

Parliamentary debate on land now a reality

Parliament is about to debate one of the most loaded issues since its formation under the new democratic dispensation in 1994; that of land reform. Whether President Ramaphosa wanted such a debate before elections is not the point anymore. The moment has arrived, and he has clearly indicated that the ANC executive wish for ConCourt to allow an amendment to the Constitution that specifically allows for expropriation without compensation.



Whether a fresh Expropriation Amendment Bill will arrive clearly defining the motivations for expropriation as a base template is yet to be known. Many argue that the Constitution is not being read properly and refining this Act is the better shortcut used by a number of countries.

The short road to freedom

Although gestures have been made to involve all citizens, it should possibly be acknowledged that Parliament is not really going to solve any such issue in its entirety, but the National Assembly will be stage where outcomes are finalised.

A lamentable lack of progress that has been made since 1994, mainly as land reform relates to the agricultural industry, simply because of the land-grab experience to the North has over shadowed progress. As farming commentators state, there is a total inability within government to either understand the process or to execute any form of land policy in reality.



Now most aspects of South African life and economic indicators in general have been drawn into the matter. In the new parliamentary session starting early August 2018, the stage is being set to finally crunch out the words for a parliamentary finding that might or might not set the path to free South Africa of a matter that has haunted its development for years; that of enacting or not legislation that regulates expropriation for restorative and redistributive purposes.

Going nowhere

The issue has only become so explosive, affecting all aspects of the economy from financial stability to food supply, simply because the governing party has achieved so little with so much money since it came to power. As Thuli Madonsela cuttingly put it, "Nothing has stopped government from doing at least something to regulate expropriation, thereby leaving the anachronistic 1975 Act still in place."



She noted that an attempt to amend the anchor Expropriation Act had been attempted and was still "being consulted on", after President Jacob Zuma referred it back to the National Council of Provinces. "And so," she said, "some 24 years into democracy the furthest that the issue has got is for the matter to reach the previous presidency and no further."

Had to happen

This vacuum of inactivity, as all know, allowed an EFF inspired motion backed by a cornered ANC to call for review section 25 of the Constitution and other clauses where necessary, to make it possible for the state to expropriate land in the public interest without any compensation.

Many have stated that the EFF have been mischievous, upstaging those of conservative thought in the ANC and re-introducing highly emotive racial subjects and cultural divisions to gain political position.

Have your say

In April 2018, a Joint Constitutional Review Committee called for “written public submissions on the review of section 25 of the Constitution and other sections where necessary to make it possible for the state to expropriate land in the public interest without compensation.”



This came after the National Assembly in concurrence with the National Council of Provinces mandated the Constitutional Review Committee to propose the necessary constitutional amendments regarding the kind of future land tenure regime needed. The closing date for written submissions and requests for oral presentation was set as 31 May 2018.

Fair choice

The joint chairpersons of the Committee, Vincent Smith (ANC-NA), who was chairperson of the Standing Committee of the Auditor General and currently serves with the Standing Committee on Public Accounts (SCOPA), together with Lewis Nzimande (ANC-NCOP), co-Chairperson of the Joint Committee on Constitutional Review, then asked the question of the public “whether Section 25 of the Constitution was an impediment to land reform or not.”



Next to happen

It is now arranged that the Joint Constitutional Review Committee must report to the National Assembly and NCOP on their views by no later than 30 August 2018 to assist MPs to vote on the EFF motion. For the motion to pass in the House, 267 of the National Assembly's members must vote for the proposed amendment. The ANC currently have 249 MPs and the EFF 25 as proposers.



Vincent Smith said to parliamentarians in the first meeting of the Committee on 17 July, “We also want to hear from the other side of the spectrum, from those who argue the Constitution in its current form is not an impediment”, echoing the views of the ANC, Luthuli House.

Only law matters

He also said that based on the arguments presented, a recommendation would be made to Parliament for the National Assembly to consider. “This is not a referendum”, he emphasised, “so it doesn’t matter how many say ‘yes’ or how many say ‘no’. It’s not about numbers – it’s about the strength of the argument.”

He added, “We have to approach the hearings with an open mind as Parliament does not have a view one way or the other”. We must remain impartial, he said. Vincent Smith has been at pains to be neutral as the current shifts in the ANC power battle would seem to demand this.

