social demands for land reform, though the growth of the urban industrial economy in the 1960's and early 1970's was also important in providing livelihoods for rural landless people.

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It deflected early social demands for land reform, though the growth of the urban industrial economy in the 1960's and early 1970's was also important in providing livelihoods for rural landless people. Secondly, the settlement preserved and maintained Kenya's export-oriented capitalist sector. Thirdly, to the extent to which the land reform created a small farm sector it arguably resulted in more agricultural efficiency. In the Kenyan experience, small farmers seem to use land more effectively than large estate owners. But today land based political conflict is extensive.

So the Kenyan experience does suggest that major land reform can be undertaken in a way that avoids economic disruption. But in the longer term the way it was done may have perpetuated inequalities. And the original settlement scheme was externally funded.

**Zimbabwe**

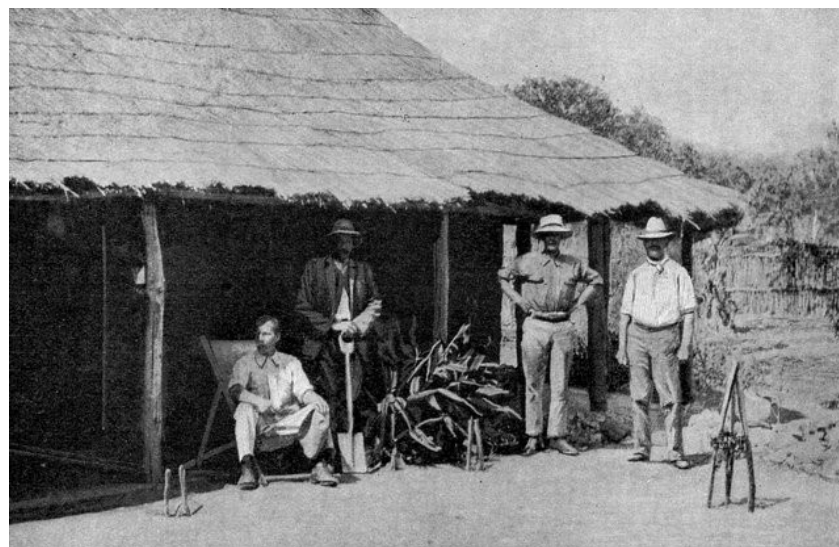
What about the Zimbabwean experience? In colonial Zimbabwe there was a roughly 50/50 split between settler farms and ethnic reserves. The reserves, the Tribal Trust areas were less fertile and more likely to be arid than white farms. As in Kenya, the independence struggle mobilised rural people, on farms to an extent but particularly in the Tribal Trust areas. At the time of Independence the rural white settler population was quite small – not more than 10,000 households. White Rhodesians were mainly urban. In the Lancaster House settlement negotiated in 1979-1980, the British envisaged a land settlement similar to Kenya’s – at that time still considered by policy-makers to be an arch-typically successful decolonisation. However planners and Zimbabwean policy makers would pay much more attention to small holder agriculture and to the possibilities of upgrading agriculture in the ethnic reserves through the extension of agricultural services, granary facilities, improving market access and making

The British committed themselves to funding Zimbabwean land reform and indeed would provide around £40 million until the mid-1990's (roughly, the equivalent of an annual budget at that time for a small university in the United Kingdom).

loans and tenure rights available. The British committed themselves to funding Zimbabwean land reform and indeed would provide around £40 million until the mid-1990's (roughly, the equivalent of an annual budget at that time for a small university in the United Kingdom). The British suspended aid for land reform after it became clear that a proportion of the funds they supplied was being used to buy farms for political leaders. In fact, though, the British provision of funding, even while the commitment

was maintained, was less generous than in the case of Kenya. Land purchases were initially on a “willing buyer, willing seller” basis.

Land reform in Zimbabwe in the 1980s and 1990s would be at a much slower pace than in Kenya, partly because of shortages of external financing but also because of the resilience of a comparatively efficient settler sector. Land purchases that would provide livelihoods for about 100,000 households by the 1990s were quite successful, though. The major growth in output amongst black



White farmers in Southern Rhodesia, early 1920s.



Zimbabwean farmers, though, was in the former Tribal Trust areas which began to produce a large proportion of the maize used in domestic consumption.

Redistribution was slow, too slow to even begin to match demand, even after the government began a policy of compulsory acquisition in 1995. Illegal land occupations began in the late 1990s, partly as a consequence of increasing economic hardship in the cities. A hastily implemented structural adjustment programme removed tariffs and subsidies that had protected the local industrial sector that had developed during the sanctions era. After 1991, urban unemployment rose sharply.

What were the effects of the state-sponsored land seizures that began in 2000 and which by 2003 had expropriated the majority of the historic settler sector?

The land invasions especially affected farms producing for the domestic market. Export-oriented agriculture received a measure of political protection though it also was damaged substantially. Maybe more than a million people moved onto the seized farms, between 160,000 and 300,000 households, depending on which calculations are believed. But much of the land they occupied has remained unused. Many of the new occupants of these farms had little or no farming experience. The government's agricultural extension services were quite unprepared and under-resourced for the huge expansion of need for their support. Zimbabwe's economy lost export receipts and in effect a food exporting country became food dependent – and remains so today. Wider economic consequences included a currency collapse, accelerating urban unemployment and an exodus of a million plus migrants to South Africa in search of jobs. At least two hundred thousand farm workers lost their livelihoods. The seizures helped to reinforce the rural support for the ruling party and were the key to its continued retention of political power. They were undeniably popular.

The government's agricultural extension services were quite unprepared and under-resourced for the huge expansion of need for their support. Zimbabwe's economy lost export receipts and in effect a food exporting country became food dependent – and remains so today.

Over the longer term there is some evidence of more benign effects. The beneficiaries of land seizures are probably today better off. There are probably today slightly more agriculturally-based rural livelihoods in Zimbabwe than was the case in 2000. A proportion of the farmers are producing export crops quite

efficiently, on medium sized tobacco farms for example, in which they employ some labour. Many of the bigger farms, though, that have remained intact are now owned by politicians and are inefficient. And research suggests that most rural households, even in areas in which surplus market oriented production has resumed remain heavily dependent on migrant remittances from South Africa. Indeed without the possibility of massive and illegal migration to South Africa, many more people would be severely impoverished.

The Zimbabwean land seizures certainly resulted in a major re-configuration of land ownership. They helped to reduce public demands for social justice and enabled the ruling party to stay in power. The cost has been the destruction of a relatively efficient labour-employing commercial sector and the wider damage to business confidence. Today the Zimbabwean government is offering compensation to the some of the expropriated white farmers as well as proposing the possibility of their resumption of commercial-scale farming under a 99 year leasehold system.

The rural people most likely to be engaged in liberation politics were school children and unemployed school leavers. In 1994 when the ANC conducted opinion polling to establish its policy priorities it discovered that demand for land reform was quite low – there was much keener interest in housing, education and health care, for example.

### South Africa

For many South Africans, it seems, Zimbabwe remains an attractive model. The facts that the state has survived and that the political elite remains resilient and that the economy has been partly reconstructed with the help of Chinese investment in mining enhance its appeal to part of the ANC's following as well as to its populist opponents. It is a model that would cause even more disruption if it was imitated in South Africa, though.

In South Africa there was a much higher share of land alienation than in Kenya or Zimbabwe. Peasant-or household based agriculture mostly lost its surplus generating capacity at some point between 1930 and 1960 depending on different geographical locations. South Africans were and are much more dependent on urban-generated incomes than was the case in Zimbabwe or Kenya before land reform. Accordingly, South Africa's political struggle for democracy, its equivalent of anti-colonial mobilisation, was urban based, not really rural until its later stages. The rural people most likely to be engaged in liberation politics were school children and unemployed school leavers. In 1994 when the ANC conducted opinion polling to establish its policy priorities it discovered that demand for land reform was quite low – there was much keener interest in housing, education and health care, for example.

In 1994, South Africa's commercial sector was relatively efficient, if environmentally costly. It was weaned off state supports during the 1980s when the government began to liberalise its management of the rural economy. The sector had become in certain areas very capital intensive and could be criticised for over-using marginal land. South Africa then and today was a major food exporter, especially to other African countries and was and is domestically food self – sufficient. Agriculture supports a large local food processing industry as well as other industries. And land reform would have needed to be internally financed for unlike Kenya or Zimbabwe South Africa had no prospects of obtaining foreign aid for funding redistribution. In the light of these considerations, the South African government's relative neglect of land reform in the 1990s was not altogether



irrational. Land redistribution would be implemented very slowly and would have to compete with other more pressing demands – housing, water reticulation, education, health and social welfare – for budgetary allocations. The government has remained committed to a constitution that protects property rights and which stipulates that except under particular circumstances government land purchases would have to be based on a fair assessment of market value.

Since 1994, there have been three types of land reform. First there has been a land restitution procedure, through which people who believe they themselves or their families lost land through forced expropriation after 1910 can claim restitution. In the case of a favourable finding by the Land Court, the government either buys back the expropriated land or provides equivalent compensation which might be in the form of a cash payment. Then, secondly, the government has sponsored its own settlement schemes, buying up commercial farmland and allocating it since 2013 on a leasehold basis to aspirant farmers who qualify for joining such schemes in various ways. Thirdly the government has tried to introduce reforms of customary tenure in the homelands so that households can have secure access to land of a kind that can enable them to raise loans to invest upgraded farming. To win support for such plans from traditional leaders, often patriarchally predisposed, conceptions of rights have been codified that discriminate against women.

Unfortunately, the management of land registry records has deteriorated, so the numbers of farms that may have been sold back to white South Africans is unknown. There is no record that can tell us how much land had been purchased by black South Africans independently of any government supported schemes.

