

Expropriation of Land without Compensation

On 27 February 2018 Julius Malema – through the Economic Freedom Front – put forward a motion to amend the Constitution to allow for the expropriation of land without compensation. Out of the 13 political parties only four – the Democratic Alliance, the Congress of the People, the Freedom Front Plus and the African Christian Democratic Party contested the motion. It was supported by all other political parties, including the African National Congress

The African National Congress (ANC), in support of the motion, called for Parliament’s Constitutional Review Committee to review Section 25 of the Constitution of the Republic of South Africa, 1996 (the “Constitution”), which is the so-called “property clause”. The Review Committee has been tasked to do so and to report back to Parliament by 30 August 2018.

What can be expected?

The announcement of the motion for expropriation without compensation was received by many with fear and questions, and by some with excitement. There has been a lot of misunderstanding over what is intended by the motion – and if there is to be expropriation without compensation, what land is intended to be included and what form such expropriation will take.

Clarity on the position taken by the ANC may be found in the outcome of the Land Summit held by the ANC in May 2018. After the discussions held at the Land Summit, the National Executive Committee of the ANC reviewed the recommendations of the Land Summit and clarified the position on the topic.

The ANC has taken the position that Section 25 of the Constitution must be used to implement the policy of expropriation of land without compensation. This is to test the assertions made in some quarters that the Constitution in its current form already enables expropriation without compensation. The ANC intends for Parliament to table and pass a Redistribution Bill to enable government to ensure just allocation of land. This is to be done in conjunction with the

Expropriation Bill. The Expropriation Bill has been in the works since 2011, and was sent back to Parliament in 2016 by then-President Jacob Zuma.

The ANC’s position on changes to Section 25 of the Constitution entails considering whether or not the intention of Section 25(2)(b) in its current form is clear enough to allow for expropriation without compensation. If the Constitution review process finds that this section does not allow for expropriation without the payment of compensation, and that this section in its current form will slow down the redistribution and reform of land, then it should be changed.

What does the Constitution currently say about expropriation and compensation?

Section 25(2) of the Constitution provides as follows (our emphasis):

“25. Property-

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application –
 - a. for a public purpose or in the public interest; and
 - b. 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.”

Section 25(2)(b) in our view specifically and clearly provides that land cannot be expropriated without compensation.

Can the right to expropriation with compensation be validly limited in terms of the Constitution? Does the Constitution allow for expropriation without compensation?

Section 25(8) reads as follows:

25(8) “No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).”

Section 25(8) creates a mandate for the government to ensure land reform. This mandate is not limited by the rights contained in Section 25 of the Constitution which includes the right contained in Section 25(2)(b) as discussed above. In other words, if the land rights contained in Section 25 are to be limited, they may only be limited in terms of Section 36 of the Constitution. Section 36 of the Constitution creates the test for when a right contained in the Bill of Rights, in this instance the property right contained in Section 25, may be limited.

The question then that must be asked is: (i) does expropriation of land without compensation result in a valid limitation of the relevant right contained in the Constitution, and as such is it allowable in terms of our current Constitutional framework and limitations provisions; or (ii) does expropriation without compensation amount to an outright deprivation and extinguishing of the right to property, which is beyond the limitation allowed for and as such is not permitted in terms of Section 36 of the Constitution?