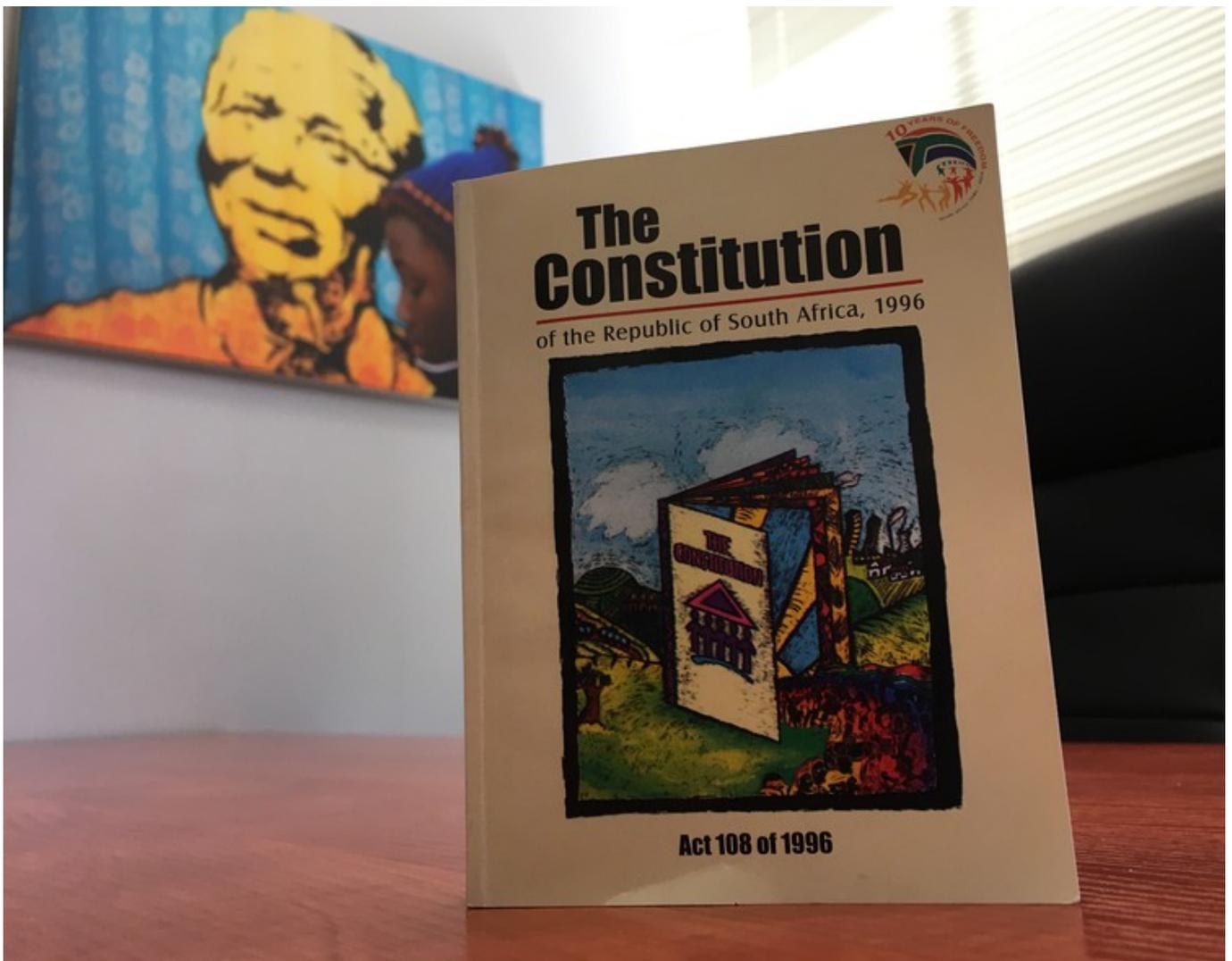


## **Expropriation: what does the Constitution say?**

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### **Four requirements, seven principles and four questions to consider**

By Johan van der Merwe



The Constitution has not been properly tested when it comes to expropriation of land. Photo: Aidan Jones

The intention to amend the Constitution to allow for expropriation without compensation (EWC) is being widely debated. But what the Constitution currently says about EWC can be summed up as four requirements, seven principles and four questions.

### **Four requirements**

The Constitution sets four minimum and non-negotiable requirements for expropriation of property:

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1. The act of expropriation may only be executed in terms of a law of general application, which means the law must be applied fairly to everyone. This provision prevents land grabbing.
2. No law may permit arbitrary deprivation of property. This provision prevents for example the donation of property to people favoured by the expropriating authority.
3. An expropriation must be either for a public purpose (including the commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources); or be in the public interest.
4. An expropriation is subject to compensation.

