

REDISTRIBUTION OF AGRICULTURAL LAND: EXPROPRIATION WITHOUT COMPENSATION DEBATE¹

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Abstract

At the African National Congress's (ANC) 54th National Conference it was announced that a decision had been taken to speed up land reform by pursuing expropriation without compensation, provided that it is sustainable and does not harm the agricultural sector or the economy. At the time of writing, no formal paper had been released outlining the exact manner in which this will be implemented. As such, the authors have attempted to unpack the decision, as well as the economic and legal consequences of the various forms that the decision may take. Four possible scenarios are created, based on specific policy decisions that may be taken to give effect to the decision of the ruling party. The paper sketches various policy trajectories that the ANC could follow to give effect to its decision, and from these four potential scenarios are envisaged. The first scenario is a self-help scenario in which the rule of law has collapsed; the second scenario involves one of gradual economic decline; the third scenario is the economic sustainability (business-as-usual) scenario; and the fourth scenario involves a hybrid approach. The paper is intended to give rise to a robust discussion on the topic with the intention of finding a common solution that benefits all.

***NOTE:** This is a discussion document circulated for discussion and contribution to the ongoing debate on expropriation and land reform. The document is interdisciplinary and was not intended for publication in a recognised economic or legal journal. As such, it does not follow the format prescribed by any specific academic journal.*

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1. Background

Land redistribution is premised on section 25 (5) of the Constitution, which places an obligation on the State to take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis.³ In the period 1994 to 2006, land redistribution for settlement or agricultural production was primarily implemented on a grant-based system,⁴ whereby beneficiaries could apply for government grants to assist them to co-finance land purchases.

The process resulted in sustainable land transfers, as there was little market disturbance and the beneficiaries received ownership of the land, but the pace and scale of transfers left much to be desired. In 2006, the State adopted a proactive approach⁵ whereby it would purchase land directly but retain ownership and lease the land to beneficiaries.⁶ The period from 2006 to 2009 was considered by the High-level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change⁷ to be the height of land reform, because the amount of land acquired by the State for reform decreased steadily from 2009 onwards.⁸

One of the primary reasons for the recent slow progress is that the Department of Land Affairs was burdened with additional obligations as it became the Department of Rural Development and Land Reform. To some extent, rural development became an unfunded mandate, leading to funds being diverted away from land reform to rural development.

This decline was furthermore exacerbated by a reluctance to implement the 2007 ANC conference decision to abandon the ‘willing-buyer, willing-seller’ system of market-based transactions to acquire land in favour of expropriating land by paying just and equitable compensation, as provided for in the Constitution. To date, the State has failed to make use of its powers of expropriation contained in section 25 of the Constitution, which has drawn criticism from leading judicial figures, as the courts were never called upon to give meaning to the concept of ‘just and equitable’.⁹ As a result of these failures, inequality has persisted and

³ Section 25 (5) of the Constitution of the Republic of South Africa, 1996.

⁴ This initially took place through the Settlement for Land Acquisition Grant (SLAG) system and was later expanded to include the Land Redistribution for Agricultural Development (LRAD) grant system.

⁵ Although initiated before that date, the Proactive Land Acquisition Strategy (PLAS) became the preferred method of land transfer in 2006, de facto replacing grant-based models.

⁶ According to the State Land Lease and Disposal Policy, beneficiaries would lease the land from the state and obtain an option to purchase it after five to 30 years. In practice, however, the option to purchase has seldom materialised.

⁷ High-level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, 2017. Parliament of the Republic of South Africa. Available at: <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf>

⁸ However, the private land purchases continued at a normal pace, as illustrated in this article; see Sihlobo and Kapuya, 2017. Land policies try to solve imaginary issues at expense of real problems. Available at: <https://www.businesslive.co.za/bd/opinion/2017-06-06-land-policies-try-to-solve-imaginary-issues-at-expense-of-real-problems/>

⁹ See Sachs J, 2017. As quoted in < <https://www.iol.co.za/news/politics/no-need-to-change-land-clauses-8290617>>; and Moseneke DCJ, 2014. Keynote address – Reflections on South African Constitutional Democracy – Transition and Transformation. Mistra-Tmali-Unisa Conference. Available at: <<http://www.mistra.org.za/Library/ConferencePaper/Documents/Moseneke%20Keynote%20Address%20at%20the%2020%20Years%20of%20Democracy%20Conference%2012%20-%2013%20November%202014.pdf>>

some amongst those historically excluded see property rights as a barrier to achieving equality. The mounting pressure on property rights has likely come about as a result of the nation's failure to broaden access to property rights as opposed to the principle of recognising property rights per se.

2. Unpacking the legal implications of expropriation without compensation

At the ANC's elective conference in December 2017, the decision was taken to expropriate land without compensation, but the decision was qualified in that it must be done in a manner that is *sustainable* and *does not harm other sectors of the economy*. The exact meaning and scope of this decision is yet to be clarified, but possible interpretations and permutations are unpacked below:

From a legal point of view, there is great uncertainty about what compensation is payable in select circumstances under the current constitutional provisions. Likewise, it is still unclear exactly what the scope and extent will be of the mooted amendments. As such, it should be understood that the following discussion is not based on settled law, but rather explores alternative legal theory regarding expropriation and compensation.

