

**Daily Maverick (online)**, 21 June 2018

### **Expropriating idle land, or inner-city slums, is a slippery slope**

Gauteng wants to expropriate so-called “idle land”. Johannesburg wants to expropriate old buildings in the CBD. But nothing stops politicians from making the same argument to confiscate “idle” savings and redistribute them to people who could better use the cash.

Gauteng won't wait for Parliament to come to a decision about the property rights clause in the Bill of Rights. President Cyril Ramaphosa wants this clause to be amended to permit property expropriation without requiring fair compensation.

In this, he is supported by the ANC and EFF in Parliament, which together command enough votes to enact a constitutional amendment. He has appointed a Constitutional Review Committee, which is due to report back to Parliament on the feasibility of such an amendment by 30 August 2018.

But Gauteng's premier, David Makhura, says the province is going to go right ahead and expropriate privately-owned land “lying idle”, for “public purposes”, and without compensation. According to News24, he said expropriated land would then be given to residents who want to use it for building houses, food production and industrialisation.

The official opposition, the DA, has to date opposed amending the property rights clause to permit expropriation without compensation. In practice, however, DA officials who actually are in positions of power are far less principled.

Even Johannesburg's DA mayor, Herman Mashaba, has succumbed to the temptation to take assets from one class of people and give them to another. He told the media that not only does he believe in expropriation, but that he would use this power himself to reclaim buildings in the CBD that have been abandoned, turned into slums, hijacked by criminal syndicates or used for speculation.

His party must have been delighted when Ramaphosa seized upon those words as proof that the determination of Parliament to proceed with expropriation without compensation is correct. Who would have guessed that a respected former member of the Free Market Foundation would turn into a useful idiot for the radical socialist agenda to undermine property rights?

All this raises several questions. Is it justifiable to expropriate land simply because it appears to be "idle", as Makhura suggests? Is property "speculation" a problem, as Mashaba suggests? Is it a "public purpose" to take property from one owner, only to give it to another owner?

Before we get to the scary implications of the former, let's tackle the last one first. Section 25 of the South African Constitution says: "Property may be expropriated only in terms of law of general application, for a public purpose or the public interest, and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

The term "public purpose" is legally defined in the Expropriation Act of 1975 as any purposes connected with the administration of the provisions of any law by an organ of state. Practically, it is most often used to build public infrastructure, such as roads, telecommunications and electricity lines or equipment, railways or ports.

There isn't a great deal of controversy about expropriation for such public purposes. A court might apply a test of rationality, prefer alternative plans that do not require the expropriation of private property, or determine a compensation amount that differs from what the state initially offered, but the broader legitimacy of such expropriation is rarely disputed.

Makhura's idea of transferring expropriated land to a third party, however, is much more controversial. To legitimise this, he would have to appeal to a different term, namely "public interest", instead.

Although the term appears in the Constitution, it is not (to my knowledge) defined in statute law. It is far more vague, and has not really been tested in South African courts, either. The Constitution explicitly includes land reform in the public interest, but it does not address other purposes, such as slum clearance or simply stimulating economic development.

Internationally, it has become possible to use similarly-phrased law to permit the forcible expropriation (albeit with compensation) of property from one owner, in order to transfer it to another owner who, ostensibly, can make better economic use of it.

For example, Donald Trump tried to use such a law to kick an old lady out of the house in Atlantic City where she'd lived for 30 years, so he could build a limousine parking lot for his adjacent Trump Plaza. The case went to court in 1998, and the old lady won.

In another case, however, in which pharmaceutical giant Pfizer wanted to build a research laboratory but first had to kick Susette Kelo out of her home, the US Supreme Court held that "economic development" was a good enough reason to take someone's property.

Kelo's case struck a chord with the American public, because her house wasn't some dump that was better off being demolished. It was a quaint pink waterfront home. In public opinion polls, 80% of respondents disagreed. They considered this case to be nothing more than legalised theft. If Kelo's home could be taken from her, nobody's home was safe.

In a scathing dissent, four of the nine justices warned: “Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.”

Yet this is exactly what Makhura and Mashaba are proposing: taking land from one private owner, and giving it to another private owner who, in the government’s opinion, can make better use of it.

Trying to make the idea of expropriation without compensation sound more palatable, Mashaba diverts attention from the wealthy family living on a sizeable estate that could be converted into many low-cost houses. It wouldn’t do to scare the base, now would it?

Instead, he mentions inner city buildings whose owners cannot be traced. He cites buildings that have been hijacked by criminal gangs. Even here, he quickly gets onto shaky ground. What happened to the idea that government was supposed to protect citizens from criminals, and in this case, reclaim the buildings and return them to the effective control of their rightful owners?

