

Land expropriation and compensation

13 March 2017

The past five weeks saw interesting pronouncements on land in SA. Will it lead to a change in the Constitution? First, as it happened.

Sequence of events

Sunday 5 February: The ANC issues a press statement listing 12 items they would like to see in the State of the Nation address. First item on the list: "Return the land to the people using Constitutional means".

Thursday evening 9 February: Mr Zuma delivers his State of the Nation speech to Parliament. He echoes the ANC's wish: land reform will be accelerated in line with the constitution. *So far, so good.*

Tuesday 14 February: Minister of Land Affairs Gugile Nkwinti speaks in the National Assembly. "...Undertake a pre-colonial audit of land ownership, use and occupation patterns. Once the audit has been completed, a single law should be developed to address the issue of land restitution without compensation. The necessary constitutional amendments should be undertaken to effect this process." He does not give any more details. *Two new ideas: 'pre-colonial land audit' and 'expropriation without compensation'.*

Friday 24 February: At an Operation Phakisa laboratory on land, agricultural and rural development, the president refers to the government amending laws and policies "...to enable faster land reform, including land expropriation without compensation as provided for in the Constitution." *The Constitution of course provides for no such action, on the contrary.* Phakisa means "hurry up" and is a conclave where stakeholders lock themselves up to agree on decisions and actions – this one had as priorities food security and job creation in agriculture. A Phakisa starts with the NDP vision for that sector and then works down to practical actions.

Tuesday 28 February: The EFF, quick on the ball, table a motion in the National Assembly for Section 25 of the Constitution to be amended to allow expropriation without compensation. Effectively they offer to add their 6% of the vote to the ANC's 62% to create the two-thirds majority needed to change the Constitution. ANC members speak and vote against the motion. It is defeated by 266 votes to 33 (EFF 25, Agang 2, UDM 4, PAC and APC one each). Julius Malema dances on the grave of the motion, accusing the ANC of hypocrisy in talking radical economic transformation but not walking it.

Friday 3 March: Three days after the parliamentary vote the President addresses the House of Traditional Leaders and reiterates: "First we must undertake a pre-colonial land audit... Once the audit has been completed, a single law should be developed to address the issue of land restitution without compensation."

Thursday 9 March: The EFF asks Dep.-Pres. Ramaphosa in Parliament (twice) whether he supports expropriation without compensation. He easily deflects them. The answer is vintage Ramaphosa: the issue is vitally important, a great injustice was done to Black people, Mr Zuma's comments came from a deep-seated pain felt by all Black people, there are various ways for government to deal with the issue; then a change of tone: "It is not sufficient to pronounce slogans..." and: "Admittedly, amending the Constitution is a strategy ... implementing what is in the Constitution is another strategy. The ANC's commitment is deep and thorough. We will solve this problem". It is noticeable that he juxtaposes "changing the Constitution" with "implementing what is in the Constitution" but does not compromise on the need to do land restitution.

Calm reaction

Also noticeable is that during all of this, the financial markets remained very calm. That sensitive barometer, the 10-year bond rate, hardly moved during all the talk of expropriation. Naturally international markets also influence SA

markets, but property is a vital issue and the foundation of economic activity so I expected a reaction. There was none. Are the markets ignorant (possible, but unlikely); or do they think it will not happen (more likely)?

So What – will the Constitution be changed?

In our view, the balance of forces at the moment is against changing the Constitution. We see four main obstacles to a change in section 25.

Firstly, as the deputy-president pointed out, amending the Constitution is one strategy, implementing what is in the Constitution is another. “Pre-colonial land audit” and “expropriation without compensation” are slogans rather than a coherent action plan. One has the feeling that the audit is used as a can that is being kicked down the road.

While still in the ANC, Julius Malema with the Youth League, made a strong push for nationalisation of mines. Even before he was expelled that idea came to naught; but the difficult issue of transformation in mining is still on the table. I expect a similar outcome around land.

Secondly, the ANC is deeply divided as we can see from the fact that the President and the parliamentary party are on different sides of the issue. It is unlikely that the one side can ride roughshod over the other side. The two sides will live in an uncomfortable stalemate until the elective conference in December – and probably even after that.

Thirdly, the very Phakisa where Mr Zuma first made his comments was convened on his authority and with his blessing. About 130 participants representing every conceivable group in agriculture and land participated in the Phakisa and agreed on twenty seven actions to be implemented. In July, these stakeholders will sign formal agreements on public-private partnerships to implement these decisions. It is very much in the spirit of “implementing what is in the Constitution” and is an important practical alternative to “expropriation without compensation”. It is unlikely that Mr Zuma or the ANC will walk away from this process.

Fourthly, changing the Constitution is a long road to travel. There will be scrutiny and contestation which will make Des van Rooyen’s four days at Treasury look like a walk in the park. According to the 2016 Community Survey, 66% of all South Africans live in their own dwellings, *and more than 80% of those dwellings are paid off*. Fiddling with those property rights will not be easy. An insider at the land Phakisa told me the demand from Black farmers for tenure was one of the biggest single issues. The ANC *sans* Mr Zuma, in fact even with him, is very unlikely to give more power to the chiefs when resistance to property being under control of untouchable chiefs is already growing strongly. This is hardly a political backdrop favourable to “expropriation without compensation”.

ANC Policy documents

Our view that the Constitution will not be changed is confirmed by the ANC policy documents released yesterday. There are no “change the Constitution” or “expropriate without compensation” proposals. The proposal on land is a tax on unused land to encourage the sale thereof. It is all very much “return the land to the people using Constitutional means”.

The risks

The risks are simply that the ANC policy conference (June) is captured by the populists and that at the elective conference (December) the patronage faction is elected as leaders of the ANC. Looking at the ANC policy documents released this weekend, I rate that risk low; but we live in the age of Brexit and Trump, so let’s not discount anything.

Addendum - what section 25 says ... and what not

Section 25, popularly referred to as “the property clause” in the Constitution, was carefully crafted during negotiations and is a balance between the status quo and the need to change the status quo. The section protects property rights (status quo), but it also obliges government to effect land restitution, land reform and security of tenure (change the status quo).

Those who claim land reform is “just politics” ignore one half of section 25; those who claim section 25 does not allow for radical change, ignore the other half.

Section 25 (2) also provides for expropriation for a public purpose and subject to compensation. The nation's commitment to land reform is specifically spelt out as a "public purpose". Section 25 (3) specifies that compensation must be "just and equitable". The much-talked-about willing buyer, willing seller dispensation is not in the Constitution at all. A body of jurisprudence has already been built up by the courts to tease out precisely what is "just and equitable" and it is a process that will continue.