

As the Parliamentary year comes to an end, we have a quick look back at the status of the s25 amendment and the performance of lead Departments

Dear Agbiz member

The final report for 2019 is headlined by the proposed amendments to section 25 of the Constitution as the ad hoc committee deliberates on proposed wording. The remainder of the report focuses on the findings of the Auditor General and the performance of the Department of Agriculture, Land Reform and Rural Development.

Bill tracking

Fifth Parliament legislation and legacy report

The Committee met for a discussion with the National Council of provinces (NCOP) Procedural Adviser about legislation not finalised by the Committee during the Fifth Parliament and how to proceed on these Bills. All the Bills from the Fifth Parliament have automatically lapsed, and the Sixth Parliament had to take a decision whether to revive those Bills.

The Committee agreed that it will revive the National Environmental Management Laws Amendment Bill and the National Forest Amendment Bill but agreed not to revive the Mineral and Petroleum Development Amendment Bill.

Themes Emerging from Land Dialogue workshop Ad Hoc Committee to Initiate and Introduce Legislation amending Section 25 of Constitution

Parliament's Legal Services provided 2 options for the committee to consider, the proposed amendments read as follows:

Option 1:

*"25 (2) Property may be expropriated only in terms of law of general application
a) for a public purpose or in the public interest; and
b) 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 a court may determine that no compensation is payable in the event of expropriation of land for the purposes of land reform."*

Option 2 – new insertion:

"(4A) Notwithstanding the requirement for compensation contemplated in section 25 (2), (3) and (4), land may be expropriated without the payment of any compensation as a legitimate option for land reform in order to redress the results of past racial discrimination"

The Committee since published draft wording in line with the first option, with the added proviso that primary legislation such as the Expropriation Bill must be used to outline the circumstances under which it may be just and equitable to award nil compensation.

In the discussion that followed, a number of key themes emerged:

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Deprivation

Adv. Charmaine van der Merwe, Senior Parliamentary Legal Advisor, explained to the Committee that section 25(1) of the Constitution guards against arbitrary deprivation and does not regulate compensation, therefore no amendment should be done for s25(1).

Meaning and impact of "without compensation" v "nil compensation"

Prof du Plessis from the North West University motivated for the Committee to use the words "nil compensation" in the Bill opposed to "without compensation". The internationally, compensation is regarded as one of the defining characteristics of expropriation internationally. Prof du Plessis had recommended the wording be changed to "compensation that has no value" instead of using the words "without compensation". This was however disputed by Parliament's legal services.

South Africa's international obligations

Adv. van der Merwe cautioned the Committee to take South Africa's international obligations into consideration, as there are a number of bilateral investment treaties, to which South Africa is a signatory, which requires host nations to compensate an investor upon expropriation. The African Charter was cited as an example. This does not hinder the Bill, but may affect South Africa's obligations.

Meaning of the word 'land'

Adv. van der Merwe noted it was suggested that the word 'land' should be "fleshed out", and found that there was no definition of 'land' in the land reform legislation. She cautioned the Committee that the term 'property' in s25 was a broad term in law and can include tangible and intangible property such as copyright.

Expansion on the meaning of the word 'compensation'

Recommendations were made that compensation be expanded to include compensation in kind rather than monetary compensation. Parliament's legal services opined that 'compensation' is not limited to monetary compensation and that it is already possible to include non-monetary compensation and that no amendment is necessary to cater for this.

Ownership of land

The EFF proposed that the state be the custodian of all land in the same vein as the state's custodianship of minerals and water. Overall, there was a call for certainty to be established with regards to the Bill. It was recommended that the Bill to be prioritised, as property rights must be protected and ensured by the wording of the Bill to allow for certainty and stability. Adv. van der Merwe was asked to provide clarity on the legal opinion of Prof du Plessis that expropriation always requires compensation. Adv. van der Merwe responded that Prof du Plessis made these findings on the basis that the most recent cases where expropriation occurred but was of the opinion that international customary law may not always have to include compensation.

What's happening in Government Departments

Former Department of Agriculture, Fisheries and Forestry (DAFF): Annual Report

The Committee was briefed by the Auditor General of South Africa (AGSA) on the audit outcomes of the Department of Agriculture, Land Reform and Rural Development (DALRRD) and its entities for the 2018/19 financial year.

