

Explainer: Everything you wanted to know (or would rather not have known) about expropriation without compensation

By Marianne Merten • 10 September 2018

The Constitution has been amended 17 times since it was signed into effect as South Africa's supreme law by President Nelson Mandela on 10 December 1996 in Sharpeville, where 69 anti-pass protesters were shot dead by apartheid police in 1960. But none of these 17 constitutional amendments, including to do with politically expedient floor-crossing, have caused as big a furore as has land expropriation without compensation. Here's a look at the politics, the processes and prerequisites.

Where did it all begin? Well, not the land question, but the process of public hearings and considerations by Parliament's constitutional review committee...

The National Assembly adopted a motion to review the Constitution with a view to an amendment for expropriation without compensation on 27 February 2018 – the 40th anniversary of the death of Robert Sobukwe, the founding president of the Pan-Africanist Congress (PAC), whose slogan is *Izwe lethu* (the land is ours).

The original EFF motion scheduled for that day talks of the state being the custodian of all land, but it was amended after a day of consultation with the ANC, for the ANC to support the EFF. And that's what happened with 241 votes in favour and 83 against – unlike the previous year when a similar EFF motion was defeated 261 against and 33 in favour.

What changed between 2017 and 2018. The politics, take one.

At the end of February 2017, the EFF brought a similar motion calling for a constitutional amendment for expropriation without compensation, one of the cardinal pillars, or policies, of the EFF.

That party's leader Julius Malema told the House the party would give its MPs to the ANC to meet the required threshold for changing the Constitution.

Then the ANC argued against that. Or as rural development and land reform committee chairperson ANC MP Phumuzile Ngwenya-Mabila explained:

“We are not going to be told what to do. We are not in alliance with anyone else. We are a ruling government... Expropriation of land should be done for public purpose and public interests, not for the EFF purpose and EFF interests. Secondly, expropriation without compensation is unconstitutional. We need to respect and uphold the Constitution as citizens of this country and, moreover, as members of this House.”

A few days later, then president Jacob Zuma criticised his own parliamentary caucus when, in his opening address to the National House of Traditional Leaders, he called on “black parties in Parliament” to unite on the land issue. “We can't fight over nothing and not deal with the real issues... and waste time, instead of creating

the legal institutions to address the problems we have of inequality, poverty and unemployment.”

Last year, 2017, was a bruising political year for the ANC, marked by factional jockeying in the run-up to its December national conference that by the slimmest of margins elected Cyril Ramaphosa as party president over Nkosazana Dlamini Zuma, who had been the candidate for the radical economic transformation (RET) grouping.

There were compromises, many, also on the factional policy proxy battles. At the 11th hour in a nod to RET agreement was reached on expropriation without compensation, although the resolution was carefully worded to include compensationless expropriation as one instrument of land reform that may not undermine food security and such.

“Expropriation of land without compensation should be among the key mechanisms available to government to give effect to land reform and redistribution. In determining the mechanisms of implementation, we must ensure that we do not undermine future investment in the economy, or damage agricultural production and food security. Furthermore, our interventions must not cause harm to other sectors of the economy.

“The ANC’s approach to land reform must be based on three elements: increased security of tenure, land restitution and land redistribution. Concrete interventions are required to improve the functioning of all three elements of land reform. These interventions should focus on government-owned land and should also be guided by the ANC’s Ready to Govern policy document which prioritised the re- distribution of

vacant, unused and under-utilised state land, as well as land held for speculation and hopelessly indebted land...,” the resolution reads.

It was this ANC resolution in December 2017 which led the ANC in Parliament to support the EFF motion of 27 February 2018. Of course, with amendments, that brought it closer to the ANC resolution. And with the vote firmly coming down in favour (241 for, 83 against) in the House, Parliament’s constitutional review committee got its marching orders.

Parliament’s public participation process...

By 21 March 2018 the constitutional review committee announced there would not only be written submissions, but also countrywide public hearings.

This unfolded after behind-the-scenes haggling for resources – and compromises were reached. To get across the country, the usual parliamentary niceties of providing catering would be ditched. Water, yes.

Microphones and recording systems, yes. Translators, yes. Food, bring your own, whether you’re an MP, support staff or member of the public.

In what can be described as one of the most extensive public consultations by Parliament, there were 34 public hearings over six weeks across all nine provinces.

Well over 500,000 submissions were received from among which around 40 were selected for another round of public hearings that unfolded in Parliament last week.

Academics, lawyer, agricultural organisations, civil society groups from Black First Land First (BLF) to Orania and AfriForum, churches, business and banks and traditional leaders had their say then.

The public hearings triggered widespread public debates. And the unprecedented focus on land reform has led to an overwhelming agreement – well, with the

exception of the alt-right AfriForum – that skewed, unequal and unjust land and property ownership patterns must change.

The question is *how*.

