Expropriation without Compensation

Business Partners

1. Introduction

It is quite clear that the ANC is intent on amending the Constitution to provide for expropriation without compensation. Despite all of the current debate, what exactly is proposed remains uncertain.

Ramaphosa's August letter to the London Financial Times gives some pointers. He stated that, although Section 25 of the Constitution permits, in limited circumstances, expropriation without compensation, the constitutional amendment would make explicit the conditions. The purpose of the amendment is to create certainty and clarity.

The further assurance was given that the amendment would re-inforce the fundamental principles of the property clause. The expropriation would be just and equitable and at the same time, redress the results of past racial discrimination.

Is the ANC about to embark upon the wholesale expropriation of land without compensation or will the proposed amendment simply be a clarification of what Section 25 of the Constitution is understood to mean?

The Freedom Charter which the ANC Congress adopted in Kliptown in 1955 called for all land to be returned to the people and redivided.

When it came to negotiating the final Constitution some 40 years later, the same call was made. It was, of course, a different era. Nonetheless, section 25, the property clause, was the most hotly debated and the last to be resolved. A compromise was reached. Ownership of property was protected subject to 3 exceptions:

1.1 The state was conferred the right to expropriate property not only for public purpose (such as roads, bridges, schools) but also for public interest;

1.2 Public interest included the nation's commitment to land reform and to bring about equitable access to natural resources; and

1.3 Compensation would be just and equitable and not necessarily market price.

Two further sections were also inserted. Section 25(5) obliges the State to take reasonable legislative and other measures to enable citizens to gain access to land on an equitable basis.

Section 25(8) states that no provision of section 25 could impede the State from taking legislative and other measures to achieve land, water and related reform so as to redress the imbalances of the past.

These measures however were qualified by section 36(1) which provides that limitations have to be reasonable and justifiable in an open and democratic society based upon principles of dignity, equality and freedom.

Section 25 created the necessary compromise and balance between the protection of our economy based on private property and free market enterprise and the need to dramatically transform the economy following decades of oppressive laws and policies.

Unfortunately, the State's track record over the last 20 years, in giving effect to restitution and redistribution, has been poor. It adopted a willing buyer willing seller policy when there was no need to do so. It did not use its expropriation powers to redistribute land. The land claim process has been ineffective. By the end of last year, the pace of land restitution and redistribution ground to a halt.

It is not surprising that coming out of the frustration of lack of delivery, a call has been made for wholesale land redistribution through expropriation without compensation. This is just another way of saying that land should be returned to the people.

How serious is this threat? Is it something that will affect only farms in rural areas? Will it impact upon commercial properties, particularly properties in urban areas? Can expropriation without compensation be achieved without

amending the Constitution in a way that the economy is not detrimentally impacted? What amendment to the Constitution would achieve expropriation without compensation, and in what circumstances, without impacting upon the economy?

I will seek to identify some of the arguments and factors which are important and relevant to the debate. These should provide some guidance on where all of this is likely to go and hopefully some assistance to you, as property owners, on how best to act and plan.

I will be covering :

(a) The Parliamentary resolution itself and the process that will be followed.

(b) The results and recommendations of the State Land audit published at the end of last year.

(c) The conclusions and recommendations of the High-Level Panel commissioned by Parliament (the **Motlanthe Report**). This report looks at the State's track record on reform since 1994 and makes recommendations going forward. It is not in favour of expropriation without compensation.

(d) Various land bills which have been published recently containing restrictions on land and which seek to redress imbalances. Most of these bills are regarded as being unconstitutional. A proposed amendment to Section 25 may cure this.

(e) How our water and mineral law was transformed and which resulted in the effective expropriation of all water and mineral rights without compensation.

(f) Aligned to this, the concept of the nation being the owner of natural resources with the State acting as the custodian of the nation.

(g) The Constitutional Court's acceptance of this approach even though it is something not found in the jurisprudence of any other country in the world.

(h) The statements made by Deputy-Minister Cronin to the effect that this process will be restricted only to certain types of land being vacant land, disused buildings, land held for speculative purposes and land occupied by labour tenants.

