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"Wandile Sihlobo is too bullish on the Expropriation Act"

The nature and history of the African National Congress (ANC) cannot be discounted when reading the text of the new Expropriation Act.

By Martin van Staden 14 Mar 2025

Source: Pexels.

The rule of law is not only concerned with the law, but also with who implements it and how. This is often forgotten by those who seek to reassure the public about the dangers of the Act.

Chief economist at the Agricultural Business Chamber of South Africa, Wandile Sihlobo has always been and remains a friend to the cause of property rights in South Africa. However, like Annelize Crosby before him, his attempt to assure investors and owners and avert panic is counterproductive.

Every country requires an expropriation law, but as far as South Africa's existing one is concerned, we simply have to return to the Constitution-shaped drawing board. The Expropriation Act is a non-starter.

Fixes

Firstly, it is important to note that the adopted version of the Act is better than what was previously before Parliament. Various problematic aspects of the Expropriation Bill were fixed before Ramaphosa abandone his constitutional oath and assented to it.

To name two examples: the serious conceptually problematic approach to "abandoned" land has been largely rectified, and it is no longer stated explicitly that government may confiscate property without compensation due to "health and safety" considerations (though it may still do so implicitly).

The remaining problems, however, are now contained in an operative law, and are nonetheless still inconsistent with the Constitution and constitutionalism.

'Nil compensation'

There is no such thing as "nil" compensation. Sihlobo – like many others – has been misled by lawyers wit

their heads in the clouds of legalistic and euphemistic word-play.

The law has always prohibited simulation.

The law will not allow you to deem your income to be “donations” in order to avoid paying taxes. In the sam vein, the law does not allow the state to deem its compensationless confiscation of property to be the “payment” of an “amount” of “nil” in order to avoid the constitutional requirements. This is fraus legis, simulation, or simply: fraud.

If any of us call the police to report that someone has stolen money out of our wallet, and we end up in cou months or years later, only to testify under oath that the person we reported had stolen the amount of “nil” rands, we will immediately be charged with wasting police resources, falsely reporting a crime, and conten of court.

Do not allow dishonest legalism, formalism, and euphemistic abuse of language by journalists, lawyers, ar politicians to obscure the substance of what you know your eyes and reason to be perceiving in reality.

The Act pretends to allow that which sections 25(2) and (3) of the Constitution does not allow. It is therefo unconstitutional.

Sihlobo is correct that the Constitution has not been amended, and that the Expropriation Act must therefo be utilised in accordance with the highest law, but that is no reason to suppose that nothing has changed.

Up to now, “nil” compensation was legally inconceivable. Now, it is possible (though still illegal), even if Sihlobo believes it will only occur extremely exceptionally.

In the realm of property rights, it is akin to saying that up to now extrajudicial executions have been legally proscribed absolutely, but they are now conceivable albeit only exceptionally. The reality is that exceptiona or not, this change is legally, politically, and above all, morally unacceptable.

Safeguards

The constant references – not only by Sihlobo – to the Act’s mandating of “negotiations” is sophistry. “Negotiations” around expropriation and the “agreements” that might flow from them are not that.

Both these terms – negotiation and agreement – are terms of voluntariness and choice. In a negotiation, where one party wants something from another, either party can walk away, with the result that the instigatir party does not get what it wants.

The Expropriation Act turns this on its head.

If the state and owner fail to come to an “agreement” during the “negotiation”, the state can simply declare the amount of compensation it is willing to pay – which might include “nil” – and proceed effortlessly from t “negotiation” into the process of confiscation.

With this threat constantly hanging over owners, no engagement between the two parties can ever be characterised by choice. Owners will – they must – feel compelled to “accept” the state’s lowball offers to avoid potentially getting nothing.

Of course, expropriation is never a voluntary affair, and the Expropriation Act should not pretend that it is. Lawyers, certainly, should not pretend that it is ultimately based on “agreement” just to legitimise the uglier aspects of the law.

If the Act wants to voluntarise expropriation, it needs to actually do that, so that if the state and owner fail to come an agreement, the state must walk away. But it is attempting to utilise the terminology of choice to condone the unfair and unambiguous violence evident in the legislation.

The “negotiations” are therefore not a safeguard worth much consideration when evaluating the validity of Act.

The burden of expropriation

Other “safeguards” by the Act are similarly problematic.

But the overarching problem with all the “safeguards” is that an infinitesimally small number of South Africa – even among the relatively wealthy – can afford to litigate over periods of months or years. The Act can have the most pristine formal “safeguards” imaginable, and they would be useless in light of how inaccessible the courts are.

The Land Court which the government is setting up is not going to relieve this burden. This fake court throw many of the rules of evidence and due process that ensures fairness and justice to the wind, and also hypothetically allows biased assessors to “assist” judges.

To add insult to injury, one of the important safeguards in the 1975 Act – the payment of solatium – was no simply removed by the 2024 Act, but is in fact prohibited.

Solatium is an additional amount of money that government must pay to expropriated owners over and above market value due to the inconvenience and disruption caused by the expropriation. This, at least, goes some way to assisting with legal processes.

By default, the new Act prohibits government from paying solatium – unless there are “special circumstances.” (Expropriation itself should always be regarded as an exceptional, “special circumstance.

The only real safeguard in expropriation matters is prohibiting the government from doing certain things pe se. It must be – it is – simply illegal for government to take property without paying for it. This has to be so basically unlawful that no state organ would dare do it, knowing that defeat in court is a foregone conclusio

That is not the case under the Expropriation Act or pending laws like the Land Court Act. With activist assessors – not to mention activist judges – now potentially involved in property matters, it becomes very conceivable for (black and white) owners to be left out in the cold in a domain of law that came about specifically to protect property owners against state abuse.

We know this devil

A lot of problems in South Africa arise because people pretend to not know the ANC.

This is why the Government of National Unity is wobbling, threatening to tip over. The Democratic Alliance and other partners – despite being warned – pretended to not know who they were getting in bed with and

how that partner would behave.

Civil society – perhaps especially those in the agricultural space – should not do likewise and pretend to b unfamiliar with the ANC.

If the ANC is unwilling to respect the formal safeguards of the Constitution, why would it respect the supposed formal safeguards of the Act?

Sections 25(2) and (3) of the Constitution were written very clearly in respect of requiring compensation. T ANC and government have nonetheless sought to circumvent this formal, unambiguous protection. It can - will – do likewise in practice under the Act and its “protections".

The ANC has never tried to hide its disdain for the institution of private property. When international communism had the ANC firmly by its short and curlies in the mid-1950s, it adopted what is more accurate called the Serfdom Charter.

In one clause, this charter seeks to both recognise the validity of non-racial land ownership and the requirement that the state must “re-divide” land among workers at the same time. This internal inconsisten has allowed the ANC to pursue authoritarian socialist redistribution while telling the world it is committed to constitutional property rights.

In the first years of its government, the ANC then forcibly brought water, minerals, and petroleum resource under state ownership. This is not an institution friendly to private ownership of the means of production.

Wandile Sihlobo, the agricultural lobby, and civil society all favour strong protections for private property. I this respect, we must not talk out of both sides our mouths when it comes to the Expropriation Act. This is legislation that must be ambiguously rejected.

ABOUT THE AUTHOR

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