THREE PROPOSED CHANGES TO THE EWC CONSTITUTIONAL AMENDMENT BILL

By Dr Anthea Jeffery

The draft constitutional amendment bill (the Bill) allowing land expropriation without compensation (EWC) is already damaging enough to make South Africa largely uninvestable.

The Ad Hoc Committee (the Committee) responsible for drafting the Bill is nevertheless considering amending it – and making it very much worse – in three crucial ways.

In particular, the Bill might be changed to:

- limit the role of the courts in deciding on 'nil' compensation;
- extend the 'nil' compensation provisions from land to property of all kinds; and
- make the state the custodian of all land, as the EFF continues to demand.

Such changes are potentially momentous. Yet how much public participation will be allowed on these further changes remains unclear.

These vital issues came to the fore at the committee's most recent meeting (on Friday 7th May 2021), when parliamentary legal adviser Charmaine van der Merwe was asked to respond to the changes being mooted.

A more limited role for the courts

The Department of Agriculture, Land Reform and Rural Development (the land department) has proposed that the wording of the Bill be changed to limit the role of the courts. It argues that allowing the courts to decide on 'nil' compensation on land expropriation amounts to 'judicial overreach' and 'violates the principle of the separation of powers'. The Department of Public Works and Infrastructure (the public works department) agrees.

According to the public works department, the Bill must thus be changed so that the amended subsection 25(2) of the Constitution reads as follows (new text is underlined and proposed omissions are marked in bold):

Section 25(2): Property may be expropriated only in terms of law of general application –

- for a public purpose or in the public interest; and
- subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: Provided that in accordance with subsection (3A), [a court may] where land and any improvements thereon are expropriated for the purposes of land reform, [determine that] the amount of compensation that may be paid is nil.

The Bill makes no change to subsection 25(3), which therefore continues to provide that 'the amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected'. The five listed factors relevant to that equitable balance – including market value and the 'purpose of the expropriation' – also remain the same.

However, a new subsection (3A) will then be inserted, as the Bill has proposed right from the start. But the public works department wants the wording of this subsection to be changed as well, so that it reads as follows (again, new text is underlined and omissions are marked in bold):

Section 25(3A): National legislation must, subject to subsections (2) and (3), set out specific circumstances where [a court may determine that] the amount of compensation that may be paid is nil.

This shift seems to reflect what the ANC decided back in January 2020: that the executive should be empowered to decide when 'nil' compensation will be paid, as allowing the courts to determine this will be too time-consuming and complex.

As the ANC put it, judicial review of the executive's decision cannot be excluded, given the Constitution's guarantee of administrative justice. But the power to decide on nil compensation should be reserved for the state's officials, while the courts should be confined to reviewing the fairness and reasonableness of these bureaucratic decisions.

The proposed changes to the Bill, as set out above, may not go as far as this – as the wording used could still allow the courts to 'decide' that compensation should be nil. However, that the courts would no longer have an automatic right to decide on nil compensation, as the Bill initially provided, is worrying.

So too is the peremptory element in this proposed sub-clause. This can easily be read as meaning that 'the amount of compensation that may be paid' – in other words, that is permitted to be paid – 'is nil' whenever land and improvements are expropriated for land reform purposes.

The underlying intention may, of course, be different. If that is so, the final wording of the Bill will need to be far clearer in stating that nil compensation will apply, in the land reform context, only if this is either agreed by the owner or 'decided or approved' by a court.

According to Ms van der Merwe, there is a problem with the Bill's original wording as 'the courts would have serious backlogs if every case [of nil compensation] were to be referred to them'. Hence, if the Committee does not want the courts to be 'the only decision-maker in respect of nil compensation', the Bill will have to be changed. This change will need to be advertised to the public, as further described in due course.

Whether nil compensation should apply to property of all kinds

Section 25 of the Constitution defines property as 'not limited to land'. The public works department has therefore argued that the Constitution already allows the payment of nil compensation for *any* property that is expropriated in the public interest, not merely land. Since the Committee's mandate is to 'make explicit what is implicit in Section 25' – and the country's history may make it just and equitable to expropriate other property for nil compensation too – the Bill should be changed to reflect this wider scope for EWC.

According to Ms van der Merwe, any such amendment would need to be advertised. Permission might also have to be obtained from the National Assembly, as the Committee's mandate is to focus on land needed for land reform purposes.

Whether the Bill should provide for state custodianship of land

According to the EFF's Floyd Shivambu, the Bill is defective because it does not delete subsection 25(7) of the Constitution – which allows for the restitution of land to those dispossessed of it after June 1913 – or stipulate that the state must 'become the custodian of all land'. The need to provide for state custodianship, he says, can be traced all the way back to February 2018, when the National Assembly mandated the Constitutional Review Committee to 'review and amend' Section 25 of the Constitution to allow for EWC.

Ms van der Merwe responded that the Committee's mandate does not include the deletion of subsection 25(7) or the custodianship issue. But Mr Shivambu countered that 'thousands of submissions have referred to the proposal about the state being the custodian of the land'. In addition, 'the people have already informed the politicians that subsection (7) should be deleted'. Parliamentary legal advisers who disagree are thus 'undermining the work of politicians' who reflect the views of 'more than 70% of the people'.

The ANC members of the Committee seemed to support Mr Shivambu on various points, including the need to review all previous resolutions relevant to the Committee's mandate. They also implicitly agreed that the Committee may amend any part of Section 25, including subsection (7).

How much additional public comment is needed?

Ms van der Merwe told the Committee that any significant changes to the Bill will need to be advertised. However, whereas 'the first call for comments on a bill is normally quite a big exercise, the second call for comments is more specific. Only new substantive changes must be advertised. Further public hearings are held only if anything is unclear. The number of people that want to [make oral presentations] is smaller and the process therefore requires less time'.

ANC members of the Committee nevertheless questioned why more public consultation should be required. According to Vusumuzi Xaba, if people who have already addressed the Committee through public hearings 'suggest a new clause that is not in the published bill, [their] proposals [should surely be] accepted as a product of the public participation process'. Committee chair Dr Mathole Motshekga agreed that 'input from the people should not be ignored as it would make the public participation process nonsensical'.

The way forward, according to Dr Motshekga

Against the background of Mr Shivambu's repeated accusations that the Committee has been 'hijacked' and diverted from its original mandate, Dr Motshekga promised that all relevant resolutions would be brought before the next meeting so that 'members can refresh their memories'.

Further deliberations on the content of the Bill are due to begin this week. The Committee is expected to finalise the wording before the end of May, so that the measure can then be submitted to the National Assembly for adoption.

According to Dr Motshekga, the Committee is 'not confined to considering what was published in the initial draft' of the Bill, as gazetted in December 2019. This suggests that all three of the changes outlined here could soon be introduced – and without much further public consultation.

This article first appeared in the Daily Friend on 13 May 2021 and is republished with the kind permission of Dr Anthea Jeffery and the Institute for Race Relations.