In the countrywide hearings a constitutional amendment for compensationless expropriation emerged as the shorthand for redress to lasting apartheid inequalities and social injustice. In contrast, the written submissions and the selected verbal responses that arose from them overwhelmingly argued there was no need for a constitutional amendment, as the Constitution already allowed expropriation without compensation in terms of its provision of just and equitable compensation that could well be zero, given, for example, the history of acquisition.

The public verbal presentations in Parliament, the written submissions processed by a contracted in company, and the arguments presented at the countrywide public hearings will form the basis of the committee report.

Public consultations done, what's the next step?

The constitutional review committee report on the constitutional amendment for expropriation without compensation had been due at the end of August. But there's already been an extension to 28 September, which in the changing parliamentary calendar now falls amid a recess period.

This Wednesday (12.9) the constitutional review committee meets again. The contracted-in service provider is expected to report back on the written submissions. Meanwhile, committee staff are expected to compile a draft report for MPs to start considering, and debating. Political parties indicated in August that they would be making their own, separate submissions

on the countrywide public hearings (EFF) and written submissions (DA, FF+ and others).

After the report is agreed to in committee – expect heated debates, as the phrasing of this document will be keenly fought over – it will be published in the Announcements, Tablings and Committee Reports (ATC), Parliament's record of work. Then it's off the House for consideration – and again a hot debate can be expected.

The politics, take two. The numbers, take one

Firmly opposed to compensationless expropriation are the DA, Freedom Front Plus, Cope and the IFP. Other opposition parties are either in favour, or are reserving their positions.

Technically there's no obstacle in the way of any mayor, premier or minister to do so right now. All already have expropriation powers, albeit under a law that dates back to apartheid days given the failure of democratic South Africa to successfully pass constitutionally-compliant expropriation laws (more later).

And while expropriation has happened, for example, for making the Gautrain railway line possible, it has never been applied to land reform, redistribution and restitution. After 24 years of political and economic will having been AWoL, it's unlikely that it would emerge now.

In the political contestation across South Africa's body politic, there's been *toenadering* between the EFF and ANC – both now agree there should be a constitutional amendment.

The EFF has never minced its words; one of its seven cardinal pillars, or policy positions, has been the nationalisation of land that should go into the custodianship of the state. And it has vigorously and

successfully mobilised to have its views clearly and vocally heard at the countrywide public hearings. The ANC, well, it's more complicated. After its consultative land workshop, it was agreed there was no need for the Constitution to be changed as it was not an impediment, although that needed to be tested. But that changed on 31 July 2018 after an ANC *lekgotla*.

Then ANC President Cyril Ramaphosa took to the national airwaves in what was styled as an address to the nation in a move that blurred the lines of party and state as such a slot traditionally is reserved for heads of state (and now subject of a DA complaint to the Broadcasting Complaints Commission of South Africa, the BCCSA). The ANC had heard the voices of "our people" in the parliamentary public hearings, Ramaphosa said, and the governing ANC now supported a constitutional amendment:

"Accordingly, the ANC will, through the parliamentary process, finalise a proposed amendment to the Constitution that outlines more clearly the conditions under which expropriation of land without compensation can be effected. The intention of this proposed amendment is to promote redress, advance economic development, increase agricultural production and food security. It will also transform the unjust spatial realities in urban areas."

And the ANC has held this line: expropriation without compensation would not undermine agricultural production, food security or anything else. The focus would be on vacant state-owned land, highly indebted land or erven held for speculation. There would be no land grabs allowed.

That emerged as recently as last Friday in a meeting between the ANC and organised agriculture, AgriSA.

And when Deputy President David “DD” Mabuza, the chairperson of the inter-ministerial committee on land reform, answered questions in the National Council of Provinces (NCOP) earlier in September he said it was clear the state did not want to own all land as he told parliamentarians that expropriated land “would go to an individual with a title deed”.

The EFF position has remained unchanged – nationalise all land. That there is wiggle room on a phrasing of the constitutional amendment is indicated in the EFF’s willingness to have its original February 2018 motion amended. Getting a constitutional amendment on land expropriation without compensation, even if that stopped short of state ownership of all land, is a major policy victory for the EFF, months ahead of the 2019 elections.

As both the EFF and ANC agree on a constitutional amendment for land expropriation without compensation – despite key differences on how this should happen – they have the numbers to push for the change in the Constitution’s Section 25, first in the constitutional review committee, and then in the House to have the committee report adopted.

So there’s a decision to amend the Constitution.

What’s next?

Traditionally, constitutional amendments are contained in a draft law that goes to the justice committee.

Traditionally, the justice ministry drafts such constitutional amendment Bills.

Usually, that constitutional amendment is accompanied by draft legislation that gives effect in real concrete terms to what the constitutional amendment provides for. For example, the 17th Constitutional Amendment Act went with the 2013 Superior Court Act to make the

Constitutional Court the highest court of appeal in all matters, not just constitutional issues.