We don't know precisely how much land that was white-owned in 1994 has since been transferred to black South Africans and retained by them. Estimates begin at a minimum of 9 per cent of privately owned commercial land though certain academic assessments calculate a much higher proportion. Unfortunately, the management of land registry records has deteriorated, so the numbers of farms that may have been sold back to white South Africans is unknown. There is no record that can tell us how much land had been purchased by black South Africans independently of any government supported schemes. Official figures supplied by the Minister of Rural Development in 2017 indicated that the government

had since 1994 bought 11,000 million hectares – about 12 per cent of total farmland. Beneficiaries of restitution or redistribution totalled around 500,000 in 2013. By that year the government had spent R12 billion on buying nearly 5,000 farms for redistribution to nearly 250,000 households and a further R16 billion on land claims, a sum that included cash compensations but which created roughly comparable numbers of new landholders to those who benefitted from redistribution. With respect to the latter group, in 2013 the government stopped transferring land to beneficiaries, leasing it instead, and requiring business plans and commercial partnerships from the new leaseholders, arguably slowing down implementation and making the scheme more restrictive. In February 2018 the Department of Rural Development and Land Reform released figures that suggested that Africans owned a mere 4 per cent of individually owned farms – which constitute 37 per cent of total farmland but that figure does not indicate the extent of state sponsored land transfers which have been characteristically undertaken through leases to groups.

Reductions in the workforce have been prompted partly by wage rises in compliance with minimum wage requirements as well as evictions by farmers anxious that their workers may claim occupancy rights.

What do we know about the impact of South African land reform up to now? We know that much of the land transferred has been of poor quality, located on the borders of or close to the historic homeland boundaries. Land purchases next to game reserves have been one quite frequently used option, with the farms handed over to the historically dispossessed community to manage as an extension to the neighbouring wildlife reserve. We know from

research conducted at the University of the Western Cape that new settlement schemes have been quite successful in relieving poverty among beneficiaries but they have yet to create a large group of assertive market-oriented “yeoman” farmers of the kind that was beginning to emerge in Zimbabwe in the 1990s. A Dutch-sponsored study in the Waterberg area indicates that redistribution schemes are more likely to generate agriculturally-based livelihoods than restitution schemes, a reflection partly of the “business plans” government has required from redistribution beneficiaries under more recent schemes. South African beneficiaries of land reform have not had the same quality of supportive extension services available in Kenya in the 1960s and Zimbabwe in the 1980s and 1990s. In South Africa local announcements of projected land settlements prompt rises in land prices, putting further strain on land reform budgets. Meanwhile the commercial sector remains efficient in terms of business criteria, and increasingly important as a generator of export income. But agricultural employment on the mainly white-owned commercial farms has been decreasing steadily, down by a million since 1994 to around 600,000 today. Reductions in the workforce have been prompted partly by wage rises in compliance with minimum wage requirements as well as evictions by farmers anxious that their workers may claim occupancy rights. Changing patterns of land usage also explain declining farm employment.

### **What explains the present upsurge in demand for land reform in South Africa?**

It is stoked by the social inequality that has intensified since 1994. Some of demand is urban – in effect a demand for housing. It is fed by widespread perceptions of social injustice which for many people remain heavily racialised. When land occupations or land invasions have happened, the authorities have

been unable or unwilling to check them effectively. But there is rural demand as well, not least because of losses of commercial farm jobs. Since 1994, the ANC has become more firmly rooted in rural politics. It has also become provincialized, because of its own organisational adaption to the requirements of a federal political dispensation. Because the provinces were partly delineated along old ethnic boundaries, the ANC has become partially ethnicised. Following this development land-based or territorial notions of political identity have become more important for its supporters. The demand for land reform without compensation is a moral or an emotive demand. It reflects widespread perceptions that present society is unfair, and that the historical beneficiaries of racial justice remain privileged. Put another way, it is about punishment and retribution, directed at white South Africans in general, not just the 35,000 or so white farmers. It is hardly likely to be assuaged with a few token confiscations of land held by criminal, absentee or untraceable owners, as certain ANC leaders evidently hope.

Another obvious lesson from the Zimbabwean and Kenyan experiences is that for effective land reform more is needed than land transfers, whether paid for or not. New settlers need a wide range of services that probably in the longer term could cost much more than the commercial price of the land.

The Zimbabwean experience shows land confiscations would be a high risk strategy, though. And as noted above, Zimbabwean officials today are contemplating payment of compensation. Even if it was done in a tokenistic fashion so as to make a symbolic point, confiscation without compensation could damage confidence across the economy, not just in agriculture, among investors in the urban economy who can also be affected by land claims and land occupations. Another obvious lesson from the Zimbabwean and Kenyan experiences is that for effective land reform more is needed than land transfers, whether paid for or not. New settlers need a wide range of services that probably in the longer term could cost much more than the commercial price of the land.

### **So, what should the South African government be doing with respect to land?**

There is no question that the state has to be seen to be acting much more assertively than appears to be the case at present.

A sensible first step would be to confirm what has been achieved so far. Re-organising the land registry should be a priority.

More extensive land reform does not require constitutional amendments, really. This was acknowledged at the ANC's Land Summit this year on may 19-20 which resolved in favour of expropriation without compensation under the fairly restrictive terms permitted by Section 25 of the Constitution. Since then, though, the government has decided in favour of a constitutional amendment that will spell out more precisely under what circumstances land can be confiscated without compensation. Speaking to journalists about these plans in August President Ramaphosa implied that the amendment will simply clarify existing powers but obviously his administration will be under political pressure to broaden them. It may well be that senior ANC politicians hope that even a minor change to the constitution will deflect political pressure from the left but an effective land reform programme will probably require more than whatever land can be obtained through the application of even a broadened mandate under section 25.



The government will probably still need to argue the case for the merits of paying compensation, in language that is accessible, though it should also act more forcibly to determine what it should pay. Even if they were technically legal, widespread expropriations without compensation would destroy any prospect of investor confidence, internally and externally. With or without compensation, extensive land reform can only be expensive and it will require a major administrative effort, well beyond the scope of the present Department of Rural Development and Land Reform. There will need to be a major expansion and refinement of agricultural extension services so that they can meet new needs. A land reform strategy that is calculated to meet land hunger-generated demands will require breaking up very large farms into small units that can be managed by households.

**If government is to take land reform seriously it will require a much larger share of the budget. Today total expenditure to date, that is in 24 years, on land reform is roughly equal to what in one year the government spends on housing.**

“Deconcentration” of a significant part of the commercial sector if it is to be done in a way that protects food security and maintains export receipts will require massive investment in rural infrastructure and services as well as very extensive training for hundreds of thousands if not millions of new farmers. It cannot be undertaken overnight. If government is to take land reform seriously it will require a much larger share of the budget. Today total expenditure to date, that is in 24 years, on land

reform is roughly equal to what in one year the government spends on housing. Obviously other areas of government expenditure will have to be reduced; there is very limited scope for raising additional revenue.

More effective and better use of state land in peri-urban areas might help to meet fresh demands for housing, though housing policy itself requires a major shake-up. More RDP-type settlements won't meet the demand for inner city housing. In Gauteng alone, estimates of the housing backlog have reached 600,000 dwellings. Addressing the needs of people involved in urban land occupations such as the Marikana and eNkanini settlements in Durban's Cato Manor requires imaginative and careful town planning rather than the present regime of armed evictions. By international standards, South African cities are extensive, not densely settled; creating additional homes need not involve expropriations. Urban land transfers may be productive in other ways too. Recent research on peri-urban land occupations indicates significant numbers of occupiers making livelihoods or at least producing foodstuffs through small scale farming.

Rural land demand can be checked by better protection for farm labour. At present slow processing of land restitution claims in the Land Court has led to a climate of uncertainty in which farmers worried about claims on the basis of occupation rights and as labour tenants are evicting workers and confiscating their livestock. At the present rate of progress, land restitution will not be complete for at least another decade.

What agricultural and livelihood gains might result from communal land tenure reform needs more research. Former homelands accommodate four million or so farmers, apparently, though how many of these actually succeed in making secure livelihoods from agriculture is uncertain. We know that land in the former homelands is underutilised. Many rural households are women headed – in certain areas most households – and they are often discriminated against in customary land provision. In any case lack of formal and legally recognised forms of title or use rights is a barrier to raising loans for investment in reclaiming neglected ex-homeland land. More investment in small loans facilities for small farmers is a key need. The Venda Building Society may have been acting irregularly in taking in short term deposits from municipalities but the loans it was making were to people whom most banks view as ineligible for borrowing, but who need credit desperately. In areas of communal tenure there is also the problem of traditional leaders or tribal authorities selling or leasing land to developers from outside the communities that share customary usage rights. The Ingonyama Trust Board in KwaZulu-Natal earns R90 million a year from corporate (that is, big business) leaseholders.

Within the existing framework of laws and regulations, then, much more could be achieved if the government wanted to really demonstrate its commitment to land reform. But it will require hard choices that will not always be popular and such choices will need skilful leadership to justify and defend.

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# Reflections on the Section 25 Public Consultation Process



**DYLLON NICHOLLS** holds a BA and is currently completing his LLB at the University of Pretoria. Dyllon served an internship at the Helen Suzman Foundation in July 2018.

## Introduction

Since the Motion to consider an amendment to section 25 of the Constitution was adopted by the National Assembly in February 2018, the 'Land Debate' has been the centre of many lectures, conferences, explosive twitter arguments, heated dinner table exchanges and research undertaken by civil society organisations.

The work of the Joint Constitutional Review Committee ("the Committee") established in terms of this Motion is close to wrapping up. At a glance, this appears to be one of the most extensive, constitutionally compliant public consultations executed by Parliament. A closer analysis yields a less optimistic conclusion. This piece will consider the different aspects of the public consultation process which is meant to lay the foundation for making an informed judgment on the process and its outcome.

## The Process

The Committee made a call for written submissions on 13 April 2018. The deadline was 15 June 2018, to which there were more than 500 000 responses. The Committee then embarked on countrywide public hearings at 34 venues, inviting everyone and anyone to have their say. These were well attended. Finally, certain persons and groups who made written submissions were invited to make oral presentations before the Committee at Parliament. The list included religious groups, academic institutions, the private sector, advocacy groups, civil society, the agricultural sector, professional bodies and cultural movements. No political parties or government departments were invited to make oral submissions. The Committee is mandated to consider the contributions made in this public consultation process, regarding the necessity of changing the Constitution to enable expropriation without compensation.

## Written Submissions

The volume of submissions is unprecedented. To put this into perspective, there are in some instances less than ten submissions made to Parliament on proposed, material legislative amendments. This response is encouraging as it demonstrates civil society's engagement with our participatory democracy but is also indicative of how passionate people feel about the protection of their property rights on the one hand and redistribution and restitution of land on the other.