Views not votes

On the same date, whilst national hearings in rural areas commenced, three notable presentations were made by the Helen Susman Foundation (HSF), Agri-SA and Business Unity South Land (BUSA), with other submissions coming from AfriBusiness, FW de Klerk Foundation, Free Market Foundation and more.

Business and society speak

HSF put it bluntly that the obstacle is not the Constitution but rather a lack of political will to implement any effective land reform policy. “The proposal demonstrates an inadequate understanding or conscious denial of the actual problems which have plagued the land reform process since 1994.”



They said that most agreed that a small portion of South African society owns a very large part of the country’s wealth and further, there was a very strong racial disparity in the division of wealth that most agreed could not continue.

The great divide

Urgent plans have to be made, the Foundation said but “making the Constitution the villain of the piece only serves as a convenient excuse for the lack of progress in the past on land reform.”

As wealth is massively skewed against the black portion of the population and in favour of other racial groups, they said, especially the white portion they called for a “flexibility that recognises a range of tenure and landholding possibilities within a continuum of land rights would seem to be consistent with international trends.”

Basic principles

HSF stated that any land reform must be based upon “a beneficial economic influence, and it is important to emphasise that the poorest in our society must be the beneficiaries. That is what this process is all about. A rushed and poorly thought out programme will incur unnecessary delays and costs and lead to disappointing outcomes.”



Land reform would not be justified, they said, if the wealthier sectors of society accumulate yet further assets in the process. Also, of much interest is the category of off-register tenure held in land owned by traditional authorities, they noted. “Land from a traditional leader is often the base on which lease payments are calculated. which may be unclear. Often unfair and oppressive, the revenue received from the lessees is mostly unaccounted for.”

Why are we here?

At the same time the Constitution, HSF said, whilst giving force to indigenous law, makes it clear that such law is subject to the Constitution and must be interpreted in the light of its values. They asked if an amendment to the Constitution was necessary at all, since the Constitution as it stood recognised that all should be able to own land and have security of land i.e. title deeds



“The Constitution”, they said, “has never talked to the issue of taking another person’s piece of land, only having some”

The law is one

Furthermore, like common law, HSF said, indigenous law is subject to any legislation consistent with the Constitution which specifically deals with the matter of land. “As a result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law”.



They pointed out that the High-Level Panel, under former president Kgalema Motlanthe, that studied the EFF motion and which recommended the formation of a Constitutional

Review Committee, had also recommended that that the Ingonyama Trust Act be repealed to bring KwaZulu-Natal in line with a national land policy.

Zulu nation

To digress slightly, around the time of the hearings King Zwelethini had his outburst stating that “all hell would break loose if anybody touched land owned by the Ingonyama Trust”. It appears that the Trust owns 3-million hectares of land having been given ownership by the outgoing apartheid government in 1994.

According to the Kgalema report, the Trust should be repealed or amended because its implementation has infringed on the individual land rights of beneficiaries.



HSF said most seemed to be ignoring the need that substantial amendments to existing legislation to secure the land rights for the people in rural areas. They asked for government to sort out the title deeds confusion and to ensure that all land vests in a person or body with proper democratic accountability accorded to them by the Constitution.

They again repeated that in their view there was no need to review the Constitution on the issue of expropriation.

Brass tacks from Agri-SA

Annelize Crosby, Head of Agricultural Development of Agri-SA was also firmly of the mind that the present property clause in the Constitution was not in any way impediment to land reform and that the real reasons for the slow pace of land reform had to be rather addressed. “Not one of these reasons justified an amendment to section 25 of the Constitution”, she told parliamentarians.



She said that principle of legality had be honoured and that full compensation for land taken by government was guaranteed in Denmark, Norway, Russia, Kenya, the Seychelles and Lesotho, with fair compensation in compensation where a balancing test applies in the USA, Poland, Japan, Egypt, Namibia, the Congo and Mozambique. Adequate compensation applied in Botswana, Malta, Uganda and Zambia and equitable compensation existed in France, Rwanda, Madagascar and Tanzania.

The EFF motion would leave South Africa “out of sync” with its neighbours and with most agricultural producing countries in the democratic world, Agri-SA said.

They also warned that “no agrarian land reform process can hope to be successful and sustainable unless it is based upon relevant and accurate data.” They said that much of what was said by DHA on land was based on completely wrong facts.