But he’s right, a slum clearance operation would probably meet the constitutional public interest hurdle. But who is to say that turning that wealthy estate into low-cost housing is not also in the public interest, and therefore expropriation without compensation is justifiable?

Mashaba notes a case in which somebody paid R1-million for a property, and the City of Joburg agreed to buy it from him for R14-million. “But I can tell you what we are doing here as the COJ, where there’s a piece of land or a building and you think you can speculate and you are not allowing us to use it as the city for the development of our economy, and providing affordable accommodation for our people, we will expropriate and never apologise to anyone about it,” he told News24.

Anybody who buys and sells anything tries to buy low, and sell high. The idea that this is “speculation” that ought to be met with expropriation is absurd. The correct response to a price that appears too high is to offer a lower price. If a seller is not prepared to sell at this lower price, it is not justified to use force against them, as Mashaba proposes.

Politicians seem to think there is a difference between the act of investing and the act of speculation. But people speculate all the time. Buying a truck full of carrots in one town, in the hope that you can sell them for a better price in another, is speculation. If you’re wrong, you make a loss, and are left with a truck full of horse food. Importing a container full of car radios, in the hope that you can sell them at a higher price, is speculation. When you buy a car, you’re speculating that a better model at a lower price won’t appear on the market in a month’s time. Even buying a meal at a restaurant is speculation that this meal will bring you more satisfaction than saving the money would bring you some time hence. We’re all speculating, all the time.

There is no rule that says you’re just a poor sod trying to save for retirement, unless your investment returns more than  $x$  percent in  $y$  amount of time, in which case you’re an evil speculator and should have your assets taken from you.

In fact, the act of speculation is essential in markets, since they contribute to price discovery and market liquidity. They help markets to quickly reach the efficient clearing price of goods or services, thereby balancing supply and demand. (For a longer, more detailed explanation of why there is nothing evil about speculation, and why speculators perform a useful market function, read this.)

If the City of Joburg wanted a better deal, it should have bought the building when it was on the market for R1-million. Perhaps it wasn’t scouring the streets to find such a building, like the “speculator” did. It has no right to punish the investor who did buy it, and now wants a higher price for it.

Like Mashaba, Makhura labours under some economic misapprehensions. He appears to think that the mere fact that a parcel of land lies idle justifies its confiscation.

In the open market, if you think you can put a piece of land to better use than its current owners, you're free to make an offer to purchase that land. If you're right, the present owners will benefit more from selling it to you than they would by continuing their use of the land.

Of course, value is subjective. You might want a factory on the property, or build a housing estate, while the present owners want to preserve nature, or an unspoilt view, or a place to ride horses. Who is to say what value the owner attaches to these wishes? The best you can do is make an offer.

The value of a piece of land is usually connected with the expectation of future income that can be earned from that land. Someone with a parcel of land might justifiably keep the land idle, in the belief that at some date in the future, land in that area will be more scarce, and hence, command a higher price.

If you did that where Midrand is now, you'd have made a good investment. If you did that south of Johannesburg, where the city did not expand, you'd have made a bad investment. The government now wants the benefits of the good investment, without having taken the risk of the bad investment.

The owners of idle land might themselves want to develop the land, but prefer to wait until demographics or urban development make it possible to realise their plans profitably. (For more on the value of idle land, see [this article](#).)

If a parcel of land can indeed be better used, then all that is required is making the owner an offer they can't refuse. That's exactly what Makhura wants to do, but he means it in the Godfather sense of the word. If he can't get the land at the price he wants (which he threatens will be zero), he will simply ride in with a squad of armed goons and take the property by force.

Once the law permits expropriation without compensation, there's no telling where it will end. The Constitution says "property is not limited to land". Land is simply an asset class. In terms of ownership rights, land is no different from cash.

It is not hard to imagine a future populist making the argument that “excess” money that “lies idle” in bank accounts can be better used for something else. That it would be in the “public interest” for government to expropriate that money and use it, say, to pay for education, healthcare, or basic services.

If you spent your life saving for retirement, and invested your money in the relatively low-risk asset class of land, your life’s savings will be at risk under the sort of laws that the ANC envisage. Soon, keeping those savings in cash might not be safe from the thieving hands of government, either.

Once property can legally be forfeit to the state merely by making a populist appeal to redistribution, no property is safe. If property rights are no longer sacrosanct, you’ll fast run out of investment options in South Africa.

Of course, if you like being a ward of the state, you need not worry about your investments, or who expropriates your assets. I’m sure David Makhura can confiscate some idle land and build a modest facility to care for you in your old age. Perhaps we could call it Life Esidimeni Redistributed.