(i) The economic impact of the proposal;

(j) How expropriation without compensation is a breach of International Law;

(k) How foreign Constitutions have dealt with similar issues; and

(l) The likely outcome of this all.

2. The Parliamentary Resolution

The concept of expropriation without compensation was first mooted by the ANC Youth League in 2011.

At the June / July 2017 ANC National Policy Conference, the ANC unanimously resolved that "*radical land distribution is needed*". The conference concluded that every option should be open for discussion, including tax reforms and changes to the Constitution. Two proposals were identified as the most popular amongst delegates. These were the amendment of the Constitution to allow expropriation of land without compensation and secondly respecting section 25 of the Constitution but mandating the State to act more aggressively to expropriate land, in line with the just and equitable principle.

At the December ANC Conference, the ANC resolved that the Constitution should be amended, allowing the State to expropriate land without compensation. This was again echoed in President Ramaphosa's State of the Nation Address.

On 27 February, Julius Malema called on Parliament to create an ad-hoc committee to review and amend section 25 of the Constitution. He called on the State to expropriate land in the public interest without compensation and for freehold rights to be converted to a new land tenure system where the State became the custodian of all South African land.

Malema's resolution clearly advances that land should be dealt with in the same way that water and mineral rights have been handled.

The ruling party then proposed an alternative.

There were three main amendments:

2.1 Current policy instruments, including the willing buyer, willing seller policy and the other provisions of section 25 of the Constitution were hindering effective land reform;

2.2 Expropriation of land without compensation should continue, making use of all mechanisms at the disposal of the State, but implemented in a manner that increases agricultural production and food security but ensures that land is returned to those from whom it was taken;

2.3 Mandating Parliament to establish a committee to propose the necessary Constitutional amendments with regard to, where applicable, implementing a future land tenure regime.

Although it is unclear, it would appear that Parliament was not asked to look into the State becoming the custodian of all South African land.

Parliament then embarked upon a process of consultation. Written submissions had to be made before 15 June 2018. Public hearings were held throughout the country thereafter and oral submissions were made to Parliament itself during the course of last week. The draft report will then be prepared and submitted to the Committee to be adopted in October.

To a large degree, the consultation process has ignored the economic and/or agricultural aspects of the resolution as well as the recommendations on a new land tenure model. In this regard, the consultation process may be flawed. Only

once this consultation process has been followed, will Bills be prepared and published during which there will be further consultation.

Further consultation will have to occur once the Parliamentary process commences.

The amendment to the Constitution is unlikely to be passed by Parliament before the 2019 elections. Should the amendment be passed by Parliament, there will inevitably be challenges both to the South African Constitutional Court and possibly also in international forums which could take years to determine.

3. The State Land Audit

For many years, both the private sector and the State have been endeavouring to obtain meaningful figures on the progress of land reform. No meaningful data has yet been produced.

In November of last year, the Department of Rural Development and Land Reform published a land audit report.

Because property records do not separately show the race of the owner, data in the report is not reliable.

Information then was first obtained from the Deeds Office for land ownership information, the Surveyor General's Office for cadastral information, the Department of Home Affairs for determining whether the person was a South African or a foreigner and the Department of Statistics, utilising census data, to establish the race of individuals. The racial classification of property is therefore, to a large degree, based on presumptions.

The report excludes State land or trust land which represents some 6% of South Africa. It also excludes companies, community based organisation and trusts as they cannot be classified by race. They own 60% of all properties.

In respect of agricultural land owned by individuals, it concludes that 72% of the land is owned by Whites, 4% by Africans, 15% by Coloureds and 5% by individuals.

In regard to urban land, which would be residential land, again, in respect of individuals only, Whites own 26% of the land, Africans 56%, Coloureds 9% and Indians 7%.

Sectional title ownership is divided 50% Whites, 21% Coloureds, 17% Africans, 6% Indians and 6% co-owners.

Other interest groups claim that the land audit significantly understates the non-white ownership of land.

The land audit concludes that all current land tenure systems should be replaced by a new land tenure system vesting all land in the nation as the common property of South Africa.