Reasons

Ms Crosby said that lack of adequate budgeting; policy uncertainty; the lack of a comprehensive, integrated support network; lack of or poor communication with stakeholders; corruption and poor settlement support systems are the real reasons why land reform has not happened at a faster pace and in a more sustainable manner.



The economic consequences of expropriation are not fully understood by the parties involved, she said, and a clear understanding of the circumstances under which the power to expropriate land without compensation had to be clearly justified and legally contained.

Giving it back

She said that the recent land audit shows that 12,1 million hectares had been redistributed to black persons, but the audit did not include land in the former homelands or land transferred to trusts that used to form part of the old homelands. Consequently, land that could be repatriated should be doubled at the very least. Also, what were previously known as “homelands”, i.e. two thirds of South Africa, were all now either in black hands or owned by the central state.



Furthermore, she said, figure showed that persons of colour bought twice as much land as the government, despite the state’s obvious ability to fund purchases from tax payer’s money, and such land was acquired at market-related prices. In most cases the land was worked properly, she said.

False figures

She rubbished the idea that large foreign owners dominated agricultural land ownership, reminding MPs that more than 70% of commercial farmers were sole owners and that the land audit had clearly assumed that all owners of land through trusts and companies were white persons, which was not a fact but also a bad assumption.

On economic consequences of the EFF motion, she reminded MPs of the serious issue that farmers in total owed various debtors R1bn; agricultural co-operatives R11.62bn; the Land Bank R44.bn and commercial banks R97bn, totalling almost R169bn in farming debt. Meanwhile, capital assets in land and fixed improvements, implements, motor vehicles, tractors and livestock totalled some R470bn.



Economies of scale

South African farmers, Ms Cosby said, enjoyed very low levels of government support compared to farmers in other countries, which meant that in terms of economy of scale the only way to remain competitive was to increase farm size. She said that those who talked land reform and agricultural take overs had not the slightest idea of farming economics or the effects of bad farming upon the economy.



She showed graphs indicating the very low support in SA for the farming industry but massive support for the Far East and Europe, Canada and Scandinavian countries. She indicated that certainty was the only correct direction for SA and security of land for farming operations.

Land and Farming

Agri SA recommended the finalization of the Expropriation Bill and to test the expropriation powers contained in the Constitution. A better land audit was called for, with a database continuously updated and the farming community agreed with the implementation the Parliamentary High-Level Panel recommendations.

Ms Cosby said it was imperative that land needs to be made available for housing for the poor and that there had to be a Land Ombud for the poor as well. They stated that rights to own in the communal land rural areas and the consolidation of traditional land should be priorities way ahead of any misguided thoughts to acquire land without compensation.

Digging out of mess

Business Unity South Africa (BUSA), in an e-mailed submission from their CEO, Tanya Cohen, said in her submission that Section 25 of the Constitution already allowed for expropriation to take place within the provision for the payment of just and equitable compensation.



It was not constitutional reform that was needed but rather addressing and implementing land reform,” she said, “which has been riddled by inefficacies”.

“Section 25 of the Constitution as it stood was sufficient to achieve sustainable land reform whilst still maintaining confidence in South Africa’s commitment to property rights, as well as fostering a growth-friendly policy environment”.

Going with it

BUSA said it liked Kgalema Motlanthe’s High-Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change report, the result of work headed by the former president and they agreed with Operation Phakisa in that the state already had the tools to deal with land reform.

Cohen said that Section 25 of the Constitution already allows for expropriation to take place within the parameters of payment of just and equitable compensation and that BUSA was “firmly of the view that constitutional amendments are not necessary to achieve meaningful land reform, and that the consideration thereof is creating policy uncertainty, which the country can ill-afford.”



BUSA gave the Committee 32 areas which is could rather focus upon that amend the Constitution which included the setting aside of land in urban areas for small business trading.

Political comment

Meanwhile, presentations and hearings in the rural areas continue and most meetings have been orderly and well attended with certain exceptions in KwaZulu-Natal and Northwest.



Parliamentary statements from the parliamentary office in Cape Town on such meetings which have been much lacking in detail and somewhat guarded. The Joint Constitutional Review Committee’s report to Parliament next month in August 2018 may frame the vote structure of the EFF motion to apply to alter section 25.