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LAND DEBATE

Draft bill on expropriation excludes the arbitrary seizure of property

Though similar to the 2015 bill, the new version to be gazetted will describe circumstances of no compensation

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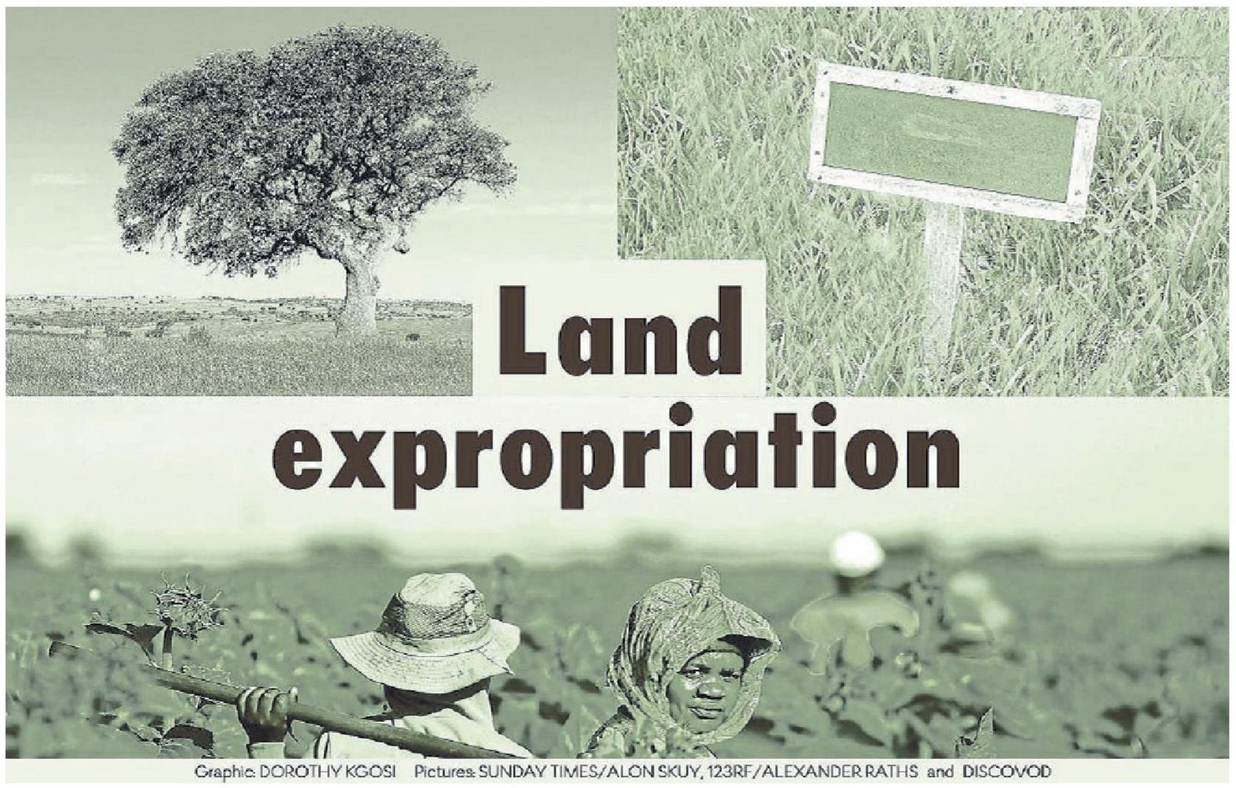

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The parliamentary majority decision to amend the constitution to allow for land expropriation without compensation has provoked extreme views. In some quarters it is seen as the silver bullet that will miraculously and single-handedly undo the horrendous original sin of colonial and apartheid-era dispossession. In other quarters it is presented as the about-to-be original sin of the post-apartheid dispensation.

In the entirely irresponsible rhetoric of a Freedom Front Plus MP in parliament last week, we were told that an era of interracial bloodshed is upon us. The MP in question even promised to run off to report us to Donald Trump. Beware of what you ask for.

It is time for cooler heads and a sense of collective commitment to our common future as South Africans, black and white. Whatever parliament decides in regard to a constitutional amendment (and we expect it to be a minor amendment), a complementary, general law of application to guide all expropriations will still be required. It is in this context that, following cabinet approval last week, we are gazetting for public comment a draft expropriation bill.