Quite clearly, within the Department of Rural Development and Land Reform there are proponents of the policy initiatives suggested by Julius Malema.

4. Parliamentary High-Level Panel

The Panel comprised of independent, high-level. eminent South Africans. Its task was to assess the State's performance in three main areas, land redistribution, unemployment and wealth distribution. It was asked to assess how the legislative changes introduced since 1994 had performed and what new changes are required.

The chapter on land reform was written by Dr Aninka Claassens. She was on the 1996 ANC technical committee responsible for negotiating section 25 of the Constitution. In the 1990's, she worked as a legal advisor to Derek Hanekom whilst he was the Minister of Lands. She is married to Geoff Budlender, who is the architect of the MPRDA which transformed our mineral law. One assumes that she represents the thinking of the Ramaphosa camp of the ANC as opposed to the Zuma camp.

A large part of the chapter deals with the very urgent need to provide proper security of tenure to Blacks who live on State land or communal land. This is former homeland areas as well as land which that has been allocated since 1994 under the restitution process.

Claassens points out that in former homeland areas and in redistribution schemes, the State has preferred the mechanism of leases being granted which has perpetuated the legacy of apartheid. It has aggregated all Black people into tribes. Individuals remain tenants of the State.

The report recommends that individual land rights, recognising customary traditions, need to be established under a new form of title and this should apply both to urban areas as well as to rural areas.

It is estimated that this will affect some 17 million South Africans and if proper title was given, could result in significant investment in land and the property sector.

A new land record system could be established which would enable the property rights of all South Africans to be recorded and registered on a sustainable basis. The new Act would provide for a continuum of rights and encompass not only historic property rights registered in the Deeds Office but also land rights of those in shack settlements around cities, those on communal land within the former homelands and those on trust or communal property association land settled post 1994.

The report concludes that the land restitution and redistribution process has largely failed.

The report notes that there has been a significant downward trend in the pace of redistribution measured by hectares since the Zuma administration came to power in 2008. In 2008, redistribution peaked at 500 000 hectares per annum. By 2016 / 2017, it was down to zero.

The panel concludes that section 25 contains all of the legislative mechanisms so as to enable the State to achieve proper redistribution. It also concludes that budget constraints have not been the main barrier to redistribution. There is therefore no need to amend the Constitution or to remove the obligation to pay compensation. The most important constraints have been corruption, the diversion of the land reform budget to elites, lack of political will and a lack of training and capacity.

Apart from amending the tenure arrangement in rural areas, the report recognises that there is a critical need to provide land and housing in urban areas. The apartheid city has distanced the poor from city centres.

Well situated urban land, not owned by the State, needs to be identified and the State should aggressively expropriate this land for redistribution and subdivision. It indicates that section 25 allows the State to expropriate land at a discount to market value if the purpose is to achieve land reform.

In summary, the high-level panel report :

4.1 concludes that the Constitution should not be amended;

4.2 recommends that the State use the existing expropriation powers available to it to achieve land reform;

4.3 believes that the Constitution enables the State to acquire certain categories of land, such as unused land, at discount;

4.4 recommends a new form of land title on reserved land within cities and in rural areas

5. **Land Bills and Creeping Expropriation**

5.1 Regulation of Agricultural Land Holding Bill

This Bill was published in March 2017. Its aim was to redistribute agricultural land more equally by race and class. It also aimed to increase agricultural output and food security. Some of the features of the Bill are :

(a) Land Commission would be established having jurisdiction over all land in South Africa;

(b) The Commission would maintain a register of all agricultural land holdings;

(c) Every owner of agricultural land would have to declare their race, gender and nationality;

(d) No foreign person could acquire additional agricultural land unless a Black Person held 51% of the interest in the land;

(e) A foreign person would have to grant the State a right of first refusal should it sell agricultural land;

(f) The Minister could place ceilings for agricultural land holdings in each district;

(g) Land owners would be obliged to effectively redistribute a portion of their land which fell outside of the category or ceiling.

This Bill was clearly unconstitutional and has not progressed further.

