

# No need to change the Constitution for land reform

THE parliamentary committee is about to convene to consider whether section 25 of the Constitution should be amended to allow expropriation without compensation.

Written submissions have been made and the road shows around the country completed.

The core of the debate is whether land reform requires the Constitution to be amended. The Freedom Charter, adopted by the ANC in 1955, called for all land to be returned to the people.

Forty years later, when the final Constitution was negotiated, a compromise was reached.

Section 25 mandates the state to expropriate land so as to achieve land reform and for compensation to be just and equitable, reflecting an equitable balance between the public interests, including the commitment to land reform, and the individual affected by the expropriation.

Unfortunately, in the 23 years since the Constitution was adopted, the state has not used the powers conferred on it.

It has also not yet amended the Expropriation Act to allow expropriation to achieve land reform.

Amending section 25 of the Constitution to allow expropriation without compensation would be a blunt instrument. It would have serious negative effects on the economy; it would be in breach of the Bill of Rights and contrary to international law.

The Motlanthe Report concluded that section 25 of the Constitution allowed the state to achieve proper redistribution.

It, and other experts, have accepted that compensation is not the impediment.

## Victims

Customary international law forms part of our law. It does not countenance expropriation without compensation. In international law it must be for a public purpose and without discrimination.

The traditional measure of compensation is market value. In 1974, under the Charter of Economic Rights and Duties of States, developing countries watered this down to appropriate compensation.



Michael Jackson.

It is possible, given the South African imperative for land reform, for an internationally acceptable measure of compensation to be applied.

Justice and equity may under very restricted circumstances have the result that very little or any compensation will be payable (for example, when the expropriated property has been abandoned).

In all of this, the expropriatee should not be the victim of confiscation as that in turn would be unconstitutional. There has to be a balance between the rights of the state and the rights of the individual affected.

In a study of some 24 other constitutions, only one constitution, that of Zimbabwe, provides for no compensation.

The other various formulations include just compensation, fair compensation, full compensation and adequate compensation.

Germany's is similar to our constitution. It provides for a fair balance between the public and the individual interest.

The call for expropriation without compensation in the field of land reform is unnecessary and unacceptable.

It is likely to land South Africa in international controversy. The Constitution is flexible enough to provide, in certain circumstances, minimal or no compensation, where it is just and equitable to do so.

The Expropriation Act should be amended so as to permit equitable compensation, balancing the interests of the individual with the need for land reform, and in a way which is not contrary to international law and constitutional principles.

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