Letter: Expropriation Bill remains a danger - Farmer's Weekly

29 January 2021 - Prof Elmien Du Plessis' argument (8 January 2021) that the Expropriation Bill sets out a system which will serve both the state and private property owners and provide 'clarity' is unconvincing.

Prof Elmien Du Plessis' argument (8 January 2021) that the Expropriation Bill sets out a system which will serve both the state and private property owners and provide 'clarity' is unconvincing.

While the proposed legislation does contain provisions for mediation and legal challenge, it also structures the expropriation process in a manner heavily tilted towards the state.

An 'expropriating authority' investigates the property it wants, then negotiates with the owner for its purchase. If no agreement can be reached, it can turn to expropriation (by issuing a notice of intention to expropriate). This invites representations on the expropriation and compensation envisaged – but these must only be considered, not necessarily responded to, and decisions need not be explained.

Then comes a notice of expropriation. This will set out the dates on which ownership and the right to possess will pass to the state. This could be very soon, since the only time limit imposed is that ownership cannot pass on a date which is 'earlier than the date of service' of the notice.

Ownership and the right to possession will pass to the state on the dates provided in the notice of expropriation. This is irrespective of any ongoing dispute over the compensation to be paid, as set out in Clause 21(8).

The Bill creates a relatively simple and convenient system for expropriation – for the state. For those losing their property, it is less accommodating. Launching a court challenge will not always be practically possible. Because of how the process is structured, property owners may well have to challenge the expropriation after having already lost the property and suffered indirect damages such as the possible loss of income.

Neither does it provide clarity. The definition of expropriation seems to be based on the 2013 Agri SA case (limited in the judgment to the specifics of the case, but which clearly piqued official interest as a possible general principle). Thus, compensation of

any sort is only necessary when the state becomes the new owner. Where it acquires property as ‘custodian’ – as in the case of water and mineral rights – the owner is deprived of the property, but this does not technically amount to an ‘expropriation’. Hence no compensation is payable.

Even when compensation is to be paid, the Bill provides wide latitudes for discounts, or for ‘nil’ compensation to be contemplated. This follows earlier initiatives, such as the 2019 regulations gazetted under the Property Valuation Act, which grants generous reductions in compensation where property is taken for land reform purposes.

Moreover, while defenders of the Bill argue that it is consistent with Section 25 of the Constitution, it is entirely possible that the amended Section 25 might propel major (unwelcome) changes to the Bill. Recall that just before the pandemic hit, the African National Congress said that it rejected the proposed amendment, and wanted the Constitution to specify that expropriation decisions would vest in the executive and not the courts.

Prof Du Plessis, however, goes on to say that farmers should not get ‘worked up’ about the proposed constitutional amendment. She ‘doesn’t think’ it will affect working farms – although elsewhere she refers to the fact that the government’s 700 000-hectare redistribution programme has targeted a number of these. Intuition is in any event a poor guide for policy action.

Taken together, the Expropriation Bill and the associated moves on property rights constitute a seminal danger to the country and its agricultural sector – and do little to address the real problems besetting land reform.

Terence Corrigan, Project Manager

Institute of Race Relations