A contract was awarded to an outside service provider to compile and summarise the written submissions. By late August, 1 49 886 submissions had been processed

and from a Report<sup>1</sup> presented by Co-Chairperson Smith of the Committee, clear trends emerged. According to this Report, the submissions were analysed in two groups – those that wanted the Constitution to be changed and those that did not want the Constitution to be changed. Although numbers on their own are an oversimplification, 89 327 (59,6%) of the analysed submissions were against a constitutional amendment, 60 157 (40,14%) indicated the Constitution must be amended and 402 (0,27%) were undecided.

The highline trend for those that do not want the Constitution amended is the argument that section 25 in its current form allows for expropriation without compensation. This position is generally substantiated by a fear of loss of investor confidence caused by legal uncertainty, job losses and threats to food security. Many submissions identify the adoption of this land policy as an electioneering tactic. A view frequently expressed is that land reform efforts must prioritise the use and redistribution of government-owned land rather than expropriation of private property.

A recurring position taken by those who support a change to the Constitution is that an amendment will satisfy the need to recognise historical injustices and that the Constitution in its current form is an impediment to land reform. Another trend identified from this group of submissions is the legal entitlement farm labourers should have to land they have lived on for many years and the injustice of forced removals which such labourers often have to endure at the hands of new farm owners. It is suggested that an amendment to the Constitution will remedy this situation.

## Public Hearings

The public hearings which took place over several weeks triggered much controversy and debate. In contrast to the view of most written submissions, the overwhelming sentiment expressed at the public hearings was that the Constitution should be amended. While many people came in their personal capacity as an interested party there was also a clear Economic Freedom Fighters ("EFF") representation in most towns.

As expected, contributions made at these hearings were of a more personal and emotive nature – people speaking of their experience of dispossession, disappointment with the lack of land reform progress and a need for not just land but housing and post-settlement support in the case of redistributed agricultural land.

Tensions were particularly high around the question of who the 'rightful owner of the land' is. The Khoi-San people stated that section 25(7) of the Constitution constitutes an inhibition to restitution because their claims were negated by the 1913 cut-off date. Descendants of Khoi and San people saw themselves as the rightful owners whilst black African communities contended that they were the rightful owners.

Those against an amendment to the Constitution frequently cited the findings published in the Report of the High-Level Panel to support the argument that the

The Khoi-San people stated that section 25(7) of the Constitution constitutes an inhibition to restitution because their claims were negated by the 1913 cut-off date. Descendants of Khoi and San people saw themselves as the rightful owners whilst black African communities contended that they were the rightful owners.



Constitution has not been an obstacle to land reform but that the obstacles have been corruption, elite-capture and weak institutions. White farmers spoke about the necessity of certainty to maintain a productive agricultural sector.

Co-chairperson Smith remarked on behalf of the Committee, "I want to say to South Africans that this is not a referendum so it doesn't matter how many say yes or how many say no. It's not about numbers – it's about the strength of the argument".<sup>2</sup> As reassuring as this sentiment is, it remains difficult to imagine how the Committee members will impartially distinguish between strong and weak arguments and not ultimately reduce their analysis to a for/against numbers question.

### Oral Submissions

Around 40 organisations and individuals made oral presentations to the Committee. This stage of the consultation process was meant to give persons the

chance to reinforce the position put forward in a written submission and to allow the Committee an opportunity to clarify points in the submission. In general, the engagements, which were live-streamed, lacked the intellectual rigour one would have expected. Digressing from a constructive dissection of the substance of submissions, members of the Committee focussed on aspects of presentations that were often irrelevant to the issue at hand. This stage of public consultation does not carry more weight than any other but it is an opportunity to quiz experts in the field and absorb research willingly put before Parliament to assist in making informed, rational decisions.

### Conclusion

South Africa is far from the enactment of a Constitutional amendment. The task of the Committee is a preliminary inquiry to determine whether South Africans believe the Constitution needs to be amended to allow more rapid land reform. In the Report still to be adopted by Parliament, the Committee recommends that

the Constitution be amended. The actual drafting of the amendment Bill, another public consultation period and the processing of the Bill through Parliament (where it must obtain a two-thirds majority in the National Assembly - the ANC on its own does not constitute two-thirds) is still to take place. First, the outcome of this preliminary process must be accepted as a constitutional, meaningful and proper process – as demonstrated above, it is easy to allege that the public participation was in many instances superficial, meaningless and inadequate.

It remains unclear whether the true substance of the written submissions was appropriately distilled by the service provider and accurately relayed to the Committee. The fact that Committee members have expressly raised doubt about the appointment of the service provider, the mandate given to them and their methodology does not bode well.<sup>3</sup> The conflation of a constitutional amendment to explicitly allow for expropriation without compensation and redress of lasting apartheid inequalities and social injustice dominated the public hearings and may have distorted any impressions at this stage.<sup>4</sup> The oral hearings lacked substantive engagement and caught the attention of the public for the wrong reasons. The whole public consultation process seems to be more of a box-ticking exercise than a meaningful engagement with stakeholders.

The public participation model itself raises questions to consider: What duty does a Committee member have to South Africans and the Legislature? How can they be held accountable? How is access to engage given to the poorest South Africans (the cost of transport is just one barrier to participation for example)? This was never going to be an easy undertaking but perhaps the magnitude and importance of a constitutionally meticulous process was wildly underestimated. All we can wish for at this stage is that reason will prevail.

The conflation of a constitutional amendment to explicitly allow for expropriation without compensation and redress of lasting apartheid inequalities and social injustice dominated the public hearings and may have distorted any impressions at this stage.

### NOTES

- 1 Parliamentary Monitoring Group, Section 25 review: progress update & selection of oral submission participants, 22 August 2018.
- 2 Parliamentary Monitoring Group, Public Hearings on Review of Section 25 of Constitution, 17 July 2018.
- 3 The appointment of the service provider, Isilumko, is contested. Suspicions were raised about Isilumko's suitability for the job as a recruitment company with no established track record of doing work of this kind. Questions were raised in a Committee meeting about the company's capabilities and whether their analysis of the written submissions is adequate (<https://www.news24.com/SouthAfrica/constitutional-review-committee-to-ask-for-extension-for-its-work-on-section-25-20180920>)
- 4 Marianne Merten, Explainer: Everything you wanted to know (or would rather not have known) about expropriation without compensation, Daily Maverick, 10 September 2018.

**This piece complements a report and a brief. Both are entitled *Human Settlements and Urban Land Reform*, and they are available on the Helen Suzman Foundation's website ([www.hsf.org.za](http://www.hsf.org.za))**

The major requirement [for dealing with the Cape Town's housing need] is the availability of large tracts of well-located land.

As it happens, Cape Town is particularly well-endowed with such land. There are five large tracts, all owned by national government (the Department of Defence and Transnet). The sites, [known as Culemborg, Ysterplaat, Youngsfield, Wingfield and Denel] could yield close to half the number of affordable units required to meet the need on the City's current database.

Ever since I was mayor of Cape Town between 2006 and 2009, I have been trying to secure the release of these sites for this purpose.

Helen Zille, *Daily Maverick*, 6 August 2018

# Urban Land Reform



**CHARLES SIMKINS**

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## Introduction

The frustration experienced by Helen Zille is at the core of the urban land reform problem. The problem is resolvable and needs to be resolved quickly if disorderly development is to be avoided in Cape Town and in the other large metros. The purpose here is to explain why.

The argument can be summarised as follows:

- South Africa is more urbanised than is generally realised. Urban land reform has the capacity to reach many more people than rural land reform, although the latter should not be neglected. Urban land reform is capable of improving the lives of many more people than rural land reform.
- Urban areas can be divided into three categories: the urban parts of the metros<sup>1</sup>, urban areas outside traditional areas, and urban areas inside traditional areas. The proportion of the total urban population in the metros has been rising and is expected to continue to do so. The population in urban areas outside traditional areas has been rising more slowly and, in about a third of municipalities it has been dropping in absolute terms in recent years. Rural areas are emptying, both within and outside traditional areas.
- Average household size has been dropping and it is likely to drop further, to about three people, by 2030.
- Real income per capita has been dropping since 2014. Absent populist adventures, it can recover and then improve in the coming years, but progress is unlikely to be rapid. Because average household size is falling, real income per household has dropped faster than real income per capita and it will take longer to recover.
- An assessment of housing need (rather than reference to 'backlogs') has the advantage of making clearer what needs to be done.
- It is fiscally impossible to build Breaking New Ground houses<sup>2</sup> at a rate to meet existing and new need. Currently, production is running at about a third of new need. The government's human settlements programme needs to be refocused

on (a) the rapid release of land, particularly in the five large metros and (b) a more vigorous and incentivized promotion of urban densification.

- There is nothing to stop the various levels of government from developing a rapid response except government inertia. Municipalities have, or ought to have, integrated development plans and land use management plans to guide land acquisition and the employment of developers to service it.

The justification for each step in the argument is briefly set out below. More detail can be found in the *Human Settlements and Urban Land Reform* report.

## South Africa is more urbanised than is generally realised

Perceptions of urbanization are driven by Statistics South Africa's definition of 'urban'. But this definition applies only in areas outside traditional areas (roughly, the old homelands). Traditional areas are reported as a single category. It is clear from publicly available cadastral and land use maps that there are both formal urban areas laid out in demarcated erven and areas of high density informal occupation in traditional areas. The population in them has to be estimated by indirect methods which, when applied to the 2011 Census and the 2016 Census, indicate that close to 65% of the population in traditional areas is urban. Add this to the 94% of the population outside the traditional areas in urban areas and the national urbanization rate in the country as a whole becomes 84% in 2016, rather than the official 64%. The estimate should be rendered more precise in future censuses and surveys by the use of a standard and appropriate official definition of 'urban' across the country.

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## The urban population is concentrating in the metros, particularly in the large ones

When the results of the 2011 Census and the 2016 Community Survey are placed in a coherent demographic framework, the share of the metro population in the total urban population (metros, urban areas outside traditional areas and urban areas inside traditional areas) rose from 42.5% in 2011 to 46.0%, implying an annual growth rate of 3.3%, and more than 4% in Johannesburg and Tshwane. Growth in other urban areas outside traditional areas was about 1% and in urban areas inside traditional areas was close to zero.