Although the current fifth parliament will not have the time to pass this bill, the objective is to put down a marker, to provide a clear signal of the government's intentions. After public comment, we expect to submit the bill to the current parliament, with the expectation that the sixth parliament after 2019's elections will revive it.

All political parties in parliament pay lip service, at least, to the need to address our hugely skewed land ownership and land use patterns. The current reality is simply unsustainable. In KwaZulu-Natal and Mpumalanga there are still about 20,000 families — the descendants of formerly successful, black commercial farmers — whose farms were expropriated but were allowed to stay on as labour tenants.

In exchange for providing free labour for six months a year to the new white owners, they were allowed to pasture their cattle or plant crops on parts of the farm. They remain active farmers, but without secure tenure and, therefore, without collateral, their decades-long endeavours continue to be stifled.

In our towns and cities, apartheid spatial patterns persist, while developers — with the connivance of public officials — gentrify well-located and long-settled areas, in effect allowing the market to do the work of former apartheid-era group areas expropriators.

Some of our larger state-owned enterprises are sitting on unused prime land. Departments such as public works are now quite rightly under pressure to identify and dispose of land for affordable human settlement and agriculture — something we are now fast-tracking.

In many former homelands, where one-third of South Africans live, tenure insecurity is chronic and covert expropriation without compensation commonplace.

At the ANC's land summit earlier in 2018, the governing party conceded that, for a variety of reasons, post-1994 land reform has been exceedingly weak. The backward-looking land restitution programme has been beset by many challenges. Greater emphasis on a forward-looking land redistribution process that benefits those actually capable of boosting agricultural production has been largely absent. Advancing an appropriate mix of tenure forms for our specific social reality (private, co-operative, communal and public) has been sluggish.

So where does the expropriation bill that will be gazetted this week fit in? Despite the hype surrounding it, expropriation, with or without compensation, is a relatively small but important part of what needs to be a major land reform programme. The president, several ministers, all provincial premiers and all municipalities have expropriation powers in terms of various laws. The problem is that there is no overall statute providing general law of application to those with expropriation powers. What we have on the statute books is an outdated (and draconian) 1975 Expropriation Act, which is unconstitutional in several respects. In particular, it fails to provide guidance to expropriators, to those affected and to the courts on what constitutes an administratively just expropriation.

Section 25, the property clause in our bill of rights, explicitly calls for a law of general application to guide expropriation. For some years now, the government has endeavoured to pass such legislation.

Most recently, in 2015, we submitted an Expropriation Bill to parliament.

After extensive hearings in the National Assembly and an unnecessarily rushed National Council of Provinces process, it was passed by parliament in 2016. In our view, it was a very good piece of legislation. After almost a year, however, and partly on our advice, former president Jacob Zuma returned it to parliament on procedural grounds — the National Council of Provinces process was vulnerable to legal challenge and needed to be redone.

The bill to be gazetted this week is essentially the 2015 version with a brief new section dealing with circumstances in which nil compensation may be just and equitable. Both the 2015 bill and the new version meticulously follow the spirit and letter of section 25. At the very outset, both bills state that no expropriating authority may arbitrarily expropriate property. All steps in the process, including the question of what constitutes just and equitable compensation, are subject to judicial review.

What has now been added is a brief section outlining circumstances in which it may be just and equitable for no compensation where land is expropriated in the public interest. Such circumstances include where the owner has abandoned the land; where the land is occupied or used by a labour tenant; where the land is owned by a state-owned corporation (subject to concurrence with the relevant executive authority); where the land is held for purely speculative purposes; and where the market value of the land is less than the current value of direct state investment or subsidy in the original acquisition or subsequent capital improvement of the land.

Even in these situations, in which it may well be an injustice to pay more than a nominal or indeed nil compensation, a case-by-case approach will still be required. The constitutional requirement is for a just and equitable balance between the public interest and that of those affected. Compensation paid is with public, that is taxpayers' (not government), money.

Let's isolate blood-curdling right-wingers. Let's isolate their sparring partners, those making demagogic calls to nationalise all land at a stroke of the pen through expropriation without compensation. Turning us all into tenants in the land of our birth is profoundly out of step with the aspirations of an overwhelming majority of South Africans.

When those making this call have a track record of privately pocketing public resources and mutual funds, the real intention behind the pseudoradicalism becomes ever more apparent.

Substantive land reform must be undertaken, but in a rule-governed manner and in ways that reinforce the transformational imperative so well expressed in section 25 of our constitution.

● *Nxesi and Cronin are minister and deputy minister of public works, respectively.*