

## EXPROPRIATION WITHOUT COMPENSATION

- July 2018

Land reform, land restitution and land expropriation are currently at the core of the public discourse and debate in South Africa.

Parliament's Constitutional Review Committee is conducting public hearings in all nine provinces and receiving submissions from citizens, interest groups and experts whether changes should be made to Section 25 of the Constitution to allow for land expropriation without compensation.

Section 25 was included in the South African Constitution, 1996, following the democratic transition in 1994. The Constitution states:

### Property:

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may 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.
4. For the purposes of this section -
  - a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
  - b. property is not limited to land.
5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
8. 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).
9. Parliament must enact the legislation referred to in subsection (6).

### Background:

At its national conference in December 2017 the governing ANC resolved that to ensure effective land reform, expropriation without compensation should be used as one of the mechanisms available to government.

Conference then decided to start the process of amending Section 25 of the Constitution to allow for land expropriation without compensation.

This decision was qualified by the requirement that the Constitution would only be amended if it would not negatively impact on agricultural production, food security and other sectors such as financial services.

Section 25 (2) of the Constitution states that 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.

Section 25 (3) determines that the amount of compensation – which must either be agreed upon by the parties or decided, or approved, by a court – need not be equal to the market value of the property. What is required is the payment of "just and equitable" compensation, reflecting an equitable balance between the public interest – including the need for land redistribution – and the interests of those affected.

#### **Current initiatives:**

In February 2018 the National Assembly passed a motion to review Section 25 following a public participation process conducted by the Constitutional Review Committee, a standing committee of Parliament. It has the following mandate:

- To review Section 25 (and other sections as necessary) of the Constitution to make it possible for the state to expropriate land in the public interest without compensation, and
- To propose constitutional amendments regarding the kind of future land tenure regime needed.

Parliament's public hearings on changing the Constitution started at the end of June 2018 and was scheduled to conclude in mid-August. The multi-party committee was split into two teams and followed a comprehensive programme to reach out to communities and interest groups in all nine provinces.

In addition, the Review Committee has received over 700 000 written submissions by the closing date of June 15. Further public hearings will take place in Parliament in early August during which individuals and organisations that submitted documentation will be given opportunities to make oral submissions.

Following the public consultation process the Constitutional Review Committee is expected to report back to the National Assembly by August 30, 2018. Should it propose an amendment to the Constitution this will have to be approved by a two-thirds majority in the National Assembly with the concurrence of at least six of the nine provinces.

President Cyril Ramaphosa has also appointed an Inter-Ministerial Committee (IMC) – chaired by Deputy President, David Mabuza – on land reform to expedite land redistribution. The presidency stated that the IMC will coordinate and implement measures to accelerate the redistribution of land, the extension of security of tenure, the provision of agricultural support and the redress of spatial inequality.

This move is in line with President Ramaphosa's commitment in his 2018 State of the Nation Address "...to accelerate the land redistribution programme, not only to redress a grave historical injustice but also to bring more producers into the agricultural sector; and to make more land available for cultivation towards security, rural development, poverty reduction and strengthening the economy."

The IMC is comprised of nine cabinet ministers supported by a panel of experts that will provide technical support.

Referring to this decision the Deputy Minister of Public Works, Jeremy Cronin, remarked that the governing ANC was exploring the option to use the Expropriation Bill to allow for expropriation of land in specific instances, including when land is standing fallow, where labour tenants are farming productively or where owners are using land for speculative purposes.

The Expropriation Bill was passed in Parliament in 2017 but not signed by former President Jacob Zuma after concerns were raised about the process in the National Council of Provinces.

Cronin indicated that there was "an emerging view within the ANC that the Constitution does not require an amendment" and that the objectives of comprehensive land reform can be achieved within the parameters of Section 25 and/or through existing or pending legislation.

South Africa's land policy is based on three main pillars:

- Restitution involving people claiming back land taken away from them after June 1913, or receiving compensation for their loss;
- Land redistribution involving the acquisition and transfer of land from existing farmers to emerging farmers for a variety of purposes, including farming and settlement;
- Tenure reform which aims to secure the land rights of those whose rights are insecure because of past discrimination.

Speaking in Parliament during his 2018 budget debate, Pres Ramaphosa emphasised that land reform and economic stability are not mutually exclusive. "For South Africa to grow faster and build a more transformed economy, land reform is necessary and urgent," he said.

