

Ad Hoc Committee
to amend the Constitution
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BLF's submission on the Draft Constitution Eighteenth Amendment Bill, 2019 to amend Section 25 of the Constitution to allow for expropriation without compensation

1. I am Andile Mngxitama, the President of Black First Land First (BLF), and I am duly authorized to represent BLF regarding all matters relating to the subject matter of these submissions.

2. BLF is a Black Consciousness, Pan Afrikanist movement which embraces a Sankarist leadership ethos. This submission is canvassed under the following subtitles:

- a. Introduction
- b. Amendments are two fold: nil compensation
- c. On the influence of Advocate Tembeka Ngcukaitobi and Professor Ruth Hall
- d. On "just and equitable" compensation
- e. What do we as BLF propose regarding Section 25 of the Constitution?
- f. Can these proposals regarding the amendment of Section 25 of the Constitution be realized and are they within the prism of the law?
- g. Oral presentation at public hearing

Introduction

3. We note the following indications by the Ad Hoc Committee to amend the Constitution (the committee):

a. The Draft Constitution Eighteenth Amendment Bill, makes provision for Section 25 of the Constitution be amended to allow for "expropriation without compensation".

b. Should the Bill be adopted, the preamble (which provides the context of the Bill), will not be part of the Constitution.

c. This preamble provides the context of the Bill and recognizes that expropriation without compensation will serve as an option for land reform to redress the wrongs of history, ensure equitable access to land, and to empower South Africa's majority.

d. Section 25 (2) of the Constitution currently reads:

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

e. The Draft Constitution Eighteenth Amendment Bill, 2019 adds the following provision to that:

"Provided that in accordance with subsection [3A] a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil."

f. The draft Bill further adds the following as subsection (3A) to Section 25 of the Constitution: "National legislation must, subject to subsections [2] and [3], set out specific circumstances where a court may determine that the amount of compensation is nil."

4. We further note the following 23 Month Timeline:

a. In late February 2018 a motion was brought in the National Assembly (NA) by EFF leader Julius Malema for land expropriation without compensation (LEWC).

b. The ANC, that had ostensibly adopted LEWC at its 2017 Nasrec conference support the motion with certain amendments, including abandoning total state ownership.

c. This culminated in a public participation process.

d. In November 2018, it was decided by the ad hoc constitutional review committee that Section 25 of the Constitution must be amended to make explicit that LEWC was possible.

f. On 5 December 2018, the NA resolved by a vote of 209 for and 91 against, that Section 25 of the Constitution must be amended to make explicit that LEWC was possible.

g. The year end recess of the NA followed.

h. The newly formed committee noted the decision to amend Section 25 of the constitution in early 2019, but the process, which was punctuated by the May 2019 elections, was only revived in July 2019.

i. On 5 December 2019 the 'ad hoc committee to initiate and introduce legislation amending Section 25 of the Constitution' approved the Draft Constitution Eighteenth Amendment Bill, 2019 ahead of it being opened for public comment.

j. The "Draft Constitution Eighteenth Amendment Bill, 2019" was published for public comment at the end of December 2019.

Amendments are two fold: nil compensation

5. The "Draft Constitution Eighteenth Amendment Bill, 2019" indicates a strong resistance to land return without compensation. The amendments are two fold. It firstly suggests the notion of "nil compensation" in the event that parties are amenable or if such nil compensation is determined by the courts.

6. It secondly provides for legislation to be enacted to determine under what circumstances the "nil compensation" would apply. Here the Expropriation Bill published in December 2018, which refers to abandoned land, unproductive land, land laying fallow, abandoned buildings, and state land, is

instructive as a guide in this respect. So all the unwanted land is what the land expropriation bill says will be expropriated - for which nil compensation will be paid.

7. This then indicates other circumstances where “nil compensation” won’t apply and to this end where market value will apply.

8. The memorandum attached to the Bill makes it clear that this “nil compensation” is but one of the options to be considered.

9. The idea that the landless and land thieves can agree on no compensation is silly and an insult to black people. If this idea of land donation by land thieves was viable, there would be no need for a land redistribution policy.

10. This nonsensical idea suggests that there are land thieves out there waiting to give back land for nil compensation. Moreover, in the event that the matter is decided by the court, then “fair and equitable compensation” must apply - and it’s already determined by our courts that the first consideration is that of market value.

11. This then indicates other circumstances where “nil compensation” won’t apply and to this end where market value will apply, as already suggested by the courts.