Exactly how any of this will unfold in relations to expropriation without compensation, it's a little murky. The justice committee may well process a constitutional amendment, submitted by the justice ministry, or maybe there's a decision to allocate this to an ad hoc committee, given the workload on the justice committee, where several other bills and other work remain outstanding.

At the same time Public Works may want to table a new, the third Expropriation Bill. After the first 2008 version was withdrawn, the 2015 version was passed a year later, but returned by then president Zuma over concerns of inadequate consultations, particularly with traditional leaders. That Bill was left on the parliamentary back-burner pending the resolution of the ANC factional battles at its December 2017 national conference, and then pending the constitutional review committee public hearings.

Now the ANC had agreed on a constitutional amendment, this expropriation Bill was rejected by the National Assembly on 4 September. And that means the public works ministry can now redraft expropriation legislation with a full view of what the constitutional amendment may hold.

Regardless of how this process may unfold, a draft constitutional amendment Bill must be tabled in the national legislature for the next phase.

The process. The numbers, take two.

There must be a public comment period, and public hearings, as a constitutional amendment Bill for expropriation without compensation moves through the parliamentary process.

The ANC may want to bring its constitutional amendment, as Ramaphosa said, but that's no guarantee it will get what it wants. The EFF wants all land nationalised, which is not the ANC position. And the DA, FF+ and IFP are opposed, with other opposition parties falling in between the two sides.

Political contestation lies ahead. And then the public comment and participation process that must happen, may throw curveballs to the parliamentarians.

There are special adoption thresholds needed in both the National Assembly and the National Council of Provinces (NCOP).

In the National Assembly at least a two-thirds majority is required – that's 266 of the 400 MPs.

The ANC with its 249 seats and EFF's 25 MPs make up the numbers, a total of 274, to comfortably pass a constitutional amendment. And that's without any other political party like the UDM, Pan-Africanist Congress (PAC), African People's Convention (APC) or African Independent Congress (AIC) coming out in support.

The DA (89), IFP (10), FF+ (4) and Cope (3) simply do not have the numbers even if they get support from other opposition parties like the African Christian Democratic Party (4).

On such high-profile occasions it's usually a three-line whip, parliamentary speak for everybody has to be present and vote the party line, and pretty much no excuse except severe illness or hospitalisation is indulged. So it's reasonable to expect a full House.

After approval in the National Assembly it's off to the NCOP. There, a constitutional amendment must be approved by six of the nine provinces. Separate public consultation processes must be held for each of the provinces to arrive at its own mandate.

It's all seems political. Is that acceptable?

Some constitutional amendments are more about better governance, like making the Constitutional Court South Africa's highest court. Others are not.

Just take floor-crossing at municipal and national and provincial level respectively that accounts for four of the 17 constitutional amendments, numbers 8, 10, 14 and 15. Floor-crossing was introduced from 2002 to allow the New National Party, aggrieved and frustrated in the recently formed DA led by former Democratic Party leader Tony Leon, to leave that political party – with its seats.

It was a political move, negotiated at the highest political level in the ANC and NNP, that saw the Western Cape come under ANC control. Several councils also swung to the ANC. The *toenadering* between the NNP and ANC ultimately led to the Nats merging into the ANC before the 2004 elections, when the ANC clinched a two-thirds majority in Parliament, lost again in 2009.

But the instability particularly at municipal level not only led to a Constitutional Court win by the UDM, but a wide-ranging pushback against floor-crossing. And the 2007 Polokwane ANC national conference resolved to abolish floor-crossing.

Or as the constitutional amendment draft legislation of 2008 put it, that “the political terrain that necessitated floor-crossing had changed. There is a groundswell of opposition...”

Constitutions are living documents, and although politicians may want certain things to happen, there is a built-in protection through the special majorities needed for constitutional changes.

So when will land be expropriated without compensation?

Difficult to say. The EFF has publicly said it wants the constitutional amendment wrapped before the 2019 elections. Neither the ANC nor any other political party has set a time frame.

It's going to be tricky. An already tight parliamentary calendar is under further pressure as it has cleared weeks, and weeks, for constituency recess to allow MPs time off for electioneering. A rough back-of-the-napkin calculation looking at other constitutional amendments, including those everyone agreed on like the abolition of floor-crossing, shows it could take months and months. When it comes to expropriation without compensation, it's imminently more controversial, and throughout the public hearings there have been warnings of litigation. For there to be expropriation without compensation in action, even after a constitutional amendment, there needs to be law and regulation setting out when it's done, how and for whom. Giving those kind of granular details is not the role of a Constitution that in Section 25 allows expropriation for a public purpose and the public interest, which "includes the nation's commitment to land reform..."

And so, for now, it's all a waiting game. **DM**