The Auditor-General of South Africa (AGSA) commended the Perishable Products Export Control Board (PPECB) and the Deeds Registration Trading Account on achieving clean audit outcomes. The financial statements prepared remained a concern, as material adjustments had affected the annual financial statements.

The DAFF had produced credible and reliable financial statements that were free of material misstatements and had reported in a useful and reliable manner on performance as measured against predetermined objectives in the annual performance plan.

Mr Mike Mlengana, Director-General of DAFF, reported there were 42 targets planned for Quarter 1, and 36 targets were achieved. This therefore translated into 86% achievement during submission of the validated report to DPME by end of October 2019. However, six targets were not achieved. The non-achievement of certain targets was attributed to the lengthy process of collating and validating evidence for reported performance.

Dr Hilton Vergotine, Chief Risk Officer, Agricultural Research Council (ARC), informed the Committee that the entity had received a qualified audit opinion for 3 consecutive years. The number of findings has been reduced, but the organisation had findings which had a negative impact on the opinion. The audit opinion identified the following areas that need to be addressed to avoid getting another qualified opinion: property, plant and equipment; inventories; payables and receivables from exchange transactions; and revenue from rendering of services

The committee was further informed that the Agricultural Research Council (ARC) had operated at a deficit, and this had been the case for the prior year as well. A deficit of R22 million (2017-18: R38 million) was reported. Measures had to be implemented to address this situation to ensure sustainable service delivery and financial viability.

With regards to land claims, Mr. Mike Mlengana, Director-General (DG): DAF, said that the land question and its productive use would need a meaningful conversation with land owners, whether they are farmers, companies or trusts. There needed to be genuine deliberations on transforming this sector. Historically, black South Africans had been excluded from meaningful participation in the agricultural economy. He stated that the food value chain remained highly concentrated amongst a few players and that this was not the basis for building a sustained agriculture economy that served all South Africans. The DAFF needed to work together to open up the sector, create opportunities for the historically disadvantaged groups and make a concerted effort in growing the sector on an inclusive basis.

Mr Joe Kgobokoe, Deputy Director General (DDG) added that various instruments that sought to support developing farmers, which in large measure were grants for support in infrastructure such as CASP and land development which currently resided with Rural Development. He further stated that the commercialisation of black farmers remained an important objective in South Africa, and to date 463 farmers had been assisted. Better policy instruments would be developed in order to articulate what form of support government could provide. DAFF had various instruments that sought to support developing farmers. These were in large measure grants for support in infrastructure, such as CASP and land development, which was currently with rural development. According to Minister Didiza, there is a responsibility to revitalise restituted land back to production as well as support farmers settled on agricultural state land and those in communal areas who had acquitted themselves as farmers, even where land scarcity remained a challenge.

South Africa had performed particularly well on food security, despite the continuing drought. During the drought. Minister Didiza informed the committee that all spheres of government had to take responsibility for the implementation of drought policies, but disaster management was a competency of the Department of Cooperative Governance and Traditional Affairs (COGTA). DAFF had been working closely with the Northern Cape on the current drought affecting the region.

Former Department of Rural Development and Land Reform (DRDLR)

The acting COO of the DRDLR, said the Department had recorded a 73% organisational performance for the 2018/19 financial year, and 69% overall for the five-year 2014/19 period. It had obtained an unqualified audit.

On skills development in rural areas, the Department had set a target of 6 864 people to be placed and as a result of interventions by rural disaster management, 8 589 people had been placed.

According to the CFO, a total of 31 496 hectares had been acquired, and eight smallholder farmer beneficiaries had been allocated land. 71 land claims were finalised, with 59 claims settled. Most of the expenditure related to grants and subsidies that had gone to rural development, restitution and land reform.

The Department had 63 audit findings during the 2018/19 statutory audit. 16 of them were repeat findings from prior years, and 24 of the 63 had been resolved. Management was in the process of developing a management action plan to address the root causes.

Commission on Restitution of Land Rights (CRLR)

Ms Nomfundo Ntloko-Gobodo, Chief Land Claims Commissioner: CRLR, said the CRLR was prohibited from processing any new order (submitted after 1998) claims until it had settled or referred all old order claims to the Lands Claim Commission (LCC) as per the directive of the Constitutional Court in the LANDESA case. During the period under review, the CRLR had managed to settle 502 claims, finalised 995, and 140 phased projects had been approved.