On the influence of Advocate Tembeka Ngcukaitobi and Professor Ruth Hall

12. The “Draft Constitution Eighteenth Amendment Bill, 2019” presents the misleading propositions of Advocate Tembeka Ngcukaitobi, and Professor Ruth Hall, who are staunch opponents of land return without payment to land thieves.

13. This idea of nil compensation in fact comes from Professor Hall and Advocate Ngcukaitobi. Professor Hall has for a very long time been doing work on the land issue to make sure that she protects the Constitution and in so doing doesn’t interfere with it. Basically she ensures that white people’s property remains secured.

14. Ngcukaitobi is the author of this very popular book, “The Land Is Ours” which Hall assisted in promoting. In fact this book has nothing to do with land. It has to do with this idea that black people contributed to the birth of the constitution of South Africa (SA) and that if they want land they must adhere to the same constitution that says we must buy back our land.

15. Ngcukaitobi in his book clearly intends to instill faith in the SA Constitution which has failed to resolve the land question for black people. He misrepresents the liberation struggle as being premised on the bourgeois anti black notions of the rule of law and constitutionalism. It is significant that the book was published on February 1, 2018, some 7 months before Ngcukaitobi’s appointment to Ramaphosa’s Advisory Panel on Land Reform and Agriculture.

16. In this regard, on 21 September 2018, the appointment of President Cyril Ramaphosa’s ‘Advisory Panel on Land Reform and Agriculture’ (which included Professor Hall and Advocate Ngcukaitobi) to advise the ‘Inter-Ministerial Committee (IMC) on Land Reform’, was announced.

17. The panel was tasked with providing approaches on land policy, suggesting models for implementation by government, and the circumstances under which expropriation without compensation will be implemented.

18. In its final report the panel proposed amongst other things retaining the compensation centered nature of Section 25 of the Constitution by providing for limited circumstances in a constitutional amendment where expropriation without compensation may be necessary; zero compensation in justifiable circumstances; as well as devising a Donations Policy for properties to be donated by landowners, for the donors to be exempted from donations tax, and for government to pay the land transfer conveyancing costs in this regard.

Sources

1. "These are the women and men tasked with advising Ramaphosa on land reform", see link, <https://www.timeslive.co.za/politics/2018-09-21-these-are-the-women-and-men-tasked-with-advising-ramaphosa-on-land-reform/>)

2. "Panel releases land reform report", see link, <https://www.sanews.gov.za/south-africa/panel-releases-land-reform-report>

On "just and equitable" compensation

19. The fact is that the "Draft Constitution Eighteenth Amendment Bill, 2019" is not intended to realize land expropriation without compensation. What we have rather is expropriation of land without land expropriation. And while the Bill says land expropriation without compensation, it actually doesn't give us land expropriation without compensation.

20. Why is this so? It is because it does not deal with the big question, which is compensation. Section 25 of the Constitution makes the provision that in any situation where you're going to take land or property, you must pay what they call "just an equitable compensation". "Just an equitable compensation" is critical for Section 25.

21.; Now this bill doesn't deal with this issue of compensation. What it does provide for is this really crazy idea (option) of nil compensation and an amendment to the Constitution that says under what circumstances there must be nil compensation as indicated above.

22. Is it possible for this idea of zero compensation to be accepted in the South African constitutional dispensation? The answer is no. Adv Ngcukaitobi is lying. He and Ruth Hall say there's no need to amend section 25 of the Constitution because it caters for Land Expropriation Without Compensation sufficiently. He sits as the Acting Judge (AJ) in the Land Claims Court of South Africa. He dealt with a matter where the question of compensation had to be decided and his decision was taken on appeal to the Supreme Court of Appeal (SCA).

23. Why didn't Ngcukaitobi tell the nation that he has attempted to reject the market related value in computing compensation and failed. Moreover, SCA didn't only overturn his decision, it did so with costs.

24. Section 25(2) and (3) of the Constitution, which deals with "just and equitable" compensation for expropriation of property, provides that land may:

'(2) ...be expropriated only in terms of law of general application-
(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct State investment and subsidy in the acquisition and beneficial capital improvement of the property;
- and (e) the purpose of the expropriation.'

25. The key question that renders Section 25 a clause that legitimises land theft is the provision of "just and equitable compensation", in all instances of land expropriation. Case law shows that in each case of expropriation, market related compensation is to be paid.