5.2 Property Valuation Act of 2014 and the Draft Regulations of 2017

The Property Valuation Act of 2014 distinguishes between property being valued by the Valuer General for the purposes of land reform and property to be acquired for any other reason. The Act provides that if the property is to be acquired other than for land reform, then market value should be utilised.

If it is for land reform, the different valuations may be made depending upon the purpose for which the expropriation is to be done.

The Constitution does not provide that a different form of valuation must be used if the purpose is land reform. It is likely that the proposed amendment is to stipulate that if the purpose of the expropriation is land reform, a discount to market value is to be paid on a spectrum, depending on the circumstances, of 100% (no compensation) to market value itself.

The 2017 regulations sought to prescribe the method of achieving a discount for property valuations for land reform. Again, this was unconstitutional.

5.3 The Expropriation Bill

Since 1994, the State has been trying to introduce a new Expropriation Bill that is consistent with Section 25 of the Constitution. Parliament has passed the

most recent version of the Bill but it has not yet been brought into effect. This version is constitutional. Earlier versions were not. They sought to oust the jurisdiction of the courts as the final arbiter in determining compensation and also sought to impose an interpretation on section 25 to the effect that just and equitable compensation meant a reduction in market value if the purpose was to achieve land reform.

The new Expropriation Bill has now been withdrawn. Clearly this is because Section 25 is to be amended to allow a reduction in market value if the purpose is to achieve land reform.

6. Water and Minerals

Using section 25(5) and section 25(8) of the Constitution, which mandates the State to take legislative measures to enable citizens to gain access to land and resources and to achieve land, water and related reform, our law on water and minerals has being transformed from a system based on private ownership to one whereby the State allocates water and mineral rights.

Both the National Water Act of 1998 and the Mineral & Petroleum Resources Development Act of 2002 converted old privately held rights into new order rights.

Under the NWA, water rights became owned by the nation and the Minister became the trustee of the nation's water resources. Old rights were recognised provided they were used and were lawful subject to the holder applying, in due course, for a licence.

When applying for a licence, the State has the power to re-allocate a portion of the rights so as to redress past imbalances. Only if all of the rights are taken away, is compensation paid.

The same process was followed in regard to minerals. The holders of privately held mineral rights were given a period to convert their rights into new order rights. All applications for conversion would have to comply with the Mining Charter which included an obligation, within a 5 year period, that the right holder be at least 26% held by previously disadvantaged people. Unused rights could

only be converted if the holder started using them, otherwise they would be forfeited to the State.

AgriSA challenged this process on the basis that it constituted expropriation without compensation. The Constitutional Court was requested to rule on whether the deprivation of coal rights and the vesting of those rights in the State on behalf of the people of South Africa, constituted expropriation without compensation and was unconstitutional. Although there is no precedent in any other legal jurisdiction in the world whereby the nation becomes the owner of natural resources, the majority judgement of the Constitutional Court concluded that this scheme was constitutional.

In order for there to be an expropriation, the State has to acquire rights from the citizen.

The scheme adopted in respect of water and minerals did not result in the State acquiring the mineral rights but rather "*the nation*" or "*the people of South Africa*". The only place where the nation or the people of a country is recognised in International Law is in cases of genocide.

The Constitutional Court stated that section 25 must be interpreted in the context of its need to facilitate nation building and reconciliation and the opening up of economic opportunities. It records that there will inevitably be a tension between the interests of the wealthy and the previously disadvantaged.

As the core right was upheld in the transition process (the mining company was entitled to convert the right provided it undertook to use the right and introduce BEE participants), the core right was not taken nor was it acquired by the State. The court held that section 25 had to be interpreted so as to promote equitable distribution of land or resources stemming from an unpleasant past.

The minority judgement of Fronemann J warned that this approach could lead to the abolition of private ownership of all property without compensation if it was done by the State as custodian of the country's resources.

