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The Expropriation Act: a solution to South Africa's land reform challenges?

OPINION

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THE Expropriation Act (the Act), recently signed into law by President Ramaphosa, has sparked mixed reactions from various groupings across the country. Some, probably influenced by certain misconceptions, remain strongly opposed to the Act's purport, while some have strongly defended the Act. Of particular concern to those opposed to the Act is the provision for nil compensation when it is just and equitable.

The key objective of the Act, as explained in its preamble, is to give effect to the constitutional promise of land reform; a promise which, over 30 years post the Constitution's adoption, has not really materialised. Is the Act a solution?

Section 25 of the Constitution, known as the property clause, prescribes in section 25(1) that no one may be deprived of property, except in terms of a law of general application (a law that applies to everyone equally), and any such law may not authorise the arbitrary deprivation of property (deprivation of property without due process). Section 25(2) permits the expropriation of property for a public purpose or public interest, and section 25(4) clarifies that "public interest" includes the country's commitment to land reform.

Section 25(3) provides for the payment of just and equitable compensation in the event of expropriation, "reflecting an equitable balance between the public interest and the interests of those affected". Section 25(3) also prescribes the circumstances to be considered when determining just and equitable compensation. These include the current use of the property, the history of the property's acquisition, the market value, the extent of state support in the acquisition and improvement of the property and the purpose of the expropriation. This provision is mirrored in the Act to determine just and equitable compensation. Arguably, the Act is many years late. The constitutional assembly, tasked with crafting our constitution just over a quarter of century ago, would have probably been the most appropriate forum to challenge the vision the Act seeks to realise.

The main point of contestation is that the Act provides for nil compensation when it is just and equitable. However, this aligns with the Constitution, as Section 25 does not prescribe what just and equitable compensation ought to be but rather provides guidance for its determination. It is therefore conceivable that in appropriate circumstances, compensation could be nil.

Fortunately, the Act does provide guidance to determine when nil compensation may be justifiable. This includes whether the property is held for speculative purposes; is owned by an organ of the state but not used for core functions and is unlikely to be needed in future; has been abandoned; or has a market value equivalent or less than what the state has invested in the property.

A FOR SALE sign in the farm in Polkadraai road in Stellenbosch. Stellenbosch has seen a rise in land and farm and property for sale after the Land expropriation without compensation debate. | Independent Newspapers

In addition to the above point of contestation, some argue that the Act could be seen as a backdoor mechanism for expropriation without compensation for the purpose of land reform. This, however, should not necessarily be contentious as the Act clearly outlines its intent in this regard. Additionally, as noted above, land reform is a constitutional promise. What ought to be probed is whether the Act will help resuscitate the failing land reform process.

From our perspective, three concerns emerge: first, the government department granted the power of expropriation; second, the potential impact for informal land rights holders; and third, the possible effects on successful land claimants.

According to the Act, the Minister of Public Works (the Minister) is granted the authority to expropriate on behalf of other organs of state, upon the request of the minister responsible for that organ of state. Ostensibly then, the Land Claims Commission, responsible for overseeing land claims, may request through the Minister of Rural Development and Land Reform, the expropriation of land. If circumstances permit, this could be for nil compensation.

The implementation of this is, however, at the discretion of the Minister of Public Works, who may or may not be satisfied with a particular request from the Department of Rural Development and Land Reform.

In our assessment, it may perhaps have been preferable for the expropriation power, aimed at transforming the property relations in South Africa, to reside with the Minister of Rural Development and Land Reform.

On the issue of informal land rights holders, the Act appears to practically treat informal land rights holders as ordinary land rights holders. The terminology used is 'unregistered rights', which the Act defines as "right[s] in property, recognised and protected by law [...] which does not require registration and includes a right to occupy or use land".

According to the Act, when gathering information for expropriation, the expropriating authority must establish whether unregistered rights over the property in question exist. Thereafter, the process followed mirrors that of ordinary right holders. This in effect means that the land held by informal/unregistered holders may be expropriated in terms of the Act.

The Act also contains some post-expropriation relief, which permits the holders of informal rights to claim compensation. Notably, the Interim Protection of Informal Land Rights Act (IPILRA) may not be available as protection, since the limitation on the deprivation of informal land rights in IPILRA is subject to the Expropriation Act of 1975. The Act will now stand instead of the 1975 Act. We hope that informal land rights holders will not be subjected to nil compensation. This would, at least, be somewhat of a silver lining in all the uncertainty.

Regarding successful land claimants, the Act poses a risk of land deprivation. It is conceivable that when land is not used effectively, if at all, and circumstances militate in favour of expropriation, then the awardees could be deprived of said land within the parameters of the Act.

This risk is not as remote as may perhaps be argued. For example, the Mineral and Petroleum Development Act permits expropriation of land for purposes of mining, and there are recorded instances of newly reinstituted land being subject to prospecting, bulk sampling and mining rights and thereby limiting the holders' rights, if not depriving them entirely.

The Act does not create a carve-out for such instances, and the mechanisms for recourse contained in the Act may not be a sufficient safeguard. This is likely to result in tension between successful claimant communities and the state.

Overall, the Act operationalises the Constitution's property clause, and on a balanced and simple reading, it does not grant the state any additional powers than what is already constitutionally prescribed. Additionally, those aggrieved by any decision to expropriate, whether with nil compensation or otherwise, have the Constitution's protection and access to the courts. What remains unclear is whether the Act will achieve its stated goals in relation to land reform.

Based on our initial reading and understanding of the Act, we have concerns that it may not achieve its stated goals in respect of land reform, and may potentially further slow the process.

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