26. The whole argument on paying for stolen property turns on the phrase "just and equitable compensation". Defenders of the status quo sell the lie that the Constitution as it stands makes land expropriation without compensation possible. There is no truth to this back hand defence of land theft. As indicated above, the full bench of the Appellate Division has now settled the matter. It overturned the mild decision of Ngcukaitobi in the Msiza matter elaborated below and in fact decided that the market value be paid to land thieves. This decision was made in September 2017, and according to information at our disposal no one is challenging it. A precedent has accordingly been set.

27. At least four matters related to land and compensation has already been decided by the highest courts of the land.

28. To be truthful to the demand for land expropriation without compensation, a criteria that clarifies the meaning of "just and equitable compensation" so as to ensure no exchange of monetary compensation to land thieves, is important.

29. The Committee must be aware of at least four instances where the courts have dealt with compensation to see the leanings of the Judges in interpreting "just and equitable" compensation, namely:

a. Firstly, Judge Geldenhys in the Land Claims Court tried to give interpretation to the clause "just and equitable compensation". To this end he came to some complicated calculation that claims to take into consideration the same long list of considerations repeated in the Expropriation Bill. He however did not solve the problem. At best the Geldenhys Judgment has left the legal system with "two states" evaluation to arrive at a fair compensation.

b. Secondly, the former Head of the Constitutional Court, Deputy Chief Justice (DCJ) Dikgang Moseneke, has decided to rely on "inflation" to calculate compensation for those who have lost property and who are beneficiaries of the restitution process. DCJ Moseneke's determination is open to the accusation of racism because white land owners are never confronted with valuation of their property based on the Consumer Price Index (CPI). It is an established principle that property is not evaluated on the CPI. So, what then was the thinking behind this weird logic?

c. Thirdly, firm indication that the phrase “just and equitable compensation” (within the current framework) would mean “market value” was expressed in the Zimbabwean land expropriation matter, which was first decided by the SADC Tribunal and then ultimately decided by the South African Constitutional Court. In this case DCJ Moseneke led the bench in concluding that compensation must be paid whenever there is expropriation. This led to a judgement which effectively foreclosed the property of the Zimbabwean state so as to pay compensation to the white farmer who lost property in Zimbabwe.

d. Fourthly, the Msiza matter (full citation below) was heard at the Land Claims Court by Acting Judge Tembeka Ngcukaitobi, who applied the two tier method elaborated by Geldenhys. Ngcukaitobi managed to take off only R300 000, from the market valuation of R3.8 million. Even this modest adjustment has been rejected by the full bench when it overturned Ngcukaitobi and instead ruled for the full market value to be paid to beneficiaries of land dispossession.

30. In *Uys & another v Msiza & others* (1222/2016) [2017] ZASCA 130 (29 September 2017) the following is instructive:

a. the Supreme Court of Appeal (SCA) dealt with an appeal from the Land Claims Court (LCC) where Ngcukaitobi AJ and Canca AJ presided - cited as *Msiza v Director General for the Department of Rural Development and Land Reform & others* 2016 (5) SA 513 (LCC) (5 July 2016) - “against the amount of compensation it determined was due to the owner of a portion of a property expropriated pursuant to successful claim by labour tenant under s 23 (1) of Land Reform (Labour Tenants) Act 3 of 1996”;

b. the owner of the property (about 352 hectares in extent) is the Dee Cee Trust (the Trust) represented by its trustees the first and second appellants; and the labour tenant, who was awarded a portion of that property being 45.8522 hectares in extent, is Mr Msindo Pillemon Msiza (Mr Msiza);

c. “[t]he Trust’s complaint is that the LCC determined the compensation on the basis that the property was zoned for agricultural use instead of having regard to its developmental potential”;

d. the LCC “then compounded the error by arbitrarily reducing the market value of the property because it was awarded to a labour tenant”;

f. Agri SA made submissions as *amicus curiae* “regarding the proper consideration of market value in the assessment of just and equitable compensation as contemplated in s 25 of the Constitution”;

g. “The LCC ... accepted the market value of R1,8 million. It then proceeded to consider compensation which would be just and equitable. It determined that an amount of R300 000 should be deducted from the market value.”