Expropriation will take place without harming economic development, productive agriculture and food security. According to him, investors understand the importance of land reform and respect the need to pursue it while ensuring "stability, certainty and a clear, consistent message."

### **Debate about data:**

The 2012 National Development Plan placed a 20% target for the redistribution of agricultural land by district by 2030.

A major concern that influences the current debate on expropriation is the paucity of accurate information about how much agricultural land has been privately purchased by black farmers, and how much has been acquired via land reform.

There is broad agreement among experts that land restitution has, thus far, been a slow process. This, inevitably, leads to distrust of government at all levels and uncertainty which impacts negatively on the economy – especially the rural economy.

Most quoted research show that only 8% of such land has been distributed by the end of 2017. Data from the Department of Rural Development and Land Reform shows that 7% of registered property in towns and cities belong to blacks, who make up nearly 80% of the country's population. Some 11% is in the hand of whites and about 80% of urban land belongs to companies, such as mining firms, or is held in trusts by government of behalf of black communities.

The report of the High-Level Panel that assessed the impact of legislation passed since 1994 shows that, if the current pace of distribution is maintained, land claims lodged by the initial 1998 cut-off date will take another 35 years to be settled – and claims lodged after 2014 a further 143 years.

Two national land audits have been published in the past 12 months – one by government and one by the agricultural lobby group – AgriSA. Both claim to be based on the analysis of information contained in title deeds in the national registry.

The AgriSA land audit of 2017 argues that the initial target of transferring 30% of agricultural land via land reform is close to being met. It concludes that the market is much more effective at transferring land than the state.

Critics of this report – such as Prof Ben Cousins of the Institute of Poverty, Land and Agrarian Studies at the University of the Western Cape – claim that the methodology used, and conclusions made in the study "are fundamentally flawed". He argues that much of the 4.3-million hectares of land that AgriSA claims were acquired through private purchases by previously disadvantaged individuals are actually transfers of land through land reform. These were, thus, not private transactions, but instances where the government provided the funds and served as an intermediary in the transaction.

Government's latest land audit – February 2018 – is also criticised. It provides evidence of continuing patterns of racial inequality in land ownership – but it can't identify the racial, gender and national identity of the 320 000 companies, trust and community-based organisations that own 61% of all privately-owned land.

Cousins concludes that "there is almost zero information of how many people have actually benefited from land reform, patterns of land use after transfer, and levels of production and income."

The reality is that most state land in rural areas consists of densely settled communal land which is not available for redistribution. The figures in the most recent government land audit show that state land comprises only 18% of the total.

In urban areas, however, state-owned land can be used for low cost housing, provided this land is well-located and close to economic opportunities and transport networks.

Prof Ben Cousins recently wrote that after more than two decades of democracy "land reform has barely altered the landscape of South Africa" with only 8-9% of farmland transferred through restitution and redistribution.

Several thousand of restitution claims lodged by 1998 await resolution and over 20 000 resolved claims have not yet been implemented. "These could be swamped by new claims lodged since 2014, which already number around 150 000 and might rise to 400 000."

Several studies have shown that the budget for land reform is at an all-time low – less than 0.4% of the national budget with less than 0.1% set aside for land redistribution. Experts that presented to both the High-Level Panel and the Parliamentary Review Committee highlighted serious constraints on land reform caused by –

- Evidence of corruption by officials
- The diversion of land reform budgets to elites
- Lack of political will, and
- Lack of training and capacity.

Similarly, they pointed out that government has not used the powers it already has to expropriate land for land reform purposes effectively, nor used the provisions in the Constitution that allow compensation to be below market value in specific circumstances.

There is, thus, a strong line of opinion that the Constitution need not be changed – but that government should rather use its existing powers of expropriation more boldly and test the provisions of Section 25 (3) as it relates to land that is underutilised or unutilised.

This is especially relevant in urban areas where the lack of well-located land for urban settlement remains an enduring legacy of apartheid spatial planning. Well-situated state-owned land can be made available for new housing developments to benefit the poor and well-located privately-owned land can be identified for expropriation.

### **Existing available measures**

The acquisition and transfer of land may prove to be the least difficult aspect of land reform. It simply requires increased budgets and the payment of just and equitable compensation in line with the Constitution.