Why was this? There are three main reasons:

1. The employment rate<sup>3</sup> in the metros is higher than in other urban areas.
2. Parts of the platteland are depopulating, with urban populations in about a third of municipalities dropping.
3. There is a slow erosion of displaced urbanization. In the apartheid years, a lot of urban residential development associated with cities and towns outside traditional areas was displaced to traditional areas. The Mbombela municipality, with Nelspruit as its principal town, is a case in point. Just 13% of its population lived in urban areas outside the old Kangwane in 2016. Add the traditional urban areas in, and the urbanization rate rises to 76%. The erosion is slow because households invested where they could and are now reluctant to abandon their dwellings.



If a dwelling which has (a) no more than two people per room (with kitchens, bathrooms and garages excluded), and (b) no major weakness in floor, walls or roof, and (c) a municipal water supply plus a flush toilet or ventilated pit latrine plus refuse removed at least once a week plus access to electricity is regarded as adequate, then 71% of dwellings in urban areas were adequate in 2016.

#### Average household size is dropping

Average household size dropped from 3.30 to 3.21 between 2011 and 2016. This was partly a consequence of a change in the age structure of the population. One method of projecting average household size is to hold headship rates by age and sex constant and to apply them to the future structure of the population. On that basis, average household size is projected to drop to 2.99 by 2030.

It follows that new household formation is growing more rapidly than population and that average household income will rise more slowly than per capita income.

#### Household incomes are under considerable pressure and will be so for nearly a decade longer

April 2018 International Monetary Fund estimates and projections indicate that real per capita gross domestic product has been falling since 2014. It expects the trend to be reversed from 2019, but improvement will not be rapid and the level of real per capita income will not exceed the 2014 level even by 2023. Thereafter, if progress can be made on the structural reform needed to promote growth, the growth rate could rise. Assume it rises to 2.8% by 2030, which would exceed population growth in that year by a respectable 2.0%. This would imply a 16% increase in per capita income between 2011 and 2030, but only a 6% increase in income per household, with income per household exceeding the 2011 level for the first time in 2027. Settlement options have to be considered against this backdrop. Slow economic growth and falling household sizes mean that the majority of new households in urban areas are likely to be in the poorest income category (less than R 3 500 per month in 2016 prices) in the next decade.

#### The dimensions of housing need

Basing analysis on the length of municipal housing waiting lists is a hopeless endeavour. Not every municipality is able to report the statistics, and some households on the lists may have dissolved or ceased to qualify for publicly provided housing. It is much better to start with the fact that every household lives somewhere, and to assess what households have against what they need. Housing may be adequate in the sense that they meet a set of standards. Or it may be inadequate for one of several reasons. It may be overcrowded, it may suffer from major structural defects, or it may lack one or more essential services.

If a dwelling which has (a) no more than two people per room (with kitchens, bathrooms and garages excluded), and (b) no major weakness in floor, walls or roof, and (c) a municipal water supply plus a flush toilet or ventilated pit latrine plus refuse removed at least once a week plus access to electricity is regarded as adequate, then 71% of dwellings in urban areas were adequate in 2016. 12% were overcrowded, 8% needed repair and 9% needed to have their services upgraded. Each category of inadequacy requires a different solution.

National government expenditure on human settlements is expected to be R 32.5 billion in 2018/19. Most of this money is transferred to provinces and municipalities. Provinces add about 16% to grants from national government from their equitable share of national revenue.

#### Government expenditure on human settlements

National government expenditure on human settlements is expected to be R 32.5 billion in 2018/19. Most of this money is transferred to provinces and municipalities. Provinces add about 16% to grants from national government from their equitable share of national revenue. Municipalities, especially metros, may add a little more. Most of the expenditure is on the human settlements development grant, which funds housing development, and the urban settlements development grant, which supports the broader development of the built environment, with a strong focus on upgrading informal settlements.

This is expected to finance 99 000 subsidized houses, 20 000 affordable rental housing units and 131 000 services upgrades in informal settlements. By contrast, the annual increase in the number of new households in urban areas between 2018 and 2024 is expected to be 316 000, 72% of which will be in the metros. To the need to provide for new households should be added an allowance to cover currently unmet housing need. At the present rate of production, queues for BNG housing, already long, can be expected to get longer.

Building costs depend on terrain and wage levels, so they vary across the country. Information about them is also incomplete. The national average cost of a serviced site is of the order of R 45 000 and of a BNG house R 180 000, so that four serviced sites can be produced at the same cost as a BNG house.

It should also be noted that, while densification of existing settlements in urban areas is regarded as desirable by government, there are no fiscal measures to incentivize it. One might, for instance, remit registration fees for subdivision of residential land in urban areas. Or housing developers may be required to construct a certain proportion, say 20%, of their dwellings for rental by low or lower middle income households. Or, redevelopment of run-down urban areas could be supported.

### Urban land reform

Urban land reform is about making adequate provision for residential development needed now and in the coming years. Ultimately, as both the demographic and urbanization transitions near their end, the pressure will ease, but a special effort is needed during the coming decade. The necessary components of this effort are as follows:

- \* Acceptance of private construction of dwellings, often incrementally, on serviced land in urban areas by government and urban communities. Acceptance has always been the case in urban settlements in traditional areas, but it has long met resistance in urban areas elsewhere. Even so, such development had to be accommodated in the late apartheid years and the pressures for it have been increasing again in recent years. The occupation of new land by households and incremental housing is going to happen, especially in the metros. The only choice is between orderly and disorderly development. Disorderly development will lead to social tension, sub-optimal location and increased cost of servicing in the longer run. Acceptance will require political leadership.
- \* The identification and acquisition of land for new residential development, and the installation of both on-site services and connection to bulk infrastructure by contractors from the private sector. Serviced sites can be provided free of charge to the poorest households, at partly subsidized prices to lower middle income households, and at cost to higher income households. This would require some reallocation of funding within the state housing budget, but not necessarily an increase in aggregate human settlements expenditure at the three levels of government.
- \* The organization of complementary inputs, such as support of small building contractors, and micro-finance providers, as well as building plans for incremental housing to assist households to build optimally towards consolidation in later years.
- \* A more determined approach to densification. It would be rational to incentivize the process up to a unit cost equal to the unit cost of green field development. Densification may lead to locational advantages for new households thus accommodated.

Urban land reform is feasible, and it requires no constitutional change, and little alteration to the existing legal and fiscal framework. It needs to be aligned to urban development plans, and it should be directed towards the entire household income range. It needs to be tackled with speed. Getting to grips with it in the five largest metros would be a very substantial start.

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#### NOTES

- 1 Some metros contain rural areas as well
- 2 The successors to RDP houses
- 3 The employment rate is the proportion of people in the economically active age range who are working.

# Welcome to the (Peoples') Republic of Bantustan

However unpalatable it may be, conquest is an enduring feature of being human. Groups conquer one another; there are victors and victims. People are killed, abused, adopted. Property is seized; cultures and languages merge or disappear. New hegemonies appear, sometimes to prosper for centuries. Then new tensions emerge; the hegemon may be displaced, retreating to safer territory, or may be conquered, to be subject to a new hegemon. Against this perspective, contemporary South Africa is unexceptional. There has been conquest by external and internal forces; there has been admixture; there have been losses and gains. Nothing is fixed as the tide of humanity ebbs and flows across the land. The dynamics of these tides characterize our present impasse.

### Arrival of the Europeans

The history of these climes, as recorded in text, dates back, perhaps, a millennium. Detail is strongest from the time of the European incursions that followed the defeat and expulsion of the Moors from Spain. Their shipbuilding and navigational skills then enabled the Portuguese to tip-toe down the west coast of Africa, much as in prior centuries had the Gulf Arabs, traders in goods and people, down the east coast. At the cool temperate Cape the Europeans found a pleasing climate, but were unable to establish a beachhead for another century, from when on the Vereenigde Ost-Indische Compagnie (Dutch-East India Company) – the VoC, exercised its monopoly of violence for another century and a half. The tidal wave of VoC depredations, including the importation of African and Asian slaves, carved out a domain of some 570 000 km<sup>2</sup> out to Graaff-Reinet and the Fish River. Beyond this were numerous kingdoms of migratory and semi-settled pastoralists and hunter gatherers. The boundaries of their commons were in part fixed by natural obstacles.

Then enter Great Britain, newly victorious over Napoleon, that exercised direct rule for the next century, during which time she added further territory to the Kaap de Goede Hoop, up to the Orange River and along the east coast to the Tugela. Under such pressure, indigenous peoples were displaced, or entered into their own war campaigns, destabilizing an area out as far as today's Botswana and Zambia. Under such pressure, the 'Boers', they of Dutch and French and wider origins, undertook their own 'Westward Ho' conquests, founding their republics, independent of the Monarch. The discovery of diamonds and gold permanently altered the entire socio-political fabric, leading to race-based proletarianization, civil war, and expropriation, all cemented in Her Majesty's Act of Union of 1909.



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### Accommodation One

That Act defined the borders of the Union, centralized white power, and pushed the majority of the indigenous population out to the territorial margins, there to remain for virtually another century. A perverse Pareto principle decreed that 13% of the people would control 87% of the land. The tide of Anglo-European expansion, conducted by Bakgoa (Setswana: those spat out from the sea) signified the defeat of all tribes, Afrikaner and African alike. While the Union gave local political power to the Boer Generals, extraction of mineral wealth was secured in private and foreign hands, with steady dividend flows to London, New York, and Paris. Accommodation One served the economic interests of the Crown, with the defeated acting as labour brokers.

Come the peace, the Nationalists exploited White fears of competition, and with an eye on European methods of ethnic cleansing, instituted formal apartheid as the mechanism to keep the majority 'op sy plek.'

To manage this huge extractive enterprise the new state developed and took ownership of the commanding heights of the economy. Tribal matters were dealt with by indirect rule, a system perfected in other lands before. These new structures amount to Accommodation One, strengthened with the 1948 ascent to power of the Afrikaner Nationalists, as the unexpected beneficiaries of the disruptions of World War 2. The War had demonstrated that

the African majority was a force to be reckoned with in the cities, on the farms, on the mines and in industry. Come the peace, the Nationalists exploited White fears of competition, and with an eye on European methods of ethnic cleansing, instituted formal apartheid as the mechanism to keep the majority 'op sy plek.' The apartheid state legitimized its rule via the fiction of separate development that included own political forms, a defined territory, own language channels on radio and then TV, and of course print and film media. The White state, with its ethnically defined Bantustans was maintained to 1994. The inevitable armed conflict was largely conducted through the proxy war in Angola alongside a low intensity civil war. Geopolitical changes, battlefield stalemate, a stagnant economy, and civil chaos ultimately forced the belligerents to reach an armistice.