h. “The reasons for making the deduction were listed as being: that there was a ‘disproportionate chasm’ between the amount paid by the trust and the market value it sought to claim; that the trust made no significant investment in the land; that the use of the land had not changed since it was acquired; that when the land was acquired there was a land claim and the Msiza family were residing on the land; that the land had been awarded to the Msiza family in 2004 and had not been transferred; that as the object of the compensation is land reform the fiscus should not be saddled

with extravagant claims for financial compensation when the object of expropriating the land is to address the pressing public concern for such reform; that the Msiza family had lived and worked on the farm since 1936 as Labour tenants and should receive compensation.”

i. “The LCC also found that there has been no direct State investment or beneficial capital improvement of the land.”

j. The SCA held that,

i. “there was no ‘disproportionate chasm’ between the price paid by the Trust when it bought the land and the market value at the time of the determination. Over the period of Trust ownership the value of land increased. This does not result in a disproportionate chasm but rather in a reflection of the escalation of the value of land.”

ii. “[t]he failure of the Trust to make any significant investments in the land since acquisition; the unchanged use of the land; the Trust’s knowledge of the impediment to development; the success of the determination, the fact that the Msiza family have been labour tenants and have worked the land since 1936 have all been taken into account in considering market value.”

iii. the LCC had “accepted that the expert had considered these factors as against market value“.

iv. there was “no justification for stigmatising the Trust’s claim as ‘extravagant’”, no “evidence that the fiscus is unable to pay R1,8 million for the land”, and the State was willing to pay R1,8 million.

v. the “LCC arbitrarily decided on this amount with no rational foundation”.

vi. there were “no facts justifying the deduction of the amount of R300 000.”

vii. a “just and equitable determination for the land is R1,8 million” being the market value of the land.

31. Accordingly the nil compensation suggested by Ngcukaitobi which informed the Bill under reply, is inconsistent with what the court has held.

32. Adv Ngcukaitobi and Prof Hall run with this notion that the constitution is adequate instead of allowing parliament to amend the constitution. Black First Land First (BLF) has proposed amending the constitution by removing the entire section 25 clause and replacing it with a radically new clause.

What do we as BLF propose regarding Section 25 of the Constitution?

33. On 31 January 2017 BLF submitted the Anti-Racism Bill of 2017 - which is its response to the "Prevention and Combating of Hate Crimes and Hate Speech Bill" published in the Government Gazette (No 40367) on 24 October 2016 (“Hate Crimes Bill”) - to the Department of Justice and Constitutional Development. It is for consideration ultimately by the National Assembly and the people of South Africa.

34. "CHAPTER 2" of the BLF Anti Racism Bill makes the following provisions - which we are now proposing to this Committee - relating to the amendment of the SA Constitution and the new Land Clause, so as to realize land return without compensation to the black majority:

"2. Repeal of Section 25 of the Constitution and the new land clause

2.1 Section 25 of the Constitution shall be repealed in its entirety and the following shall be used instead:

- a. All the land held by whites in South Africa is stolen property.
- b. The primary purpose of the redistribution of land to the black majority is for historical redress.
- c. All black people have a right to land in South Africa without any payment.
- d. The eviction of farm workers and poor people from land is illegal (in this regard there must be an end to the strange distinction between legal and illegal evictions)
- e. A new department, which shall be called the Department of Land Redistribution, must be established. It's sole mandate shall be the redistribution of land. (Right now South Africa does not have a department that solely focuses on land redistribution).
- f. A process must be outlined where land ceilings shall be effected in accordance with the soil capacity of each of the regions and provinces.
- h. The value of mortgage bonds must be adjusted to a value that excludes land in determining housing price because land must be offered to all for free.
- i. Land occupation by the landless is lawful".

35. A further point that should be added is:

"j. That constitutionally determined targets be set and the responsible Minister be held accountable. To this end we propose that in the next five years 80% of the total land be redistributed to black people".

Can these proposals regarding the amendment of Section 25 of the Constitution be realized and are they within the prism of the law?

36. The answer in both instances is yes! Amending the Constitution is a legal exercise. All you need is a 2/3rds majority which the National Assembly already has, as per the motion that set in place this process.

37. Once these amendments are effected the notions of zero or market related compensation is removed because you have determined in legislation that land is a national property which must be returned to those who own it.

38. The Committee must locate the land question in history and in the logic of land theft so that land expropriation without compensation is undertaken within a framework that would ensure decolonization and redress.

Oral presentation at public hearing

39. As the BLF President I request to make an oral presentation on the subject matter during any public hearing scheduled for this purpose.

Submitted 27 February 2020 by:

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