

## Into the quagmire and now trying to get out

10 April 2018

### Mixing deep emotions and factional politics

During 2017 a deeply rooted and emotive SA issue, land dispossession and ownership, was conflated with factional fighting in the ANC. It did not achieve the aims of the faction who started it, but it left the country with profound uncertainty on a critical policy.

It all started in February 2017 when the then minister of land affairs, followed by then president Zuma ten days later, unexpectedly called for land expropriation without compensation. Various Zuma supporters propagated the matter further, all within the context of “radical economic transformation”.

In July, at the ANC’s policy conference, and again in December, at its elective conference, there was a strong push from the Zuma camp that the party should adopt expropriation without compensation as official ANC policy. At the December conference the Zuma-ites threatened to collapse the conference if they did not get their way on this issue. Land is of course a deeply felt and legitimate issue, but it was also a way to try and undo the election of Cyril Ramaphosa as ANC president.

Throughout 2017, however, there was also a lot of push-back against the expropriation idea and the party ended up deeply divided. The result was a messy compromise – a conference resolution which called for expropriation without compensation, but subject to various qualifications: expropriation must not harm the economy, the agricultural sector, food security or the financial sector.

In February 2018 the EFF, always quick on an opportunity and sensing the ANC’s divide, proposed a motion in Parliament that an ad hoc committee be established to review sec 25 of the Constitution (the property clause) *and amend it* to allow for expropriation without compensation. The ANC amended the motion to read that Parliament’s standing Committee on constitutional review should undertake the task, but for the rest agreed with the motion. Sec 25 was thus very much in the firing line.

This dominated the news flow, took SA into the quagmire of uncertainty and took some shine off Cyril Ramaphosa’s election as president.

### Drawing the attention away from sec 25

Between Parliament’s adoption of that motion at the end of February and the Easter weekend a month later, further developments have taken place.

Firstly, the ANC released the minutes of its December conference. No-where is there talk about changing sec 25 of the constitution. There is certainly ample reference to expropriation without compensation, but subject to the qualifications set out above (plus additional statements about acting strongly against land invasions and not tolerating land grabs). This formulation creates political space for moderates to argue their case.

With this qualified statement the ANC is obviously trying to satisfy both the camps in its own ranks. So which way will the balance tilt?

This is where the second development comes in. A task team under deputy-minister Cronin was appointed (presumably by president Ramaphosa?) to develop a way forward on this issue. Cronin’s presence is important, as he played a critical role between 2014 and 2015 in drafting the current Expropriation Bill, bringing it into line with sec 25. Earlier versions of the Bill did not comply with sec 25, but under Cronin’s leadership it was brought into line. Cronin is from the Ramaphosa camp, very unlikely to do the Zuma faction’s bidding and, judging by his past record, will tilt the issue in favour of the constitution.

And that is just what he did before the Easter weekend. He told a conference in Johannesburg that “It is possible (and preferable) *not* to amend the Bill of Rights, but to introduce a brief limitation clause into the (forthcoming) Expropriation Bill...”. This is in line with the minutes of the December conference and tilts the emphasis away from amending sec 25 to amending the Expropriation Bill.

Also at the conference two ANC MPs and members of the Constitutional Review Committee, Mathole Motshekga and Vincent Smith, said that it is not a foregone conclusion that the committee will recommend a change to sec 25 in August.

In a shot across the EFF's bow Smith also said, "Our decision will be based on what makes the most sense, not on who shouts the loudest".

### Differences between the ANC and EFF

The EFF was quick to pick up on this distinction between amending sec 25 and changing the Expropriation Bill, saying that the ANC is "dilly-dallying" on the issue. The EFF wants sec 25 changed.

The party also wants all land to belong to the government with leases granted to "owners" (as is the arrangement with mining rights). This approach was specifically rejected by Cronin as not being ANC policy.

### Expropriation Bill (also see addendum below)

If sec 25 is not amended, but the Expropriation Bill is, how will it be done?

At the same conference Cronin suggested that a clause be inserted into the Expropriation Bill to make provision for four types of property that could be expropriated without compensation: abandoned buildings (the DA mayor of Johannesburg has been threatening to do this); unutilised land; commercial property held unproductively and purely for speculation; and land farmed by labour tenants with an absentee titleholder.

The ANC is obviously trying to bring some certainty on the issue by demarcating which property can be expropriated without compensation.

### Testing section 25

During the past month Land Affairs Minister Maite Nkoana-Mashabane has said she is preparing for a test case to expropriate land without compensation using the clauses which are currently in the Constitution. Afriforum, like the EFF always quick on an opportunity, promised to assist whoever is targeted by the minister.

On more sober reflection, however, the minister finds herself in good company. In November 2014 then deputy-chief justice Dikgang Moseneke, in a robust defence of the constitution and the property clause, pointed out that expropriation is allowed under the property clause, but the extent and limits of that power has never been tested. "In 20 years our courts have not resolved even one case of land expropriation under the property clause ... . One would have expected that a matter so pressing as land ... would pre-dominate (cases before the court)."

However, it will take time to get a court ruling in a test case. The matter will have to be resolved politically before then.

### So What?

- Land is a real issue and needs to be dealt with; but during 2017 it was conflated with ANC factional politics, resulting in a deeply divided party. The overall result is a quagmire of confusion and uncertainty.
- The ANC got itself into this quagmire and must now find a way out, managing factions along the way.
- There are currently two processes running concurrently: a Parliamentary review to be finalised by August and a task team headed by deputy-minister Jeremy Cronin.
- It seems as if there is a tilt away from sec 25 to looking at other avenues like the Expropriation Bill and using the property clause as it stands.
- The upside scenario is that sec 25 is left untouched and that the matter is resolved through a narrowly targeted, circumscribed amendment to the Expropriation Bill, which must in any case follow sec 25's precepts.
- Parliament's constitutional review committee has started work on section 25; by August we should know if it favours an amendment.

### Addendum: Background on the Expropriation Bill

The Expropriation Act of 1975, which governs expropriation in the country, predates the country's constitution and transition to democracy. Various attempts have been made to draft a new bill which complies with the Constitution, the first dating back to President Mbeki's time in office. These attempts have been controversial and defective, all eventually coming to nought. In the mean time the courts developed a jurisprudence, applying the 1975 Act, but

doing so in line with sec 25 of the Constitution.

In February 2015 a new Expropriation Bill was introduced into the National Assembly (NA). It was passed by the NA a year later in February 2016; referred to the National Council of Provinces (NCOP), which passed it in May 2016; and sent to the President for his signature. It is important to note that this Bill was in line with section 25 and that important stakeholders like Agri SA signed off on it (which does not mean the Bill did not have its detractors, that is normal). Deputy-minister Cronin oversaw this process.

In July 2016 the President put signature of the Bill on hold, following various petitions to his office that there was insufficient public participation by Parliament in processing the Bill. The NCOP had to undertake consultations in the provinces and allegedly did not do so. This created the risk that the Bill could be declared unconstitutional because of insufficient consultation. There are Constitutional Court judgements to that effect.

After deliberations by the Speaker and the Chairperson of the NCOP, the president referred the Bill back to Parliament in Feb 2017, where the required consultations have since been taking place. It is this Bill into which a clause can be inserted as per Cronin's suggestion. Since the Bill has largely been agreed to it should not take a long time to steer an amendment through the legislative process.