In paragraph 105 of the judgement, it is stated :

"*If private ownership of minerals can be abolished without just and equitable compensation – by the construction that when the State allocates the substance of old rights to others, it does not do so as the holder of those rights – what prevents the abolition of private ownership of any, or all, property in the same way?"*

It should be clear to you, by now, that a new law along the following lines could be upheld as constitutional without amending section 25 :

6.1 All land vests in the nation (or certain types of land such as agricultural land);

6.2 The Minister is the custodian of the nation's land;

6.3 The Minister is empowered to grant new land rights;

6.4 The owners of old order rights will be categorised as holders of used or unused old order rights;

6.5 The owners of used old order rights would be entitled to apply for a new right but subject to complying with certain conditions. This could include BEE participation;

6.6 The holder of unused rights would also have to prove the rights were going to be used otherwise they would fall away.

A lot of the talk that the Constitution does not need to be changed for expropriation without compensation to occur is premised on this.

7. <u>Clarification Statements</u>

So as to appease the concerns raised by investors generally and by the property sector, Deputy Minister Cronin has issued statements to the effect that the process will target unused vacant land in cities, abandoned buildings, commercial properties held unproductively and for speculative purposes and agricultural land occupied by labour tenants.

Contrary to earlier expectations, the thrust is on urban as opposed to rural farming land. How will commercial property be categorised as unproductive. Although it may not be used in the most productive manner, it would, or could, have significant value. What is meant by holding land for speculative purposes? Speculative investors invest in land where there is a higher risk and potentially a higher return.

Vacant land attracts higher rates and property owners are prepared to pay these rates because they see significant value. There seems to be no logic or justification for singling out these categories of land as being appropriate for expropriation without compensation.

These categories, however, all fall within the use it or lose it principles which were applied to minerals and water.

It does seem that the Deputy Minister likes the approach taken by the majority judgement in the Constitutional Court.

8. **Economic Factors**

The Parliamentary resolution and all statements that the ANC have made since then is to the effect that the concept of expropriation without compensation is to be implemented in a manner that does not harm the economy, increases agricultural production and provides for food security. As the thrust of the debate appears to be on urban land, agricultural production and food security seems to be irrelevant.

The economic impacts, and the impact generally to the property sector, which is valued at R8 trillion, hasn't been properly considered by experts.

Those experts who have considered the matter have concluded that the economic cost of introducing a policy of expropriation without compensation would far exceed the financial benefit of acquiring land for free or at a discount.

The Zimbabwe example showed that the economic cost of expropriation without compensation was US$20 billion whereas the compensation that would have been payable was estimated at US$11 billion.

9. **Expropriation without Compensation is a breach of International Law**

Customary International Law does not allow expropriation without compensation. In terms of Section 232 of our Constitution, Customary International Law forms part of South African Law, unless it is inconsistent with the Constitution or an Act of Parliament.

The question is thus whether the Constitution or an act of Parliament can be adopted or amended to provide for expropriation without compensation, whilst still conforming to International Law.

Expropriations are lawful in International Law if they are for a public purpose, without discrimination against foreign nationals and if compensation is paid promptly.

The subjects of International Law are sovereign states and international organisations with legal personality. Private individuals or companies benefit from the protection of International Law :

9.1 Through diplomatic protection of their state if the host state acts in breach of minimum international standards; and

9.2 Through international arbitration in terms of treaties, should the host state expropriate property without compensation and in breach of a treaty.

If South Africa breached the international minimum standard which requires that compensation be paid if property is expropriated, then the diplomatic protection which may be introduced would include such measures as economic sanctions (as was applied against Zimbabwe) or the referral of the dispute to the International Court of Justice. It is unlikely that South Africa would allow itself to be subjected to international controversy through the breach of International Law.

Traditionally, under International Law, the quantum of compensation was adequate or effective compensation which tended to equate to full compensation or market value.

Since the acceptance of the Charter of Economic Rights and Duties of States by the General Assembly of the United Nations in 1974, the measure of compensation has been watered down to “appropriate compensation”.

The South African circumstances and the imperative for land reform may give rise to an internationally acceptable formulation of measures of compensation which is less than market value but which is regarded as appropriate in the circumstances. In various international arbitrations, a wide margin of appreciation has been allowed for necessary social and economic reforms in applying International Law when quantifying compensation on expropriation.

If we look at Section 25(3) of the Constitution and interpret it broadly, it is a very flexible instrument which may, in certain circumstances, give rise to full compensation but, if just and equitable, to less than full compensation and even very little or no compensation in very exceptional cases. It is premised on a just and equitable balance of interests.