The longer-term challenges involve the targeting of beneficiaries, the identification of well-located land, the allocation of water rights to support commercial activities, effective district-based planning and the facilitation of small scale economic activity in both urban and rural spaces.

The core of the resolution adopted by the National Assembly is to ensure that Government would continue the land reform programme that entails expropriation of land without compensation, making use of all mechanisms at the disposal of the state, implemented in a manner that increases agricultural production, improves food security and ensures that land is returned to those from whom it was taken under colonialism and apartheid.

Contrary to popular perceptions modern constitutions are conceived and written to be amended in response to changing socio-political circumstances and to remain relevant. The South African Constitution has been amended 17 times since it was adopted in 1996.

Phephelaphi Dube, the director of the Centre for Constitutional Rights argues that it is "a wrongly held view that the property clause in the Constitution guarantees property rights. It does not. It merely protects against the arbitrary deprivation of property, for those who are owners." In addition, the clause seeks to ensure land reform through redistribution, land restitution and tenure security, as well as the equitable access to natural resources.

Dube concludes that "there is no need for a constitutional amendment to the property clause. Effective land reform requires political will which, given the ever-shrinking budget for land reform purposes, is debatable."

Prof Ben Cousins argues that the property clause which requires compensation to be paid for land acquired by the state is not a fundamental constraint. Acquiring farms at prices below market value is quite possible since compensation must be "just and equitable." If the budget for land reform is increased from its present 0.4% of the national total to about 2% land purchase would be eminently affordable. He argues that "insufficient political will" is more constraining than the Constitution.

In an article in City Press on 15 July 2018, Joel Netshitenzhe, the executive director of the Mapungubwe Institute for Strategic Reflection (MISTRA) – and a long-standing member of the ANC's National Executive Committee – argued that there should be "practical action to test the limits of current constitutional provisions."

He called for the processing of the Expropriation Bill to be expedited – which can then be tested through the judicial processes – and concludes: “expropriation without compensation does not have to wait for the completion of the constitutional review process.”

According to Netshitenzhe the constitutional review committee “may or may not propose an amendment to the Constitution.” Whatever decision is taken, the Constitution can only state general principles and an expropriation act will still be required as a law of general application to give effect to its recommendations.

Prof Pierre de Vos of the Department of Public Law at the University of Cape Town states that the circumstances of each case will have to be assessed to decide the value of the compensation paid by the state for expropriated land. “Obviously, if the land is expropriated to effect redistribution, the property is not being used productively; and the owners obtained it during the apartheid era, the state would have to pay a minimum of compensation. The compensation could, therefore vary dramatically. One farm might be expropriated for R1 000 while another might require a much higher amount to be paid.”

Moreover, former Constitutional Court Judge, Albie Sachs told the Review Committee that whatever decision is taken by the legislature it must remain open to judicial review. He said Section 25 is “an empowering section that calls for extensive land redistribution and gives the state, in the public interest, extensive powers.”

Prof Pierre de Vos has pointed out that any steps to exclude the judicial process from expropriation measures will impact on Section 1 of the Constitution – the “Rule of Law clause” – and the Bill of Rights and will require a 75% majority in the National Assembly before it can be changed.

Judging from statements by senior members of Government in recent months it appears as if one element of the solution would be to identify parcels of unused state land, to supply the basic water and sanitation infrastructure and to issue title deeds to people giving them the right to build their own homes within a broad set of regulations. The new owners can then use their properties as security but will only be able to sell it after a fixed period.

Moreover, unused privately-owned land near urban cores and job opportunities can be targeted for the same purposes. This will become the first example of expropriation without – or with very little – compensation. Such action will be within the parameters of Section 25 of the Constitution or would serve as test cases within the judicial processes.

### **Solutions from High-Level Panel:**

In December 2015 the Speaker's Forum, a body representing the national and provincial legislatures, established an independent, high-level panel to assess the content and implementation of legislation passed since the democratic transition of 1994. The mandate was to assess implementation, identify gaps and propose actions with regards to laws that need to be amended or strengthened.

Chaired by former President, Kgalema Motlanthe, the Panel held public hearings in all nine provinces and also commissioned reports from experts and senior researchers and presented its report in November 2017.

