

## **Are we looking the wrong part of the Constitution?**

Following the debate on expropriation without compensation has shown a stark divergence in how people view the Constitution. The views seem to vary from one extreme to the next with some believing the Constitution to be sacrosanct and others going so far as billing it a “sell-out”. I wonder how many people know that the Constitution has already been amended 17 times in our short democratic history? Ok, I must qualify it slightly: our Bill of Rights (section 9 to 39 of the Constitution) has never been amended and I am yet to hear a compelling argument rooted in facts and logic as to why section 25 needs to be amended. However, there are other sections which have, almost miraculously, escaped critique.

The vast majority of our Constitution, from chapter 3 all the way to chapter 13 and including the annexures, sets out the powers and functions of different spheres of Government. In short, it is the blueprint for the South African state. We are a qualified, federal system which means that local and provincial government is not an extension of national government nor wholly accountable to it. There are certain functions which the Constitution reserves for national, provincial and local government. These are vital issues such as water and sanitation, certain roads and municipal infrastructure.

To be frank, outside of the metros there are only a handful of local municipalities that are effective in service delivery and maintaining infrastructure. Where these services are not delivered effectively, it has a far greater impact on business conditions than theoretical debates about property rights. To illustrate this point, we have recently seen prominent businesses in rural municipalities that are closing their operations and moving to other areas of the country where service delivery is more effective. Where these businesses move away, the rural economy loses its anchor and there will inevitably be a ripple effect on employment figures and local businesses that supply these businesses. On the other hand, how can one expect a business to operate without a reliable supply of water and electricity or where roads are no longer maintained? An urgent intervention is required.

The Constitution currently provides a number of ‘soft’ remedies. Provincial governments can provide support and lend their experts to assist the municipalities. If the necessary political hurdles can be negotiated, a municipality can even be placed under administration, effectively being placed under supervision by the provincial government. Despite many municipalities being placed under administration, the Auditor-General still reported R3,47 Billion Rand of wasted expenditure and only 27 out of 278 municipalities obtained a clean audit for the 2019-2020 financial year. To place this into context, there is more unaccounted for expenditure at municipal level than the entire land restitution budget. Clearly then, administration is not as effective as the Constitutional drafters hoped it would be. You can take a horse to water, but you cannot force it to drink...not under our current constitutional provisions at least.

So what alternatives are there? A unitary system of government, where local and provincial governments are merely ‘branches’ of national government, wouldn’t necessarily guarantee improvements. A top-heavy form of Government will only increase the reporting requirements for municipalities and increase red tape. In the agricultural space, we have also seen key government functions such as inspection services, product standards etc.

being outsourced to assignees with mixed successes. Assignees may create capacity but it imposes additional costs to the industry. Now imagine if a profit margin was built into all municipal services through wholesale privatisation, would this be affordable?

The concept of 'licenced operators' could provide an alternative. In the electricity sector, there is an independent regulator that grants licences to operators for generation, distribution and transmission of electricity. In practice, there are very few competitors and hence the regulator cannot hold licence holders such as municipalities accountable when they don't fulfil the licence conditions since there are no ready alternatives. However, if this changes in the future, there will be no constitutional obstacles and it could pave the way for healthy competition.

At present, the Constitution does not cater for a competitive environment when it comes to providing basic municipal services. As a result, many businesses have resorted to performing this function for the sake of sustainability but without a legal mandate or funds to do so. Instead of a theoretical debate on expropriation, the legislature should consider turning its eye to the issues that can make a real contribution to business conditions.