## Seven principles

Besides these four requirements, there are other principles in the Constitution relevant to EWC:

1. The concept of "property" is not defined, but it includes much more than merely land.
2. While the right to property may be classified as a human right because it is contained in the Bill of Rights section of the Constitution, the point is that it is not an absolute right. The constitutional right to property is relative. It is, like the other rights, subject to limitations referred to in the Bill of Rights.
3. The expropriation itself must be just and equitable.
4. The amount of compensation payable for the expropriation must be just and equitable.
5. What constitutes just and equitable compensation is open-ended.
6. Although open-ended, the list of considerations to decide what constitutes just and equitable compensation includes the following:
  - a. current use of the property;
  - b. purpose of the expropriation'
  - c. extent of direct state investment and subsidy in the acquisition and capital improvement of the property;
  - d. Market value of the property; and
  - e. History of the acquisition and use of the property.
7. Even though what constitutes equitable compensation is open-ended, the above five criteria must be considered.

This raises four questions.

## Question 1: What is the "evil" that not paying compensation

## **should cure?**

Most proponents for the amendment agree that EWC must achieve the following: (1) The economy must not be harmed and must in fact be grown, and jobs must be created, (2) agricultural production must be increased, (3) food security must be improved, and (4) radical economic transformation must be implemented which means that the land must be returned to those from whom it was taken.

Some, like Julius Malema, take it further and see EWC as a vehicle for the state to become the custodian of all land and think it will open the gateway to “lasting peace, security and justice”.

Many view EWC as a cure for the statistics that appeared in the 2017 land audit, to the effect that black people own about 4% of the land, and whites about 76%. Eminent scholars like Ben Cousins aim to establish a link with “unemployment, structural poverty and gross inequality. The most important question facing land reform is how it can contribute to increasing employment, incomes and livelihoods among the 55% of the population who live beneath the poverty line.”

Both those in favour and those who oppose (whose arguments are not summarised here) without exception engage in political, economic and financial discourse, and in the process, no one is addressing the reasons why compensation must be payable.

The reasons why compensation must be payable for expropriation were analysed in depth in a [2009 doctoral dissertation](#) [2]. It explains that compensation is a multi-layered matter. Compensation aims to prevent inefficient expropriation and spread its cost. “Compensation is paid to balance the interests of the individual with those of the public in order not to let the individual unduly carry the burden of an expropriation from which the public benefits. .... The Constitution requires that the interest of the individual be weighed against the interest of the public...” (Elmien du Plessis’s PhD, page 298-299)

That these reasons feature nowhere in the current debate suggests that the true reasons for wishing to expropriate without compensation are not being addressed, and that not paying compensation does not actually address the problems that have been identified.

## **Question 2: Have existing constitutional remedies been exhausted?**

The absence of data on expropriation since the Constitution was adopted means the track record has not been evaluated. The track record should show how and where the existing legislation falls short, if at all. Only armed with sufficient data can the effect and shortcomings of the current provisions for expropriation be assessed.

It is possible that if the state efficiently carried out expropriation using the current legislation, the desired ends could be achieved just as well (or as poorly) without amending the Constitution?

## **Question 3: How is EWC different from expropriation with compensation?**

The intention of the constitutional amendment is not to review and overhaul the entire law of compensation, but merely to enable EWC. The only intended change refers to the fourth requirement: an expropriation is subject to compensation. Even if the fourth requirement, requiring compensation, falls away, the other three requirements will remain intact. It is also inconceivable that all expropriation must be without compensation.

The distinction between EWC and expropriation with compensation raises further questions such as: Should the definition of property, for the purposes EWC, be limited to land, or not? Should such land be described as private, state, non-productive land? Should EWC only be allowed if good cause is shown?

The decision whether an expropriation should be with or without compensation, cannot be arbitrary. It follows that a process to determine whether property may be expropriated without compensation or not, should be developed, and this process must be subject to scrutiny under the law.

### Question 4: How will other acts be affected?

The Constitution is the supreme law but does not contain rules and regulations for expropriation (or other matters). The Constitution merely states the principles, norms and values which are relevant, and which must inform the rules. The detailed rules and regulations are set out in “normal” legislation.

Expropriation is an important tool not only in land reform, but also in other realms of government such as mining, public works and road works. So, besides the Expropriation Act 63 of 1975, several other acts also make provision for expropriation in fields other than land reform, and the ripple effect of an amendment in the Constitution means that these other acts should also be amended.

The author is a practising attorney in Stellenbosch. He has [written on the relativity of property rights in the Constitution](#) [3]. He was the instructing attorney in the [Daniels case](#) [4] where the Constitutional Court in five concurring judgements pronounced extensively on property rights in the Constitution.

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