It focused on three primary thematic areas – (1) poverty, unemployment and the equitable distribution of wealth; (2) land reform, restitution, redistribution and security of tenure; and (3) social cohesion and nation-building.

A recurring conclusion of the report is that the triple challenges of poverty, unemployment and inequality remain deeply etched in South African society despite the introduction of a progressive Constitution and the number of transformative legislation that has been passed during the first two decades of democracy.

On the issues of land reform, the Panel reached a number of important conclusions:

- The pace of land reform has been slow;
- The development of policy has drifted away from its initial pro-poor stance and lacks a vision for inclusive agrarian reform;
- There remain significant gaps on tenure security which are putting the lives and livelihoods of many households in peril;

The recommendations of the high-level Panel are of the utmost important. Any legislation that will emerge from Parliament – including possible amendments of Section 25 of the Constitution – will have to meet the conclusions reached by the Panel.

1. There must be a new framework law for land reform with a focus on pro-poor distribution. Such as law should provide measures to ensure the good governance of the land reform process and ensure transparency, reporting and accountability.
2. Any process of redistribution must be driven by the right to equitable access to land. District-level committees of local stakeholders must be established to ensure direct participation of communities and counteract the powers of officials.
3. The slow pace and poor outcomes of land restitution must be addressed. The Panel identified lack of capacity, inadequate resources and failures of accountability as the key factors that constrain these processes.
4. Any system of land administration should be underpinned by an integrated land records system. Existing rights must be recorded, and an effective administrative system must enable citizens – especially poor people – to protect their current rights and benefit from land reform.
5. Any new dispensation should recognise and effectively administer a continuum of rights to land. This is especially relevant for the millions of South Africans living in rural and urban areas who have insecure tenure to the property they occupy. This can be addressed through the creation of "a robust land recordal system."
6. There must be equal citizenship rights for urban and rural people under municipal councils. Legislation pertaining to the powers of traditional leadership and citizens living in areas under traditional leaders should also be reviewed.

### **Urban land reform:**

The conversations on urban land reform have not been as pronounced as those on rural land, communal and traditional land and agricultural land. In the past it was often included in discussions about broader urban development issues pertaining to housing, planning, transportation and municipal planning.

The current process has brought to the fore a renewed focus on the redistribution of urban land and an interrogation of issues relating to the dynamics of the property market and a review of how both private and state-owned land can be utilised to facilitate urban land reform.

A future dispensation should also include a review of regulations that place onerous burdens on informal housing and informal economic activities – leading to amendments or exemptions.

The Motlanthe-panel raised concerns about "a tick-box approach" at all three spheres of government that "causes interminable delays in housing provision." It referred to:

- The implementation of the Spatial Planning and Land Use Management Act – SPLUMA – "are compliance-centred and punitive in nature" and, thus, not open to creative approaches towards inclusionary housing. Instead of creating an enabling environment for informal enterprises they respond with evictions and confiscations.
- Cumbersome policies on environmental impact studies and the issuing of water licences are slowing and inhibiting development. The regulatory environment affecting low-cost housing provision should be streamline and updated. This might include the cutting of red tape in approval processes and consolidating the existing four separate approval processes for environment, heritage, water use and land-use planning. This will result in a situation where rules and procedures are applied more consistently, are less burdensome, more responsive to socio-economic realities and local conditions – and more developmental in their approach.
- Land reform should be accompanied by a concurrent process to reform the process of business registration and the licencing of informal enterprises.
- Parliament should take the initiative to encourage government departments to set up committees that can ensure building regulations are simplified, standardised and streamlined.
- There should be a better system of law and oversight to regulate private development on well-situated public land to protect public interests and, thus, address the legacy of spatial inequalities in cities.
- A co-ordinating structure should be established among all role-players in land, housing and urban development at national, provincial and local levels. Such a structure would include key government departments, non-governmental organisations, the private sector and research institutions. This body would be able to drive the review and amendment of the reform processes and pilot the introduction of the proposed Land Records Act.

## **Conclusion:**

The reality of South Africa 24 years after the democratic transition is that millions of black South Africans still live in shacks, in over-populated slums, in township attached to cities and towns and without easy access to economic opportunities. Because of the spatial legacy of apartheid even those who have jobs in the formal sector must travel for hours every day between dwellings and work places.