### Accommodation Two

The resulting dispensation, Accommodation Two that emerged from the CoDeSA negotiations required the formerly exiled African National Congress (ANC) to play a deft hand. To reap the benefit of exile, the leadership had first to neutralize the United Democratic Front that had mobilized structures of civil society against the last-ditch attempts of the Nationalists to broaden their constituency through the 1983 Tri-Cameral Parliament. Secondly the ANC had to open its tent to the previously derided Bantustan leadership. CoDeSA thereby became a forum of parties with little in the way of a tested popular mandate. The inherent risk to the ANC was that the original problem of ethnic identity, held at bay through the 'three doctors pact' of 1947, might once again rear its head. To quote a 1992 remark of Nelson Mandela - 'you might think you are going to control the Bantustans; beware that they don't end up controlling you.'

The inherent risk to the ANC was that the original problem of ethnic identity, held at bay through the 'three doctors pact' of 1947, might once again rear its head. To quote a 1992 remark of Nelson Mandela - 'you might think you are going to control the Bantustans; beware that they don't end up controlling you.'

The immediate outcome of the armistice was majority rule, duly constrained by the 1996 Constitution. The new order was invoked in the harsh twilight of diamond and gold mining (that had peaked in the 1970s), and the new strictures of accession to the World Trade Organization. Under trying economic conditions, the labour broker baton was handed to the ANC. Whites could now sit back and enjoy their harvest of financial and social capital.

Accommodation Two was an unstable armistice, mediated and modulated by the Constitution and the Bill of Rights. Property rights were inviolate; freedom of movement a right; the previous white labour aristocracy was opened to all; the state monopoly of violence was curtailed; the economy globalized under deregulation. By design the Constitution did not deal with the two linked and fundamental issues. The first was economic exclusion from the core economy; the second was geographic exclusion from the core economy. The implicit assumption was that gradualism, coupled with elements of redress would contain the aspirations of the majority. The former Bantustans would hold back the tide that had apartheid dammed up behind their façade.

### Mbeki's Presidency

The principal architect of change over the two post-Cold War decades was Thabo Mbeki, who, much like Jan Christiaan Smuts, strode the international stage even as his hold on domestic power waned. Mbeki's watch included the shaping the instruments of redress, including labour and tenant rights, and measures to promote economic inclusion of the previously disadvantaged. His period in high office might be termed technocratic nationalism, in ways similar to what the Afrikaner Nationalists had invoked in 1948, but with considerable differences.

Similarities include the durability of institutionalized corruption, a feature of life going back to the days of the VoC, as derided in the aphorism 'Vergaan onder Corruptie' (died through corruption). Kruger's Zuid Afrikaansche Republiek was notable for its corruption by way of issuing concessions as a tax generating device, so well described in Wheatcroft's book *The Randlords*. Add to this toxic stew wartime profiteering, sanctions busting, financial Rand round-tripping, VAT fraud, and Bantustan money laundering. The outcome, King Report on Corporate

Governance notwithstanding, was a financial services sector of deft financiers, lawyers, auditors, consultants and accountants, of which more later.

This above stew comprises some of the legacy on which the Rainbow Nation was to be built, complete with its pot of gold, blended with the anger of exclusion and subjugation. Flavour with Africanism, and reduce with a large measure of Washington Consensus. Cover and simmer for twenty years.

This institutionalized corruption manifests in the erosion of state capability. Over the twenty years the civil service has doubled in size, and its real level of remuneration has doubled, so that civil servant average pay is 50% above that of the private sector.

### Turning of the tide

So what has happened? For a start, the tide turned, with rural-urban migration encouraged by the unintended consequences of policy. Labour tenants and workers were forced out as tenant rights and minimum wage law was promulgated. Collapse of local government services added impetus to the tide that engulfed cities and towns, whose civic leaders struggled to cope. Where towns were inaccessible, squatter settlements sprang up

along trunk roads, each with their own political leadership and vested interests. Second the opportunity of controlling state assets now presented itself to the politically empowered elites, those in high office, in the bureaucracy, and trade union leadership. This process began on the Mandela-Mbeki watch during which a signal emanated that party loyalty would guarantee survival if one was caught with their hands in the pot of gold.

In quick succession the Land Bank was raided, the new Sector Education and Training Authorities became piggy banks, the mega corruption of the Arms Deal and its intermediaries unfolded, and the unions seized control of their cognate Ministries, first at national level and then into the provinces. Coupled with world-standard labour law, the ability of managers to manage their staff was eliminated. SADTU controls the education ministries; NEHAWU health, NUMSA trade and industry, NUM energy and mines, POPCRU the police and prisons, the MK veterans Defence and the State Security services. Vide the Volmink 'cash for jobs' report; vide the succession of fake intelligence reports used to eliminate rivals.

This institutionalized corruption manifests in the erosion of state capability. Over the twenty years the civil service has doubled in size, and its real level of remuneration has doubled, so that civil servant average pay is 50% above that of the private sector. The new labour aristocracy co-exists with the mass of the unemployed and unemployable, for whom their taxes provide welfare grants. These grants do nothing to ensure quality services in health and education, housing, transport and security.

### State Capture

State capture became the order of the day, well before the ascent to power of Jacob Zuma and the Premier League of the former Bantustan of the geographic periphery. This capture was facilitated by the weak state that is inherent in the design of the Constitution, and is exacerbated by the unwillingness or inability of the state to protect state assets or citizens. Here too the story goes back to the Mandela-Mbeki administration, if not earlier. In particular it was the De Klerk government that saw fit not to enforce the law against brandishing dangerous weapons in public. 'Traditional regalia' were exempt from stricture and still are.



Armed demonstration in peace time is an ongoing challenge to the state. It started with the trashing of city centres, campuses and hospitals, peaking with the mutinies of the JMPD (2008) and SANDF (2009). No-one was successfully prosecuted for those acts. It presents in the 2001 torching of Pretoria Station; in the ongoing blockade of highways and the torching of trucks; in the destruction of Metrorail on the Cape Flats; in the burning of Gugulethu fire station on 11 July 2018; in the theft of PetroSA oil reserves. Not one of these instances has seen a conviction. Instead the signal from the ruling party, the cases of Boesak and Yengeni alike, is that court process counts for nothing.

Under Jacob Gedleyekisa Zuma, the Bantustans gained the political ascendancy, aided and abetted by the deft financiers, lawyers, auditors, consultants and accountants of Sandton, Stellenbosch and Umhlanga. We really had a party. After all, up to 2014, the World Economic Forum ranked South Africa third alongside Hong Kong and Singapore for the strongest financial market development. Of course that ranking was self-assessed according to the duly moderated and validated WEF Executive Opinion Survey. It was always an oddity to observe such stellar performance alongside South Africa's dismal rank of 135 for health and primary education. Post Steinhoff, Eskom and Transnet, reality, but not humility, has forced those who provide subjective measures for the WEF survey to become somewhat chastened so that the financial market development rank has collapsed to rank 44. Ouch.

### Conclusion

So the arc of Bantustans captured the core of the state. Currently the ANC remains divided into 'modernisers' who try to use Accommodation Two to build a new developmental state that can tackle the deep structural constraints that prevent sustainable growth. They stand opposed against the neo-patrimonial traditionalists, ethno-nationalists, 'big men,' and Kings represented by the Premier League based on the way of doing things honed in Bophutatswana, Lebowa, Gazankulu, Venda, Qwa Qwa, Kwazulu, and Kangwane. Mandela's warning was prescient indeed.

# Of Kings, Chiefs and the complexities of Land Restitution: Preliminary thoughts on the Ingonyama Trust



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The Parliamentary High Level Report into the thorny land question, presided over by one of the most mature and gentlemanly figures in South African politics, former President Kgalema Motlanthe, has raised predictable storms. One of the tempests is a royal one, as His Majesty, King Goodwill Zwelithini, has taken severe exception to the suggestion that the land under the control of the Ingonyama Trust should be treated any differently to land in any of the other former Bantustans, or to communal land; in other words that it should become state land.

King Zwelithini proclaimed that the land under the Ingonyama Trust, over which he presides, is, was, and always has been Zulu land. His Majesty called upon all loyal Zulus to step forth to defend their patrimony and uttered various other blood-curdling threats. So what is the land under the Ingonyama Trust and why is it so exceptional?



Firstly, the name of the trust is derived from the title "iNgonyama" which is one of the titles of the Zulu king. Secondly, the land falling under the trust is basically the territory of the former homeland of KwaZulu. In 1994, in the tense days leading up to the first democratic general election, the territory of KwaZulu was, through legislation passed by the KwaZulu Legislative Assembly, literally two days before democratic voting began on 27 April 1994, transferred to the control of the newly established Ingonyama Trust (Former Chief Minister Buthelezi claimed recently that this was the very last act of the KwaZulu Legislative Assembly). The legislation was rubber-stamped by State President FW de Klerk, as he was required to do with all legislation from subordinate legislatures, such as the parliaments of non-independent homelands. It should be noted that, at this stage of the transition process, the operations of the dying apartheid government were being overseen by the Transitional Executive Council, which meant that the ANC were already performing an oversight role and would, together with the welter of other matters on their political plates, have had sight and knowledge of the Ingonyama Trust matter.

Dr Nkosazana Dlamini-Zuma, soon to become Minister of Health, who had been born in southern Natal in the foothills of the Drakensberg Mountains, made the apt point that KwaZulu-Natal was the only province with both a first name and a surname.

Essentially, the establishment of the Ingonyama Trust has been described as a bribe to entice the Chief Minister of KwaZulu and leader of the newly renamed Inkatha Freedom Party, Prince Mangosuthu Buthelezi, into participating in the first general elections. It worked and on 27 April 1994 millions of South Africans voted peacefully across the country, including in KwaZulu-Natal as the province had just become known. Dr Nkosazana Dlamini-Zuma, soon to become Minister of Health, who had been born in southern Natal in the foothills of the Drakensberg Mountains, made the apt point that KwaZulu-Natal was the only province with both a first name and a surname.

