



**FW de Klerk**  
FOUNDATION

## **SECTION 25: TO AMEND OR NOT...**

*Theuns Eloff: Chairman of the Advisory Board of the FW de Klerk Foundation*

The report of the Presidential Advisory Panel on Land Reform and Agriculture was presented to President Ramaphosa on 4 May 2019 and made available to the public in July. Even before this date, two panelists - Dan Kriek (president of AgriSA) and Nick Serfontein (well-known farmer) - decided to hand over a minority report to the President. It was made available to the public after the main report.

What are the key differences between the main report and the minority report? Why did these two respected panelists find it necessary to draft a minority report? The differences can be summarised in three groups: process issues, style and ideological issues and substantive issues.

As for the process of the Advisory Panel, the minority report is rather critical. The various working groups took too long to finalise their reports and therefore, their content could not be timeously and sufficiently commented upon. With a deadline of March 31 to submit a report to the Inter-ministerial Committee, certain working group reports were still outstanding on March 24. The first draft report was sent to panelists only late afternoon on March 29, with a deadline for comment less than 48 hours later. The first report was clearly a “cut-and-paste” product. Comments by Kriek and Serfontein have not been sufficiently taken into account in the final report - although differences amongst members are mentioned briefly in the main report. The minority report's main objection to the process is that after two colloquiums, the views of external participants “in a way” became part of the report's recommendations, without any attempt to reach consensus among panelists.

If one reads the main report in depth, the rush with which it was drawn up is clear. There are numerous spelling and grammatical errors, and many repetitions. This may indicate that there were different authors for different parts (which is not uncommon with such a report), but it is clear that there was no proper editing done to avoid repetitions, and especially contradictions. The Chairman's foreword, for example, contains other emphases than the main part of the report (such as the case of willing seller-willing buyer). The argument in the main part of the report contains recommendations here and there, and the recommendations chapter contains a lot of argumentation, often repetitive. The question can therefore rightly be asked: if not written by the authors of the minority report, which of the panelists did the main writing? And why wasn't consensus sought?

In terms of approach, style and ideological issues, the minority report mentions the “huge emphasis” on social issues in the report, which they said were not really part of the mandate. At the same time, they refer to the so-called “class agenda” regarding land reform, which means that access and possession of land should be seen and used as the great equaliser between rich and poor. Their problem is that regarding land reform in agriculture, greater emphasis should be placed on production, efficiency and food security. Kriek and Serfontein point out that there is an underlying assumption in the report that mere access to land will in



**FW de Klerk**  
FOUNDATION

itself bring a better standard of living for poor South Africans. They say that this is simply not true, and that history proves it.

If one places 10 strong leaders on land reform on one panel, one must accept that ideological views on class and poverty cannot be obscured. One can, however, expect the process to be stronger in order to seek greater consensus, or at least to include others' opinions in the report as well. Apparently, the time pressure and lack of optimal management of the process did not allow for this. It is a great pity and a lack that is obvious.

The differences between content issues are of course the most important. This includes the proposed moratorium on the eviction of farm workers, as it also jeopardises the rights of the landowners and can lead to large-scale land invasions. The minority report also does not support the suggestion that the principle of willing seller-willing buyer should be waived, as it will and should still be an important consideration in the majority of cases.

However, the strongest substantive difference lies in the area of expropriation without compensation (EWC) and the amendment of section 25 of the Constitution. The minority report is clear: the report should not contain any reference to EWC and an amendment to the Constitution. In addition, a remuneration policy should not be drawn up - the principle of fair and equitable remuneration in section 25(3) must be determined by the courts on a case-by-case basis.

The main report deals with EWC in different places and it is not always clear what the primary recommendation is. In the preface, the Chair, Dr Vuyo Mahlati, says that the Panel provides guidance on ways in which section 25 can be amended to provide zero compensation under certain circumstances. The main body of the report states that with the current wording of section 25, EWC would be unconstitutional (p71). If the (political) purpose of a constitutional amendment is to move away from a mandatory compensation-based requirement, a new section 25(2)(c) may read that Parliament should enact legislation describing cases where EWC is possible for land reform (as provided for in Section 25(8)). The Panel finds that if a constitutional amendment aims to make EWC the rule and apply it largely without conditions, it would be against section 1 of the Constitution - especially the Rule of Law. But the chapter with the recommendations states that the Panel supports the proposed policy amendment to use constitutional provisions to enable EWC.

In the end, the Panel seems to be wavering between a direct amendment to section 25(2) and the adoption of the *Expropriation Amendment Act*, which may provide for EWC under certain specific circumstances (such as land abandoned or totally in debt). They do, however, recommend that a new *Expropriation Act* be referred to the Constitutional Court to test its constitutionality.

What does the President sit with after receiving the Panel's report and the minority report? It is not all bad news. Both reports agree on the need for faster and more effective land reform. Both contain and/or endorse good ideas on how to better implement land reform. This includes a land audit, a national land demand survey, the establishment of a comprehensive



**FW de Klerk**  
FOUNDATION

land reform law framework, a land reform fund, the appointment of a land rights protector, the importance of urban land reform, and perhaps the most drastic, establishing a “Land and Rural Reform Agency” - and taking that function away from the current departments. There is also consensus on the mistakes made by the government over the last 25 years regarding land reform, the corruption to be eradicated and the better systems for determining beneficiaries to be found.

On the other hand, the minority report, and in particular the differences on section 25 and EWC, highlight that the President's attempt to defuse the hot potato of EWC by appointing a panel of experts and perhaps making a constitutional amendment unnecessary, failed. The recommendations of the main report are, however, softer than a radical and comprehensive amendment to section 25 and EWC as a rule. The main report points out that such an amendment would be against the entire constitutional framework (and therefore would require a 75% majority for approval). The President and one part of the ANC caucus would be able to use it in the debates on amending section 25.

But the main report nevertheless directly or indirectly recommends that EWC should happen - either via a section 25 amendment or by providing exceptions to the constitutional rule of fair and equitable compensation in the *Expropriation Act*. That's not good news for the Ramaphosa side. In the hands of Parliament (where the Zuptas are steadily influencing and the EFF is foaming at the mouth for nationalisation) it is still a dangerous course. And enough has been written and said - again recently by former President Kgalema Montlanthe - that any EWC will be catastrophic for the country and the economy.

**\*First published on Netwerk24 in Afrikaans**