It should be noted that there have been very few violent occupations of commercial farms in recent months – but land occupation in urban areas occur almost every week. This underlines the importance that any future decisions and policy on land, on expropriation and on redistribution should have a strong focus on the urban context. The Socio-Economic Rights Institute of SA – SERI – has argued that South Africa's current property regime is anchored in registered title – which can be rigid and exclusionary.

If you are poor and want to get formal access to property you have to enter a system of individual title deed registration via a housing subsidy project.

One of the consequences of the current constitutional review process might be that government will consider a range of tenures that exist outside of the formal property system.

Official data show that about 87% of land claims lodged by the cut-off date in 1998 were to urban properties and in most cases, claimants were offered – and accepted – a standard cash settlement because restoration was impractical. However, in the case of rural claims, especially involving groups of people, more claimants have opted for restoration.

South Africa is one of the continent's most urbanised countries with two-thirds of people living in town and cities. Projections by the United Nations show that this can rise to 80% by 2050. After the repeal of segregation laws in 1991 most large cities have become racially mixed – but different race groups continue to occupy separate spaces.

Lauren Royston, a senior associate at SERI argues that ownership remains pretty racialised but that the country has also seen a class-income dimension shift. Some black South Africans have been able to afford properties in the market "but the poor majority remain in dusty, cramped townships, commuting long distances to city centres where they can work and use services."

Thus, land reform should focus very strongly on urban environments and ensure better planning to create more affordable housing, better access to jobs, economic opportunities, transport, schools, hospitals and social amenities.

Colonialism and apartheid have left South Africa with a high level of spatial inequality which traps disadvantaged communities in underdevelopment and poverty, robs poor rural people of opportunities and confines urban dwellers to live within inefficient cities.

Priority attention should, thus, be given to legislation and implementation that can fix this damaged spatial pattern that is based on a body of past laws that marginalised the black majority to the periphery of cities and to Bantustans where they were excluded from opportunities for economic and social growth.

The legacy of spatial inequality has persisted despite the adoption of the National Development Plan and the introduction of the Spatial Planning and Land Use Management Act (SPLUMA).

A future dispensation will have to fundamentally address the issue of urban spatial inequality. There is growing consensus that well-located urban land must be prioritised for low-cost housing and services before it can be released for other purposes.

Parliament will play a pivotal role to provide effective oversight and greater use can be made of the provisions contained in the Government Immovable Asset Management Act (GIAMA – 19 of 2007). GIAMA provides a framework for the management of immovable assets held or used by national and provincial departments.

However, much of the well-situated vacant urban land is owned by state-owned enterprises (SOEs) which are not governed by GIAMA. Such enterprises are regulated by an array of specific laws which stipulate how their assets must be managed and disposed of.

Submissions to the high-level Panel and the Parliamentary Committee have called for the urgent review and amendments of these legislation to facilitate the release of vacant urban land for the provision of low-cost housing.

Moreover, there are also recommendations for the expropriation of well-situated private land that are held by landowners for speculative purposes. Experts point to the fact that Section 25 (3) of the Constitution specifies that the current use of property should be considered when determining compensation.

It is quite clear that any proposed solution for land reform will have to contain specific urgent interventions to address the current barriers that deny property rights to the majority and marginalise them from the core economy. This includes the release of well-located urban land as a priority initiative to mitigate the legacy of the apartheid city.

**Further reading:**

- Report of the High-Level Panel on Assessment of Key Legislation; Parliament; November 2017.
- Prof Ben Cousins – South Africa's land debate is clouded by misrepresentation and lack of data; The Conversation, 8 March 2018
- Phephehlapi Dube – Political will, not constitutional amendments will solve land issue; Media 24, 2 March 2018
- Prof Pierre de Vos – The Constitution and Land Reform; Daily Maverick; 17 January 2018.
- Judge Albie Sachs – Land expropriation can happen peacefully; University of KwaZulu-Natal; June 2018
- Jeremy Cronin – ANC won't amend Constitution on land expropriation; Mail & Guardian, 28 March 2018
- Joel Netshitenzhe – Separate the wheat from the chaff; City Press; 14 July 2018
- Lauren Royston (SERI) – Securing Land Tenure in Urban and Rural South Africa; Wits University, 2017