Let us look at the "first name" part of the province, first. KwaZulu was made up of various bits of land scattered across the province of Natal from the Mozambique and Swaziland borders to the north and from the Drakensberg mountains in the west, to the Indian Ocean coast in the east and to the Mtamvuna river, bordering the old homeland of the Transkei to the south. North of the Thukela river, in the heartland of the old Zulu Kingdom, KwaZulu occupied various large chunks of territory that had been left over "in trust" to the Zulu people, by the occupying Boers from the Transvaal and by British intruders from the Colony of Natal. The land excised from the control of the Zulu kings and various other traditional leaders was used for cattle farming by the Boers and for growing sugar by the British. Small fragments of land such as the Umfolozi and Hluhluwe Game Reserves were protected areas in which game, such as the rare white rhino, could roam in relative safety. They fell under the control of the then Natal Parks Board, head-quartered in Pietermaritzburg.

In the 1970s, in the heart of the remaining Zulu territory, near the Mfolozi River, Chief Minister Buthelezi began to rebuild a capital for KwaZulu, on the site of Ulundi, the capital of the last independent Zulu King Cetshwayo. Ulundi had been burned down by the British in 1879 at the end of the Anglo-Zulu War and its reconstruction by Buthelezi was an act of powerful symbolism.

However, KwaZulu was an artificial creation and the homeland's territories south of the Thukela River were comprised of what had been known as "Native



Locations" established by the British colonial government of Natal in the 1840s and 1850s. Many of the inhabitants of these areas were refugees from the Zulu Kingdom, or inhabitants of old Natal who had never fully acknowledged Zulu paramouncy. They preferred to lead their lives under, initially vague, British suzerainty rather than under stricter Zulu royal control. One of the most prominent of these was Princess Mawa, a sister of the founder of the Zulu royal dynasty, King Senzangakhona, and aunt to kings Shaka, Dingane and Mpande. She moved south of the Thukela river in the early 1840s with several thousand followers and many more thousand head of cattle. King Mpande contacted the new Secretary for Native Affairs in Natal, Theophilus Shepstone, more interested in the return of his cattle than in the return of his auntie.

**Nations cannot prosper or reduce economic vulnerability if they fail to secure water supplies and sanitation systems, if businesses are left without reliable electricity, if transport becomes congested in cities or if telecommunications lags behind digital opportunities.**

Shepstone had barely found a chair for his new desk let alone established his authority in the rudimentary colonial administration, so a young army officer from Fort Napier was sent to Zululand as a British emissary to the Zulu king. Shepstone began hammering out his location system for Natal's African population. These areas, many of them inhabited by opponents of the dominant Zulu factions north of the Thukela, such as Mawa, only became part of KwaZulu over a century and a quarter later.

Mentioning the British army and the locations brings us to another of the anomalies in the Ingonyama Trust. Visitors to Durban, especially those who remember flying in to the old Durban airport and those who arrived by sea, will have noticed that the Bluff peninsula protecting the southern side of the entrance to Durban harbour, is heavily vegetated for much of its length. This is because, as the colony of Natal was established, a young military officer, Lt Charles Gibb of the Royal Engineers, was ordered to demarcate and reserve lands necessary for the defence of the colony. In Pietermaritzburg, Gibb grabbed a large tract of land to the south-west of the Voortrekker core of the town and Fort Napier, the centre of British military power for more than seventy years was built there.

In Durban, it was obvious that the army needed to protect the entrance to the bay and the rudimentary harbour. Gibb reserved the end of the Point and at least half the Bluff for military purposes. Gun batteries and military communications equipment were positioned on the Bluff and were still actively used in World War II. Long after the war the South African military maintained a presence on the Bluff and may still do so. This is why the natural vegetation has remained relatively well preserved, right into the 21st Century, as commercial development has not been permitted.

But, wait, was the Bluff unpopulated land when the British army grabbed it and how does this relate to the Ingonyama Trust? The answer is no and we need to go back again to the early 19th Century. From the 1820s, British hunter-trader-adventurers established themselves on the shores of the Bay of Natal. While they had a dependent relationship with King Shaka, they also attracted and protected a growing number of refugees fleeing from the king's power. Many of these established themselves under a Chief Mnini on the Bluff. This was a good location for Mnini: he had a defensible position in case Shaka or Dingane attacked and the strange British were between him and the road to the Zulu kingdom. He also had enough land on which to graze cattle and access to the sea and the bay for

fishing and harvesting other bounty from the deep. He also traded actively and on fairly equal terms with the British settlers.

In 1838 the Voortrekkers proclaimed their Republiek Natalia and defeated King Dingane at the Battle of Blood River. Life in Durban, as the rudimentary settlement was becoming known, continued as normal. However, by 1842, the British governor of the Cape felt compelled to intervene as the Trekkers were attempting to make extravagant claims on land towards the Mzimvubu river, in what is now the Eastern Cape, and the delicate balance of power on the Cape Colony's eastern frontier was being threatened.

Captain Thomas Smith and a military force marched up the coast and took up their position on a sandy plain, known as "Itafa Amalinde" (the plain of the lookout) to the north of the bay of Port Natal. Clashes between the British intruders and the Trekkers broke out and Smith soon found himself besieged. As every white Natal school child was taught for most of the 19th and 20th centuries, the gallant Dick King (and his Zulu companion Ndongeni who was later written back into the narrative as the political climate began to change), rode from the Bay of Natal to Grahamstown to raise the alarm and gather a relief force to rescue Captain Smith.

What is less well known is that it was Chief Mnini and his followers who met Dick King and Ndongeni on the southern side of the bay and who covered their tracks so they could make a clean getaway from the Trekkers. Mnini had his herd boys drive his cattle over the route of the two horses to obscure their tracks. Andries Pretorius, the Trekker leader, suspected something was up and seized some of Mnini's cattle to be on the safe side.

**However, the new colonial government did acknowledge his loyal services and established the "Umnini Trust" in the 1850s. This controlled an extensive area along the coast south of Amanzimtoti and the land remained in the hands of Mnini's descendants until it was incorporated into KwaZulu in the 1970s.**

When the British returned by sea with military reinforcements backed up by a large warship thundering broadsides, the Trekkers retreated, the siege of what was known as the "Old Fort" was lifted, and Mnini enthusiastically claimed his cattle back with as many extra Trekker oxen as he could lay his hands on before the British stopped him.

Mnini was rewarded by being evicted from the Bluff so the British could garrison the entrance to the bay. However, the new colonial government did acknowledge his loyal services and established the "Umnini Trust" in the 1850s. This controlled an extensive area along the coast south of Amanzimtoti and the land remained in the hands of Mnini's descendants until it was incorporated into KwaZulu in the 1970s. Umgababa, in the heart of the area, was developed as the first "blacks-only" beach resort in Natal. In 1994, the Mnini Trust territory, as part of KwaZulu, became part of the territory that fell under the Ingonyama Trust, despite local protests.

As the democratically-elected government under President Nelson Mandela shook itself down in office in 1994, one of the first steps taken was to incorporate former homeland legislation into national, rather than provincial legislation. KwaZulu's Ingonyama Trust Act was one of the pieces of legislation affected. In 1997, the Ingonyama Act, which had been written in great haste, was amended and tidied up. Significantly the amended legislation allows for any lawful land reform programmes to apply to Ingonyama Trust land, after consultation with the



Ingonyama himself. In exercising his functions in terms of the act, the Ingonyama is also required not to infringe on existing rights or interests. So, over twenty years ago, unqualified control over the Ingonyama Trust land was diluted and somewhat circumscribed by the democratic parliament.

The complaints of the descendants of Chief Mnini that the Ingonyama Trust infringes on the rights given to them by the colonial grant in the 1850s should be taken seriously. As so often happens in this country, things are seldom what they seem.

**Note:** *This is a tentative and preliminary piece of research and the topic is worthy of a far more detailed investigation. I gratefully acknowledge the assistance and comments of Professor Theuns Eloff, Executive Director of the FW de Klerk Foundation who consulted former State President FW de Klerk and former Director General Dave Steward on my behalf. Nevertheless, I alone remain responsible for all opinions expressed herein and for any errors and omissions.*

# Summary of the HSF's Submission to the Constitutional Review Committee:

On 27 February 2018, the National Assembly adopted a motion on a review and potential amendment of Section 25 of the Constitution relating to expropriation without compensation ("the Motion"). The Motion had been introduced by the Economic Freedom Fighters ("EFF"), but the final text included certain amendments put forward by the ANC. The National Assembly established an ad hoc committee ("the Committee") to conduct a review of Section 25 of the Constitution. This Committee has to report to the National Assembly by 30 August 2018.

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The HSF has submitted a written submission to the Committee, which is summarised in this brief.

## Section 25 of The Constitution Already Allows for Expropriation Without Compensation

Section 25 permits expropriation of property in the public interest, which is defined as including "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources". It also sets out the criteria for compensation to be paid. On a literal interpretation, there is nothing in Section 25 that precludes the compensation from being small (or nothing at all), if that is the result of taking all relevant circumstances into account, as required by its provisions. This would be possible where land has been unutilized for a considerable time, from which the owner is deriving no income, which provides no employment, where there are no plans to use the land in a productive manner but where there is real potential (either for agricultural or urban purposes) in making it available within the Government's land reform programme. The history of the property and the way in which it was acquired may also be relevant.

In addition, Section 25(8) of the Constitution provides that:

"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)."

Section 36(1), which is referred to at the end of Section 25(8), provides that limitations may only be contained in legislation of general application. In other words, such measures may not target specific individuals or groups, but must apply to all.

Given the clear and unambiguous meaning of Section 25(8), what need is there even to discuss changing the Constitution to provide for expropriation without compensation?

Rather than recommend that the Constitution be changed, the Panel recommends that government should use its expropriation powers more boldly, in ways that test the meaning of the compensation provisions in Section 25(3), particularly in relation to land that is unutilised or under-utilised.

