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On land expropriation without compensation: The Constitutional Property Clause is sufficient to achieve land reform

The land question in South Africa is generally known to be a highly sensitive matter. Characterised by a history of dispossessions, discrimination and oppression, discussions and debates around the land issue have to be approached with much caution, striking a balance between the need for land reform and equitable access to land, and the recognition and protection of existing land rights. Public perception that not enough has been done to achieve land reform under the current legal and constitutional prescripts fuels tensions even further. With the current high unemployment and poverty rates, access to land is seen as a solution to these and many other socio-economic challenges. The recent adoption of the resolution for expropriation without compensation, despite its lack of clarity, at the recent African National Congress Conference could not come at a more opportunistic time. At the 2017 Agribusiness Africa Conference in July, ANC MP Derek Hanekom told delegates that expropriation without compensation would not only cause damage to the South African economy; but that it will also be unjust.

Perhaps, the reaction of his fellow comrades following these utterances was telling of what was in store for the country at the party's December National Conference. During its National Conference in December 2017, the ruling party announced its adoption of the expropriation without compensation resolution. Post the elective conference, the new party President has been unequivocal about the party's commitment to this resolution. The newly elected President has repeatedly emphasised that expropriation without compensation will be implemented in a manner that does not threaten food security or damage the economy. It however remains concerningly unclear how this will be achieved.

Implementation of this resolution will require amending section 25 of the Constitution. The procedure for such an amendment is set out in section 74 of the Constitution. At present, we know that the ANC resolution enjoys the support of at least two other political parties. Although this may be the case, what may seem to make sense politically, does not necessarily always make sense economically, legally or constitutionally. Whilst there can be general agreement that the wheels of transformation in as far as land reform is concerned have been turning slow, the proposed resolution cannot be a reasonable solution.

Notably, the adoption of this resolution came just weeks after the High-Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change, headed by former President Kgalema Motlante, released its report findings and recommendations on land reform. This arises questions and concerns on whether the ruling party had taken these findings and recommendations into consideration. The High-Level Panel notes in its report that the development of land reform policy and law has drifted away from its initial pro-poor stance and lacks vision for inclusive agrarian reform. It cautioned about the existing significant gaps where no legislation has not been passed. As such, its recommendations included inputs to the formulation of legislation as well as recommendations on specific existing legislation to improve their successful implementation. It identified policy flaws, implementation of existing legislation and corruption as the impediments to achieving land reform. Most notably it found as follows on expropriation without compensation:” The Panel is reporting at a time that some are proposing that the Constitution be amended to allow for expropriation without compensation to address the slow and ineffective pace of land reform. This is at a time when the budget for land reform is at an all-time low of less than 0.4% of the national budget, with less than 0.1% set aside for land redistribution. Moreover, those who do receive redistribution land are made tenants of the state, rather than owners of the land. Experts advise that the need to pay compensation has not been the most serious constraint on land reform in South Africa to date – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity have proved more serious stumbling blocks to land reform.

Agri SA is in broad agreement with the findings of the High-Level Panel report. The findings and recommendations speak precisely to what is of concern with the land reform process and what the impediments to its success are. In light of this, Agri SA rejects the notion that expropriation without compensation will expedite the land reform process and



access to land on an equitable basis without impeding food security. Agricultural economists have highlighted the impact it would have on food production, farming units and the economy in general.

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It is Agri SA's assertion that the property clause in its current provisions is sufficient to achieve sustainable land reform. The section provides a reasonable and legally sound basis from which to develop policy and legislation to give effect to its provisions. The property clause adequately sets out the three components of land reform and mandates the state to take reasonable legislative steps to realise secure tenure, redistribution and restitution.

As recommended in the High-Level panel report, more emphasis should be placed on improving legislation which has been found wanting so that it gives effect to the property clause and implementation thereof.

Secondly, where no legislation is developed, as is the case under redistribution, focus should be on developing such policy and legislation, because, whilst legislation seeking to regulate secure tenure and restitution has been drafted and updated over the years; the same cannot be said for redistribution. As a result, what constitutes equitable access to land has not been defined. Therefore, there legal danger in opting for expropriation without compensation when we have not even begun to understand and define what constitutes equitable access to land. Further, courts should be granted an opportunity to develop jurisprudence on land reform, particularly around what constitutes just and equitable compensation.

Finally, there needs to be a shift from settlement models which predominantly focus on land acquisition towards focusing on post settlement support as well. Cases of farms which were productive pre-settlement to being unproductive and inactive currently is reflective of the fact that acquisition and access to land are not the major challenge, but support is. Therefore, expropriation without compensation may be seen as a viable option to expedite land reform and equitable access to land; without effective post settlement support, it will plunge the country into food insecurity.

Agri SA has repeatedly cautioned about the lack of post settlement support and stressed the importance of sustainable settlement models.

It may be prudent for government to consider implementing the recommendations made in the High-Level report in order to improve and expedite land reform. The expropriation without compensation resolution has the potential to delay, rather than speed up land reform as land owners will likely litigate in order to protect their property and property rights.

Expropriation without compensation may make much sense politically. However, whether a sacrificing existing and protected constitutional rights to property, to achieve political expediency and political gain, is justifiable in an open democratic country founded on the values of human dignity, equality and the advancement of human rights and freedoms, remains to be seen and possibly determined by the courts.

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