It can never be just and equitable if the person whose property is expropriated is the victim of a confiscation. The principle of equivalence must always apply whereby the person whose property is expropriated should not bear the burden on behalf of society at large. Article 16 of the United Nations 1974 Charter is important to this debate. It provides that it is the right and duty of all States, individually and collectively, to eliminate colonialism, apartheid, racial discrimination and the economic and social consequences thereof, as a pre-requisite for development. If this is evaluated against our current Section 25(3) of the Constitution, then it would be acceptable for an Expropriation Act to provide that in order to eliminate the consequences of apartheid, all relevant circumstances must be considered and to provide for a comprehensive and objective formula which is acceptable, in international terms as an exception to the traditional full compensation measure.

However, a statutory provision for blanket expropriation without compensation in respect of all expropriations, is, from an International Law perspective, totally unacceptable.

It would seem that what the ANC is driving at is to clarify Section 25(3) and essentially, unpack its elements. At the end of the day, any amendment, which would in turn be incorporated into a new Expropriation Act, would need to :

(a) closely and very clearly circumscribe the circumstances when no or little compensation would be payable; and

(b) subject the provision to the just and equitable qualification currently contained in Section 25(3) in order to ensure that the equivalence principle remains applicable.

The expropriation and the measure of compensation must always be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This follows the provisions of Section 36 of the Constitution.

For this reason, it is important to look at other constitutions of other democracies to see how this has been handled.

10. Foreign Constitutions

Of a study of some 24 Constitutions worldwide, only one Constitution could be found which specifically provides for no compensation.

The Zimbabwe Constitution states that fair and equitable compensation must be paid, but this compensation has to be paid out of a fund into which the former colonial powers had to make payment. As no payment was made, no compensation was payable.

Various formulations of the norm of compensation are found in various Constitutions. Just compensation is found in the Constitutions of the Central African Republic, the Republic of the Congo, Egypt, Japan, Mozambique, Namibia, Poland, Senegal and the USA.

Fair compensation applies to the Constitutions of Egypt, France, Madagascar, Ruwanda and Tanzania.

Full compensation is found in the Constitutions of Denmark, Kenya, Lesotho, Russia and the Seychelles.

Adequate compensation is found in the Constitutions of Botswana, Malta, Uganda and Zambia.

Germany and South Africa provide that the compensation must reflect an equitable balance of interest.

There is therefore no support in other democratic countries for the notion that no compensation on expropriation is payable. A blanket no compensation formulation would be in breach of Section 36(1) of the Constitution.

11. **Conclusion**

It is difficult to know where all of this is going. Is it political or does this pose a real threat to the property industry? Most of the problems stem from the State's failure to deliver what it was mandated to do when section 25 was written.

As set out in the Motlanthe Report, the more conservative elements of the ANC seem to believe that Section 25 of the Constitution adequately provides flexibility so as to enable land reform through balancing the interests of the individual as against the interests of larger society. This element previously stated that it was not necessary to amend the Constitution, but rather its provisions should be effectively utilised.

That sentiment seems to have shifted to a position where the Constitution should be amended so as to provide greater clarification as to what is meant by Section 25(3). Instead of unpacking this into the Expropriation Act, it would seem that they now favour an amendment to the Constitution. That amendment, if properly handled, should not be substantially different to our current Constitution and will be consistent with International Law. It also should be consistent with Section 36 of the Constitution and what is found in other democracies.

More radical elements would like to see the entire tenure system changed.

Going back to the goals of the Freedom Charter, in extending what has been achieved with minerals and water, all property rights should be converted and all land held by the nation. Freehold title will then be replaced with a new form of title with the State imposing conditions on the use of land.

The economic implications of all of this has not been property considered. The economic benefit of not paying compensation versus the economic loss to the value of property has not been property considered. The property sector, after all, is the bedrock to our economy,

It is probably also necessary for the private sector to become more involved in providing solutions as opposed to simply objecting to proposals. It is after all in the interests of all of us that the issues of inequality, particularly in land, are resolved.