

January 7 2019

## Calm before the storm: Expropriation Bill debate to start

In December 2018, a new draft of the Expropriation Bill was published by government gazette with a 60-day period for comment. This means the final document will no doubt become the kingpin of debate in the first session of the new Parliament and will also form the basis of much comment by President Cyril Ramaphosa in his second State of the Nation Address.

Not many were expecting a final legislation proposal for comment so soon after the ConCourt constitutional decision on the subject. No doubt the government printer was lined up pending the decision of the learned judges.



### News you really don't want

**Land restitution**, as distinct from land reform, is the kind of hot-potato subject that many say should never be debated just before an election. With the whole issued being overlaid with a tinge of fear, it is also an ideal subject for fake news.



It is the Minister of Public Works, Thulas Nxesi, who once again will table this legislation. It might be, of course, that some representative group or entity try to kill the proposal at law, but not feel that this will be like the little boy putting his finger in the dam wall to avoid the flood of water.

### Two camps

**The for and against** seem to fall into two distinct groups. Firstly, there are the followers of AgriSA who state that almost 30% of agricultural land is already black-owned and the failure of the governing party on land reform should not be motivating the justification for stripping South Africa of its agricultural expertise and threatening food security. They seem to refer mainly to the debate between organised agriculture and government policy makers on land reform distribution. The bigger picture has not been enunciated by them in great detail.



Sitting alongside are a small vociferous group referring to the matter as “land grabbing” who, thankfully, are being ignored by most.

On the same side also, but for completely different reasons, is a large sector of business and a number of economists who say that the principle of the state acquiring land without compensation, however it is handled, will damage the free market economy and threaten local and overseas business confidence in SA at a time when growth factors should be nurtured.

### Camp No. 2

**Lined up** on the opposite side, is a large body who say the SA Constitution makes provision for the expropriation of land and this places a binding obligation on whatever government is in power to pursue land reform in certain defined ways. But, they purport, the governing party has failed miserably to pursue this objective.

The ANC executive appears to be following the populist route on land reform and mainly deals with slogans. President Ramaphosa in the meanwhile has probably learnt at Davos that the world is only interested in finding solutions, not hearing of problems.

### The issue

**Ways of recovering land** for the landless are, in constitutional terms, by restitution, redistribution and tenure reform, according to the experts.

With land redistribution and tenure reform having so far been in the doldrums, due in main to ineffective application which most seem to agree upon (*and now we learn as a result of major corruption in the allocation of land*), restitution is recognised by a number of strategic thinkers as the only course remaining if any land tumult is to be avoided.

This division of thought is well expressed by Professor Nick Vink of the University of Stellenbosch Agricultural Land Economics Dept, who is also on the South African Reserve Bank's Advisory Panel. He says that there are no statistics, as quoted by AgriSA, on black and white land ownership. If there are numbers floating about, they cannot be interpreted in any way as land owned according to skin colour.



### Good thinking

**Vink also says** the issue of black farming land and the question of land reform must remain as a priority but it will have to be run properly. The actual focus, he says, must rather be on land which is closest to main work nodes and industrial parks in order to reduce the time and money spent by a commuting workforce. This is a far bigger problem to be solved urgently, he says, and has come about very much as the product of apartheid.

Cape Town, for example, has already spotted enormous hectares of land in the form of old airports, military bases and municipality commonages that are suitable for dense housing. Johannesburg is eyeing decaying CBD structures and better commuter systems and eThekweni is working to collapse and embrace close-by traditional land. This is where acquisition of land will work for the public good, he says.

### Land focus

**Those making comment** on the new Expropriation Bill will have seen that the beginning section of the document categorises five types of land perceived as being justly and equitably suitable for appropriation for nil compensation and "in the public interest". These are: a) land that is used or occupied by a labour tenant; b) land held just for speculative purposes; c) land owned by any state entity; d) land abandoned by an owner, and; e) land that is of a lesser value than any state subsidies from which it may have benefitted.



### Who can do it?

**Only the state** is empowered to expropriate property for a public purpose or public interest and the Minister of Public Works may expropriate land for other state organs under the same conditions.

Worrying many traditional entities and structures is the fact that 60% of "lesser" forms of ownership might have no powers to object and be excluded. However, the draft Bill states that unregistered rights holders must be given equal protection under the law when expropriation without compensation is considered, meaning that all are equal to the same process.

REPUBLIC OF SOUTH AFRICA

EXPROPRIATION BILL

(As presented by the Portfolio Committee on Public Works)  
(The English text is the official text of the Bill)

(Sitting on 2016/17)

## Land hungry

**Bearing in mind** that the term “public interest” is now much broader than before and includes the need for land reform, many are of the opinion that government is not, as political rhetoric would give us to believe, just targeting existing property owners with successful farming operations or useful buildings that employ people.

Rather, the view is held, by such as Prof. Vink of Stellenbosch, that in reality the state will use the Expropriation Bill is looking for owners of land in the areas described above which is underutilised, abandoned or sites with derelict buildings and to take from national, municipal and local state departments and entities the same.



## Problematic

**Adv. Tembeka Ngcukaitobi** writing in Mail and Guardian interestingly states that until now the state has never got around to pass the legislation mandated to it by section 25(5) of the Constitution, which allows for a limited form of acquisition without compensation and which is now expanded by the new Bill. This, we gather, is part of the basis for the ConCourt decision.

The result of the current situation, he says, is that land acquisition is still driven by a judicially controlled land restoration programme which is based on an adversarial mode of proof of the historical occupation of land after June 19, 1913, an arbitrary date based on historical values which, of recent, became a contentious subject.

## Driving forces

**But it has been realised**, Ngcukaitobi opines, that with problems of the specifics of the arbitrary date of 1913 set aside, any land restoration programme that is premised on proof of historical claims cannot address the hunger for land in the urban areas where the greatest land needs reside.



This is a cold fact and must be addressed to avoid unrest. He states, that it is misinformation and people jumping the queue on the land issue that are responsible for most believing that land hunger is only a problem of rural and farming areas. The biggest need for land is the urban requirement, he reiterates, as asked for by provincial government throughout the years.

Presumably this is why chief executives are invited to stay overnight in townships to experience the experience, we add.

## ANC reality

**Without a clear policy** position by the government, a useful pointer is the text of an ANC December 2018 resolution, Ngcukaitobi said in his article, and realization of this could change the conversation.



The focus of the recent ANC resolution, which is binding on political direction, is upon expropriation without compensation but particularly for “vacant, unused and under-utilised state land, as well as land held for speculation and hopelessly indebted land”.

It is the urban pressure that is “on” with the ANC and this should be realised, he said, and not, as Jacob Zuma would have us to believe, rural communities. Service quality in over-crowded townships is the issue at hand, Tembeka Ngcukaitobi says, where a large section of rural folk has come for a better life.

### **No choice**

**In the meanwhile**, section 25(8) of the Constitution states that the implementation of any law may not 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.

The view of state strategic thinkers, and not activists we have to assume, has been put simply that in constitutional terms, if the demands of compensation by private landowners impede land reform, they must yield to what will be viewed as the greater public good of land redistribution.

What has not emerged in the public conscience until recently is that the Constitution, if it were an entity, has been expecting the Expropriation Bill for some time now.

### **Inevitable**

**The draft Bill** therefore merely expands on this premise by defining a process of implementation within the understanding of what is already enshrined in the Constitution. When such is tabled by the Minister in its final form, the document may represent a further milestone in the difficult parliamentary task of re-uniting people and meeting societal needs head on.

