

# legal update

If Section 25 of the Constitution prohibits expropriation without compensation and the limitation or extinguishing of these rights is found to exceed the powers afforded to the government in terms of the Constitution, then any attempt to adopt such land-reform method would be rejected by the Constitutional Court as unconstitutional. Should the government still wish to proceed with expropriation without compensation, the only way forward would be an amendment to the Constitution.

## How likely is it that the Constitution will be amended if the amendment is tabled?

The Constitution would be amended by the national government at a vote at the National Assembly. The National Assembly has 400 seats made up of the various political parties. If the Constitution was required to be amended, the parties in favour would require a two-thirds majority (66,67%).

With elections coming up next year, the seat allocation may change, which may affect the percentage of those in support of the motion. In addition, certain individual members of the parties who are in favour of this motion may, notwithstanding their parties' agenda, nevertheless vote against party lines and vote against such a motion.

## What impact will expropriation of land without compensation have?

The stance of the ANC regarding the expropriation topic can be taken out of context. The ANC has expressed that expropriation must be dealt with carefully; there must be a balance in order not to affect the economy.

A task team headed by the Deputy Minister of Public Works Jeremy Cronin has drafted amendments to the forthcoming Expropriation Bill. Such amendments set out which land will be expropriated without compensation. The ANC has advised that, if it is at all possible, it would be preferable not to amend the Bill of Rights but rather to insert a brief limitation clause in the Expropriation Bill.

The ANC has acknowledged that the government is concerned about what impact the debate over the topic will have on investors and on organised agriculture. The ANC resolved that the ANC, as a matter of policy, is to pursue expropriation of land without compensation – but, importantly, it should be pursued while keeping the following conditions in mind:

- Without destabilising the agricultural sector,
- Without endangering food security in our country; and
- Without undermining economic growth and job creation.

The President himself has made it clear that the ANC will not support any attempts at land-grabs. The intended expropriation will be dealt with on a case-by-case basis, by applying an established set of principles. The principles would be governed in terms of legislation and such legislation will still be tested by the courts.

The task team also identified land and property that could be potentially expropriated, which includes:

- Abandoned buildings;
- Unutilised land;
- Commercial property held unproductively and purely for speculative purposes or underutilised property owned by the state; and
- Land farmed by labour tenants with an absentee title holder.

Notwithstanding the side of this particular debate that you may fall on, it is reassuring to note that the ANC, whose vote would be required (holding 249 seats in the National Assembly) to amend the Constitution, has clarified that it prefers not to amend the Constitution, and also not to take any steps that will result in the destabilisation of the economy.

## What is the foreign perspective?

Standard and Poor's (S&P), one of the largest international rating agencies, kept South Africa's rating unchanged

despite the motion put forward in February 2018. "It is still too early to tell how the process will unfold, but we expect the rule of law, property rights and enforcements of contracts will remain in place, and will not significantly hamper investments in South Africa," S&P commented.

## Where to from here?

It is still early days in the discussion around expropriation of land without compensation. Everyone is eagerly awaiting the feedback to be expected from the Constitutional Review Committee at the end of August, to give more clarity on what will be considered and on the way forward.

The Committee initially called for written submissions to be submitted before the closing date of 31 May 2018. The Committee received more than 140 000 submissions from 13 April 2018 to 8 May 2018. The deadline was then extended to 15 June 2018 and there are currently more than 700 000 submissions.

The Committee will travel in two teams to hold at least three meetings in each province from 27 June 2018 until 4 August 2018. There will also be an opportunity for members of the public to make oral submissions (based on their written submissions) in Parliament from 7 to 17 August 2018.

Once the Committee has heard from the public, policy-makers, civil society organisations and academics, the Committee will then report back to the National Assembly on 11 September 2018 with its recommendations on the process of expropriation of land without compensation.

**The above should be seen as a brief comment and our interpretation thereof, and should not be seen as an extensive guideline. Please obtain a full legal opinion if you wish to act on any aspect hereof, as the guideline is not fully comprehensive.**

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