### **Changing The Constitution is No Substitute for a Lack of Action on Land Reform**

The Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change<sup>1</sup>, published in November 2017, ("the High Level Panel") provides a comprehensive overview of the land reform process. The High Level Panel's report makes it clear that the reason for the slow pace of land reform is not the Constitution:

"Experts advise that the need to pay compensation has not been the most serious constraint on land reform in South Africa to date - other constraints, including increasing evidence of corruption by officials, the diversion of land reform budget to elites, lack of political will, and lack of training and capacity have proved the more serious stumbling blocks to land reform .... Rather than recommend that the Constitution be changed, the Panel recommends that government should use its expropriation powers more boldly, in ways that test the meaning of the compensation provisions in Section 25(3), particularly in relation to land that is unutilised or under-utilised."<sup>2</sup>

Making the Constitution the villain of the piece serves as a convenient excuse for the lack of political will in land reform. Clear evidence of the lack of political will is indicated by the following:

- The pace of restitution has been extremely slow. According to the Report of the High Level Panel, there has been a downward trend in the pace of redistribution since 2008<sup>3</sup>. There are still 7000 unsettled claims in the current restitution process and more than 19 000 unfinalised claims that had been lodged before 1998. It will take 35 years to settle these claims at the present rate of 560 claims a year.
- The budget allocated to land reform and restitution is negligible. In the 2018 National Budget, only 0,3% of the consolidated expenditure is allocated to land reform and restitution combined.<sup>4</sup>
- The Government has made no real attempt at using Section 25 of the Constitution to effect expropriation of land in a meaningful manner.
- The failure to amend legislation such as the Expropriation Act of 1975, which contains the "willing seller – willing buyer" concept, which does not appear in the Constitution.

### **Is Expropriation Without Compensation necessary?**

Whilst emphasis is given in Government statements to rectifying the historical dispossession of land, the underlying message is that it is a way of broadening economic participation, given the degree of continued inequality in wealth between racial groups in South Africa.

Attempts to rectify this considerable imbalance incrementally through the normal workings of the economy will, even if economic growth increases substantially

over current levels, take generations. It is therefore not unexpected that more radical policies are advocated, such as a more aggressive approach to land reform.

However, a rushed and poorly thought out programme will incur unnecessary delays and costs and lead to disappointing outcomes. It should have a beneficial economic influence and the poorest in our society must be the beneficiaries. Land reform would not be justified if, as a consequence, the wealthier sectors of society accumulate further assets.

### **Expropriation Without Compensation Should Only be Carried Out Within a Clearly Defined Decision-Making Process and Administrative Structure**

The HSF believes that it is possible in terms of Section 25 of the Constitution (as it stands now) to expropriate land in the public interest, often with little or no compensation.

In order to avoid arbitrary, corrupt or incompetent conduct in the implementation of a land reform policy, a clear legislative and administrative framework, together with a properly resourced Government institution to manage the process, has to be put in place. If this is not done, any expropriation policy is going to confront insurmountable problems.

In establishing such a framework, clarity first has to be obtained on a number of different issues which would have a direct effect on any expropriation process. Examples of these issues are illustrated by the following questions (which are by no means exhaustive)<sup>5</sup>:

- How will decisions be taken on land that is to be expropriated? What criteria are relevant in any decisions? Who will take the decisions? What procedure is foreseen for objections?
- Who is to be given the expropriated land? Who will decide on who is to be a beneficiary? On what criteria? Will the policy be targeted to benefit the poor?
- Are the financial circumstances of the persons whose land are to be expropriated relevant (to avoid former owners being left destitute)?
- What dispute resolution mechanism is to be established?
- How will sufficient transparency be given to the process to avoid public discontent?
- What is to be the basis for deciding that specific land is suitable for redistribution for agricultural or urban purposes? What are the needs for each category? Will any land redistribution be subject to feasibility studies which set out what can realistically be achieved in any specific case? Have the environmental implications been taken into account in an adequate manner? If urban development is foreseen, will it fit into larger urban development programmes (including transport and basic infrastructure)?
- Is post-settlement support by Government to be provided, or will beneficiaries (mainly the poor) be left to their own devices?

In order to avoid arbitrary, corrupt or incompetent conduct in the implementation of a land reform policy, a clear legislative and administrative framework, together with a properly resourced Government institution to manage the process, has to be put in place.

- On what legal basis is the land to be held by beneficiaries? With full legal title or through a lease from a local or traditional authority? If it is a lease, what security of tenure will beneficiaries have? Is any form of tenure reform envisaged by Government for this purpose?
- Will the process be managed by an adequately resourced and staffed land reform agency? Will appropriately qualified staff be available for this?
- Will Government be able to fund this whole undertaking, in stark contrast to the purely nominal funding dedicated to land reform up to now?

Business and investment confidence will experience a serious shock. It is easy to underestimate the degree to which such confidence relies on legal certainty and on the predictability of Government policy.

It is striking that none of these issues have been raised in the public debate so far.

If the questions which are set out above are not dealt with in an adequate manner, together with the establishment of a suitable legislative and administrative framework, the consequences will be the following:

- Legal challenges based on the irrational/arbitrary exercise of executive power will bring the process to a grinding halt very quickly.
- The problems which already exist in the land reform process, will continue, leading not only to a stalled process, but also to perceptions of a failed policy, further fueling public dissatisfaction.
- Business and investment confidence will experience a serious shock. It is easy to underestimate the degree to which such confidence relies on legal certainty and on the predictability of Government policy.
- A lack of a clear policy framework also increases the perceived risk to private property rights and will have direct financial consequences in the form of urban and rural ventures being unable to source funding from banks (since the banks would not wish to lend if the activities they are financing are on land where ownership is not considered to be secure).

### **The Important Practical Issues Need to be Dealt With Outside of The Constitution**

No amendment to the Constitution will provide answers to the practical questions which are set out above. Extensive legislation and clear administrative regulations and guidelines will be required, together with a properly funded and staffed supervisory/management agency, to enable a process which is characterized by rational decision-making and efficient implementation.

### **The Need For a New Framework Law on Land Reform and for Clarification of The Content of Land Tenure Rights**

As far as the legal tenure of residents in traditional areas is concerned, the HSF shares the High Level Panel's concern, where the latter comments as follows:

"It is of great concern to the Panel that recent policy shifts appear to default to some of the key repertoires that were used to justify the denial of political and property rights for black people during colonialism and apartheid. These repertoires include the assumption that customary and de factoland tenure systems do not constitute property rights for the poor. The State Land Lease and Disposal policy, and the CPA Amendment Bill default to the model of state trusteeship put in place by the Development Trust and Land Act of 1936 as

the most appropriate from of land rights for beneficiaries of land reform. This model previously applied only in the former homelands, but now appears to have been extended to all land made available through restitution and redistribution."<sup>6</sup>

In paragraph 10(b) of the Motion, the Committee is asked to propose "the necessary constitutional amendments, where applicable, with regards to the kind of future land tenure regime needed". The HSF is of the opinion that this matter does not need to be determined in the Constitution. Rather, legislation should be prepared to enable real ownership rights to be given not only to persons who benefit from land reform, but also those who live in areas where they are subject to the authority of traditional authorities. Historical state/traditional authority trusteeship models need to benefit from administrative standards and practices that allow for secure tenure.

### **Land Ownership Statistics**

In the public debate on land reform, statistics are often selected in accordance with the individual speaker's agenda. There is no generally accepted set of statistics available for an accurate analysis. Much is clouded by the fact that private ownership statistics include land owned by companies, trusts and other entities which make it impossible to obtain an accurate impression of racial composition. Further, large areas inhabited by black residents are held by traditional authorities and the legal basis of individual tenure is often less than clear. It is also evident that this latter segment cannot be compared to freehold areas.

The various studies and audits that have been carried out, have therefore not succeeded in describing the racial imbalance in land ownership in precise terms. "There is almost zero information on how many people have actually benefited from land reform, patterns of land use after transfer, and levels of production and income."<sup>7</sup>

In an attempt to obtain an indicative overall picture, we can refer to the summary provided by the Institute for Poverty, Land and Agrarian Studies at the University of the Western Cape.<sup>8</sup> It sets out the following rough distribution:

- 67% commercial agricultural land (where most farmers are white but small numbers of black farmers with access to capital are acquiring land through the market independently of land reform);
- 15% communal areas (mostly state-owned, and settled by black households under various form of customary tenure, including the land held by the Ingonyama Trust, which on its own holds 2% of South Africa's land);
- 10% other state land; and
- 8% remainder, which includes urban areas.

In addition, even if some statistics on land ownership are accurate, they only tell a part of the story, as nothing is normally said about the quality of the land or whether it is suitable for any particular purpose. The following example shows how deceptive statistics can be in this context, without some contextual

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explanation. According to the Abstract of Agricultural Statistics published by the Department of Agriculture, Forestry & Fisheries, only 1,3% of the total area of the Northern Cape Province constitutes arable land.<sup>9</sup> You could therefore theoretically own 98.7% of the Northern Cape Province, but none of its arable land.

Statistics South Africa divides South Africa into three geographical types: urban, traditional areas, and non-traditional areas. The difficulty with this classification is that it obscures the level of urbanisation within traditional areas, which is higher than generally assumed.

In spite of a lack of accurate statistics, it is clear that a very substantial racial imbalance in land ownership exists. However, we do not believe that redistribution of land on its own, will solve the problem, without a developmental economic approach which accompanies it (and with the supporting framework that such an approach requires).

#### **Land Reform Policies need to Accept the Increasing Importance of Urbanisation<sup>10</sup>**

Land reform is often thought about in relation to rural areas, but it is most needed in urban areas. This is the result of an urban transition which is much more complete than is generally recognised.

Statistics South Africa divides South Africa into three geographical types: urban, traditional areas, and non-traditional areas. The difficulty with this classification is that it obscures the level of urbanisation within traditional areas, which is higher than generally assumed.

In rural areas the population is dropping, making land reform easier. Land there is not the main problem. It is the policy, institutional and support surround that really matters and hard work on these fronts is needed to make rural land reform work. Equally, the availability of land in metros is not the key constraint on land reform. Making human settlements policy fitter for purpose, mobilizing the energies of households, private developers and finance institutions, and providing leadership to encouraging change in outlook in urban areas are all much more important.

#### **Protection of Investment**

The Protection of Investment Act 22 of 2015, has been criticised for the watering down of foreign investors' rights to seek redress in the case of expropriation of their investments. In terms of this Act (which is still to come into force), the dispute settlement mechanism is domestic mediation and the South African Government may (but is not obliged to) consent to international arbitration, once domestic remedies have been exhausted. In the event of international arbitration, the question of customary international law on this topic will certainly be raised. Depending on the circumstances, customary international law may treat expropriation without compensation as unlawful.

Legal protection of investment would now be provided for by Section 10 of the Act which states that:

"Investors have the right to property in terms of Section 25 of the Constitution."

