

Land Expropriation Without Compensation

3 February 2020

Changing the Constitution to allow for expropriation without compensation has certainly ignited South African politics for 2020. It is worthwhile cutting through the noise.

Current Position

Currently, expropriation is allowed and is governed by both the Constitution and the Expropriation Act. Section 25(2) of the Constitution (the property clause) is quite clear: expropriation is allowed subject to compensation, which must be just and equitable. Expropriation decisions are taken by the Executive (government) and the courts can review those decisions and make a binding order. Considerable jurisprudence has been developed on how expropriation should be done, and compensation calculated. These rules bind all parties, including the Executive.

The decisions on expropriation are taken by the Executive branch of government, in practice mostly the Departments of Public Works and Land Affairs. In the last few years a specialist agency, the Valuer General, was developed inside the Department of Land Affairs with the specific responsibility to advise on the value of land. The Valuer General is part of the Executive and is subject to the authority of the Constitution, legislation and the courts.

So, the current legal position is clear: The Executive branch can expropriate, subject to the criteria of the Constitution, legislation and general jurisprudence; and the Court has the final say on whether the Executive has met those criteria or not.

Suggested Changes

What then has changed and why is the land expropriation issue now so hot?

Expropriation without paying compensation has become a policy plank of the ANC. After the 2019 election, the new Parliament appointed a committee to handle the amendment of section 25.

In assisting the committee, Parliament's legal services drafted a short Bill that amends the Constitution in three ways: it provides that '... a court may ... determine that the amount of compensation is nil'; that the R nil compensation must (still) be 'just and equitable'; and lastly that national legislation must be enacted spelling out the 'specific circumstances where a court may determine the amount of compensation is nil'.

Political Differences

The Parliamentary Committee met on the 3rd of December to discuss this draft. According to the minutes of the meeting the honourable members disagreed on, amongst others, two issues.

Firstly, DA and Freedom Front Plus members wanted the specific circumstances where R nil compensation can be paid to be spelt out in the Constitution itself and not in accompanying national legislation. Advocate Van der Merwe from Parliament's Legal Services argued for separate legislation. The committee agreed to reflect on the issue and then come back to it.

Secondly, members disagreed on the role of the courts. DA and Freedom Front Plus members felt the courts had to be involved in the decision itself (not just the review of a decision), particularly where R nil compensation is payable as it is so serious. ANC members agreed that 'The courts had a role to play as forums to mediate on disputes', however, they did not want to make the courts responsible for deciding on expropriation. That is a function of the Executive. The issue was left there. The Draft Bill was published on 6 December for public comment without resolving the differences between the parties.

On 21 January, in his concluding remarks after a four-day ANC National Executive Committee (NEC) Lekgotla, President Ramaphosa said: 'We are encouraged that the Lekgotla endorsed the recommendation that the power to determine the quantum of compensation for land expropriation should reside in the Executive.'

Then all hell broke loose.

So, What Has Changed?

The current position on expropriation is that the Executive decides and the courts review. Nothing in the Draft Bill, the president's remarks, nor the comments of ANC members in the committee suggest that this will change. Any person who is not happy with any expropriation amount, including R nil, can still approach the courts and ask for relief based on the 'just and equitable' test of the Constitution, or any other legal prescripts in our law.

In that sense, the current hysteria over the ANC making a U-turn and changing its position is clearly overdone. It is clear from the committee minutes what the ANC's position has been all along. The hysteria that the courts are being cut out is also wrong – they retain the right to review and can amend or set aside any Executive decision (including R nil decisions) that do not meet the requirements of our law.

Separation of Powers

What will be a change is if the courts are made responsible for administering R nil decisions, ie taking a decision on when an expropriation should be R nil. It all comes down to the doctrine of separation of powers.

The Constitution protects democracy by separating the power of the state into three parts or 'arms': the Legislature (Parliament, the nine provincial legislatures and local councils), the Executive (ministers and government departments that run the country from day to day), and the Judiciary (the courts).

Constitutional lawyers like Professor Elmien du Plessis from Potchefstroom argue that giving that discretion to the courts '...is not without problems. It is not for the courts to administer the legislation. They should only mediate disputes, and in doing so, they can lay down principles and guidelines for decisionmakers. The power to expropriate stems from legislation ...' and 'The Executive executes the legislation'. In short, one does not want judges acting as civil servants.

Under What Conditions Can R Nil Compensation Be Paid?

The answer lies in the new Expropriation Bill that was published for comment in December.

The Bill lists five instances where land can be expropriated without compensation (clause 12). These are:

1. land occupied or used by a labour tenant (as defined in legislation);
2. land held for purely speculative purposes;
3. land owned by a state corporation or state entity;
4. land that has been abandoned; and
5. land where the market value is equal to or less than money the state has already spent on it.

Clearly there are some major definitional issues. When, for example, is land held for purely speculative purposes?

Patricia de Lille, Minister of Public Works, will be responsible for taking the Expropriation Bill through the Parliamentary process.

Timeline

The one thing on which the Parliamentary Committee agreed is that the process of changing section 25 must be completed by the end of March. That looks completely unlikely as the deadline for submission has already been extended to the end of February. Allowing for the normal slippage, we can only hope for closure and certainty on this important matter in the second half of the year.

So What?

- The current system of expropriation where the Executive takes the decisions and the courts can review them will remain. Nothing has been proposed to change that.
- Some political parties want a change that will put that decision-making with the courts. The ANC is unlikely to accept that.
- The separation of powers doctrine requires that executive and judicial decisions are taken by different arms of government.
- The recent explosion of emotion around this issue again underlined how important it is that this matter is finalised, and certainty created. The lingering of this issue and constant emotional explosions undermine confidence, investment and economic growth. It is lingering too long.