

The subtle art of saying everything and nothing at the same time

By Theo Boshoff¹

The title of this article may ruffle a few feathers, and perhaps it is a bit mischievous to do so, but it is exactly what is currently happening with statements related to amending the Constitution to allow for expropriation without compensation.

The recent statement by President Ramaphosa after the ANC Lekgotla on Tuesday caused quite a reaction from commentators as well as from markets. However, if you dissect exactly what was said it becomes clear that the statement was carefully crafted so that it could mean multiple things to multiple people. To say everything and nothing at the same time is far from an insult, quite the contrary. What the president attempted to do was to couch the language in such a manner so that it could appeal to both sides of the debate on expropriation without compensation without straying too far from the party's original decision back in December (which in itself attempted to appease both sides). Without wanting to downplay the importance of the statements made, we must be cautious not to fall into the trap of only hearing what we want to hear.

Cast your mind back to the ANC's elective conference in December 2017. The chairperson of the economic transformation committee, Enoch Godongwana, stated that the meeting resolved to amend the Constitution to allow for expropriation without compensation subject to the proviso that it must not endanger food security or other sectors of the economy, and that the ANC will further deliberate on the detail of how this is to be done. This announcement stimulated the debate which eventually led to the National Assembly's decision to mandate the Constitutional Review Committee but that was not the only level of debate taking place.

The public hearings led by the Constitutional Review Committee has been largely dominated by people's aspirations and desires as ordinary members of the public have been coming forward to have their say. Whilst this is their good right to do so, many members of the public are not constitutional law experts and therefore often conflated the notion of expropriation without compensation, and indeed land reform more generally, with an amendment to section 25 of the Constitution. At the same time, intellectual debates have been taking place on less conspicuous platforms as to what the actual content of section 25 means and how an amendment would affect the qualifications around food security and the economy.

Because the extent of 'just and equitable' has never been tested, the debates are largely based on calculated estimates rather than clear cut legal facts. It is therefore small wonder that prominent legal scholars cannot agree on whether or not the current provisions would allow for zero compensation, but a number of interesting arguments have surfaced. Some argued that it could be just and equitable to award zero compensation in terms of section 25(3) when the right set of circumstances presented themselves. Others argued that just and equitable compensation under section 25(3) cannot be zero but concede that section 25 (8) read with section 36 could allow an owner's right to compensation to be limited if it is reasonable and justifiable to do so

¹ **Boshoff** is head of legal intelligence and research at the Agricultural Business Chamber (Agbiz) but writes in his personal capacity

in the circumstances. Due to this uncertainty, a number of interesting ideas emerged, including that just and equitable compensation not be done away with but that additional factors be added into its calculation, or that a provision be added to 'clarify' that just and equitable can amount to zero in certain instances. At the ANC indaba on 18 and 19 May it seemed as if they had decided to put an end to the speculation by 'testing' section 25 by finally invoking their rights to expropriate under the Constitution to determine the limits of what is just and equitable. In addition, they undertook to amend the Expropriation Bill to further expand on the instances in which they believed less compensation would be just and equitable.

The timing of last week's statement could perhaps be questioned as the Constitutional Review Committee is right in the middle of its own process on the subject. However, if you analyse the content of the statement, you may be surprised to hear that it does not deviate as far from its thinking up to now as some commentators may have you believe. Let's look at the exact wording used by the President:

"A proper reading of the Constitution on the property clause enables the state to effect expropriation of land with just and equitable compensation and also expropriation without compensation in the public interest ... 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".

I would argue that the ANC is still very undecided on who to believe when it comes to whether or not the Constitution allows for expropriation without compensation. However instead of undertaking to 'test' the provisions to find out themselves (as they indicated in May), they are trying to avoid the issue by claiming that both views are plausible. This is then followed by a stated desire to put an end to the debate by inserting a provision to 'clarify' what the correct interpretation will be.

The latter proposal may have considerable economic repercussions. However, the idea of inserting a clause to 'clarify' the interpretation where there is ambiguity is not novel, in fact we have even done it before. The Interim Constitution of South Africa never included the words 'public interest' in its property clause and simply stated that property may be expropriated for a 'public purpose'. At the time there was considerable disagreement whether or not 'public purpose' included expropriation for land reform so as a result, the 1996 version now includes the phrase 'public interest' and section 25 (4) (b) was included to 'clarify' that public interest includes the nation's commitment to land, water and related reform.

Debate is always healthy, but we must be careful not to hear only what we want to hear.