Any amendment to Section 25 of the Constitution would therefore have an immediate impact on the legislative protection of foreign investment. In addition, if it is accompanied by the absence of a clear legislative and administrative framework to implement a land reform policy, it will have a negative knock-on effect on foreign investor confidence. It is the perception that is important in this context. If confronted with what is seen as an arbitrary expropriation régime,

potential foreign investors are likely to come to the conclusion that the risks of investing in South Africa are too great for comfort. Such investors would prefer to invest elsewhere in the world.

#### **Conclusion**

The HSF agrees that land reform is necessary, given South Africa's history, and to assist in creating employment and addressing the inequalities in the country. However, the focus of the Motion, in considering a change to the Constitution, is misplaced and diverts attention from the policy and institutional changes needed for effective land reform. Instead of considering a change to the Constitution, the Committee should recommend the establishment of a clearly defined overall legislative and regulatory framework, together with an adequately resourced and financed administrative structure.

As an integral part of this overall framework, consideration will also need to be given to the nature of rights that are to be granted to beneficiaries. Clearly defined rights to land are appropriate, as opposed to a form of undefined lease tenure which runs the danger of being insecure and dependent on the whim of local authorities. The danger of abuse and corruption in the latter situation is clear.

It is evident that the implementation of any new land reform policy is a massive undertaking from a legislative, administrative and financial perspective. Land reform should not be jeopardized by underestimating the extent of the undertaking or by putting inadequate measures in place.

#### **NOTES**

- 1 The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change was created by the Speaker's Forum (a voluntary association comprising speakers and other office bearers of the National Assembly, the National Council of Provinces and Provincial Legislatures). The Panel was chaired by former President Kgalema Motlanthe and its work was divided into three thematic areas: (i) poverty, unemployment and the equitable distribution of wealth (ii) land reform: restitution, redistribution and the security of tenure and (iii) social cohesion and nation-building. The Working Group on land reform was led by Dr Aninka Claassens, a land reform specialist from the University of Cape Town. The Working Group was given the task of producing a report focusing on the most important policies and laws passed since 1994.
- 2 Ibid., p. 300.
- 3 Ibid., p. 210.
- 4 Tables 5.5 & 5.12, <http://www.treasury.gov.za/documents/national%20budget/2018/review/FullBR.pdf>
- 5 The Report of the High Level Panel raises many of these questions. See p 220.
- 6 Ibid., p. 303.
- 7 Ben Cousins, Land debate in South Africa is clouded by misrepresentation and lack of data, The Conversation, 2018 available at: <https://theconversation.com/land-debate-in-south-africa-is-clouded-by-misrepresentation-and-lack-of-data-93078>.
- 8 Institute for Poverty, Land and Agrarian Studies, FACT CHECK NO.1 LAND REFORM:<http://www.plaas.org.za/sites/default/files/publications-pdf/No1%20Fact%20check%20web.pdf>
- 9 Abstract of Agricultural Statistics 2013, Table 5, Department of Agriculture, Forestry and Fisheries.
- 10 The material in this section is based on Charles Simkins, Human settlements and urban land reform, HSF.

BOOK  
REVIEW

# John Laband

## The Eight Zulu Kings

**GRAHAM DOMINY**

is a former Archivist of South Africa who retired in March 2014. He has worked in and managed a variety of, archival, cultural and heritage institutions since the 1970s. He has studied extensively: obtaining his graduate and professional qualifications in South Africa (University of Natal and Pretoria), his MA in Ireland (University College Cork) and his PhD in the United Kingdom (at the Institute of Commonwealth Studies, University of London). He is a Research Fellow at the Helen Suzman Foundation.

Barely a year since the appearance of his gripping account, *The Assassination of King Shaka* (Jonathan Ball, 2017), prolific historian, John Laband, has presented readers of South African history with another popularly written account of Zulu and South African history, entitled, *The Eight Zulu Kings*. This work is on a broader canvas than *The Assassination of King Shaka* and situates the reigns of the kings very firmly in the broader social and political contexts of their times, right up to the present day.

The eight kings are Shaka kaSenzangakhona, his two half-brothers, Dingane and Mpande, and Mpande's descendants: Cetshwayo, Dinuzulu, Solomon, Cyprian and Goodwill Zwelithini, a total of six generations stretching from the 18-teens to the 20-teens. It is undeniable that the Zulu monarchy has proved to be a durable institution, but it is an institution that has evolved, often under extreme duress, from being the major political player in south-eastern Africa, into performing a more limited, but nevertheless influential, role as a source of cultural conservatism in the 21st Century democratic South Africa. Laband unpicks the political threads that make up this compelling tale.

Having written so recently about King Shaka, how does Laband give the story of the Zulu monarchy a new gloss and fit it into a broader national narrative? As with *Assassination*, he selects a dramatic, or symbolic, event as a peg from which to hang his tale. In this case, it is the 1983 opening of the reconstructed Ondini *ikhanda*, or royal residence, in the new capital of the KwaZulu homeland, Ulundi, a hoped for symbol of resurgent Zulu greatness. This kick-starts the author's discussion of the structure of Zulu traditional society and draws the reader into his thoughts about how the society was formed and grew. And it is within this context that he writes about the kings. This is a good book for a number of reasons:

Firstly, Laband has a fluent easy writing style that is a pleasure to read. Secondly he has an encyclopaedic knowledge of Zulu history and society and how the monarchy plays a crucial part in Zulu political and social identity. Thirdly, he draws interesting and necessary distinctions between chiefs and kings in African traditional society (he uses and explains correct Zulu terminology for positions offices and events and relates them to commonly used English language terms).

He shows how every Zulu king, from Shaka to Zwelithini, had to manoeuvre within the threat of outside forces: be they the evolving constraints of intruding colonialism, or conquering imperialism, and, ultimately, suffocating apartheid. Shaka faced but the outriders of colonialism, the small number of British hunters and traders at Port Natal; they were a curiosity for him. Dingane fought a major war with the Trekkers (although Laband shows that it was internal Zulu rivalries that finally destroyed him). Mpande, was perhaps the most successful, and certainly the longest reigning monarch and sustained his power in a delicate balancing act between Trekker and British and later as a peaceful, but powerful,

neighbour of the Colony of Natal. He was the only king, in the 19th Century, to die of natural causes.

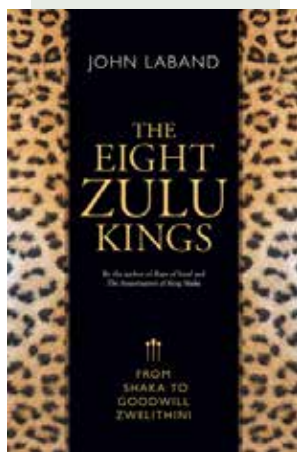
Then came the two tragic heroes: Cetshwayo, the defiant king whose armies inflicted one of the worst defeats of the 19th century on the British army and who yielded in the end to overwhelming force; and his son, Dinuzulu, whose struggles to be recognised as king led him into one-sided agreements with the Boers and eventually into exile on Napoleon's island, St Helena, by the British. Dinuzulu was finally given restricted freedom by Prime Minister Louis Botha on the coming of Union in 1910, but he was never recognised as Zulu king.

Dinuzulu's son Solomon also struggled with the Union Government for recognition and Laband gives a new twist to the account of how "Paramount Chief" Solomon snubbed the Earl of Athlone, a member of the British Royal Family and Governor General of the Union, on his visit to Zululand. Eventually, after Solomon's death, the Nationalist Government recognised his son, Cyprian, as king, provided that he supported the Bantu Tribal Authority that eventually grew into the KwaZulu homeland. Cyprian was subjected to bruising pressures from the apartheid government and, perhaps understandably, turned to alcohol for solace.

Laband brings the book right up to date with his consideration of King Goodwill Zwelithini and the controversy over the Ingonyama Trust. King Zwelithini has astutely negotiated the transition between apartheid and democracy as well as the tensions between the ANC and the IFP. The monarchy has made substantial material gains in the process. He remains a ceremonial figure, but is capable of wielding significant influence and political leaders from Nelson Mandela to Cyril Ramaphosa, including, of course, Jacob Zuma and even Julius Malema, have beaten paths to his royal doorstep seeking his blessing. The king's complex relationship with Mangosuthu Buthelezi is teased out in fascinating detail. Buthelezi fully understood that the "figure of the Zulu monarch gave meaning and coherence to Zulu politics" (p 339), but his relationship with the king waxed and waned through various political twists and turns over the decades.

As KwaZulu Chief Minister, Buthelezi pushed a reluctant Zwelithini into an agreement that the king would remain above politics. The king was then wheeled out to grace many cultural occasions that looked suspiciously like Inkatha rallies. The resentment that Zwelithini felt, gave the ANC the opportunity to curry favour with him in the crucial year of 1994, a process in which one, Jacob Zuma, played a significant part. This wheeling and dealing also influenced the agreement behind the establishment of the Ingonyama Trust with King Goodwill Zwelithini as its patron. Basically, all the land of the KwaZulu homeland was bundled into the trust just days before the first democratic election in April 1994. The Nationalists were happy, the ANC acquiesced (until Kgalema Motlanthe looked at the devil in the details over two decades later), and the IFP was bought over and participated in the first democratic elections. There is a lot more to this story than Laband has been able to explore within the confines of a wide ranging book about a long lasting dynasty.

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While Laband points out that the Zulu monarchy has benefited most of all the traditional kingdoms in the democratic era and relates this to *realpolitik* of 1994, he is not able to explore this thoroughly enough. This is an inevitable failing in such a wide-ranging book. His weaving is more deft when he is dealing with the threads of 19th Century history than with the half-hidden threads of events of the later 20th and early 21st centuries.

The publishers also seem to have rushed the publication process and there are several minor typographical errors. The one that particularly annoyed me, (as a maritime history hobbyist), is that on the same page (p 237), the *Natal*, a small coastal steamship that carried King Cetshwayo into exile after the Ango-Zulu War, is referred to twice: once as a steam transport, and once as a warship, *HMS Natal*. Of greater import is the howler on page 192, namely the caption for the photograph of Cetshwayo's "coronation" by Theophilus Shepstone. The date is given as 1 September 1879 instead of 1873. Silly errors such as this are most uncharacteristic of John Laband's writing.

Nevertheless, for anybody seeking an understanding of the roots of South African history and how the historic forces play themselves out in the modern era, *The Eight Zulu Kings* is a valuable contribution to our understanding of a complex and dramatic two centuries as seen through the lives and careers of a noble dynasty.



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