Should the Constitution be amended to allow for the expropriation of land without compensation, it may be permissible, subject to legal challenges, not to compensate owners for land that was acquired as a result of racially discriminating laws or practices in the past. However, there is an argument to be made that some compensation will still need to be paid for relocation costs, machinery (if acquired as a going concern) and other incidentals. Taking this into consideration, some compensation, although less than market value, may still need to be paid.

Alternatively, there is the possibility that the current wording of the Constitution can cater for discounted compensation to be paid where the public interest argument is compelling. The current wording refers to a just and equitable balance between the public interest and the interests of those affected. There are many differing theories about what 'just and equitable' entails, as the courts have had only limited opportunities to give content thereto, but there could be instances where the public interest should compel compensation to be significantly discounted.

For example, where land is not used productively but simply kept for recreational purposes, and where no one resides on the land permanently, the public interest may outweigh the interest of the individual. In this case it may be possible that a 'just and equitable' amount could be a significant departure from market value. If so, it may be possible to expropriate at a similar nominal value as would have been the case if a highly productive farm is expropriated without compensation, but compensation is still paid for incidentals related to the going concern.

3. Unpacking the economic implications of expropriation without compensation

Agriculture makes up only 2.5% of South Africa's GDP, but when the upstream (input supplies of fertiliser, seed, feed, animal and plant health industries) and downstream (food processing, distribution, transport and storage, trade industries) food chains are added, this comes to close to 7% of GDP,¹⁰ which makes it a large part of the total economy. A programme of mass expropriation will result in a protracted period in which there is no net new investment in agriculture, which means no growth in agricultural output as well as no growth in the agribusiness sector. This is because commercial farmers, regardless of race, who have not (yet) been expropriated, are hardly likely to start new investments and because the new farmers would not have the necessary means to invest.

Also, it is worth noting that the indigent spend a larger share of their income on food than wealthier people do, and that a stagnant or shrinking agriculture (the result of a lack of investment, as explained above) could be accompanied by higher food prices, which will impoverish the poor rather than the middle-income and wealthier people of the country. It is, of course, possible to import many commodities and process them in South Africa, but there is a limit to this, and South Africa would have to give up foreign exchange in order to import the raw materials that go into the production of the food we eat.

The agro-industrial complex is more labour intensive than most other industries in South Africa. On average, primary agriculture employs 4.5 additional workers for every R1 million in capital invested (compared to 2.94 for the economy as a whole), while the food-processing industry is the most labour-intensive component of South Africa's manufacturing sector.¹¹ Overall, growth in employment can only happen because of growth in investment. Therefore, it could be argued that radical land reform will lead to a decline in employment.

One of the biggest risks in any form of expropriation without compensation is the effect it has on general prices in the economy. All prices are the result of countless and unknowable interactions between economic agents that result in the ever-changing prices that are attached to everything. The land is simply one form of property and it is not practical to differentiate. Property rights are inherently required to establish capital investment across the entire economy. If one set of property rights is to be affected, the expectation will be that others/all might be affected in the future¹².

Moreover, a modern economy is mainly based on the credit structures of the various role players and their risk profiles, and this structure delivers the yield that is required to compensate for the risks involved. This yield requirement is directly linked to prices. The spill-over effects of expropriation therefore will be experienced across all sectors of the economy, and will not be limited to agriculture. If one set of prices is changed by government action, other prices have to adjust to allow the market to reach a new equilibrium.

¹⁰ Johann Kirsten. 2017. Reflections on 25 years of engagement with the land question in South Africa. Stellenbosch University.

¹¹ Read more in the National Development Plan (NDP) of South Africa.

¹² Johann Kirsten. 2017. Land expropriation without compensation is a bad idea. Stellenbosch University.

Many assets related to land (houses, for example) will respond by also dramatically decreasing in value, while those that are not affected by the changes will, in turn, need to increase. Foreign assets will gain value, leading to greater demand for them, which in turn will influence the value of the currency. Domestic asset classes exposed to the sector, such as banks, will have much of their underlying value destroyed, leading to much less available credit, no matter for which sector. Given the scale of the intervention, it is likely that the impact will be calamitous as capital rushes to adjust. Below are the few scenarios we consider relevant in contributing to the ongoing debate on land expropriation without compensation in South Africa.

4. Scenarios

Using the ‘scenario matrix tool’,¹³ we attempted to formulate four scenarios based on two key uncertainty factors that were identified, namely the economic and legal consequences. We recognise that there are other variables that could be affected, but we chose to restrict our analysis to the legal and economic impacts on a macrolevel. As per the methodology, we projected each scenario based on a continuum between the extreme positive and extreme negative threshold of each factor, which in turn means that the positive and negative outcomes of each factor must be defined. Regarding the legal uncertainty factor, we assume that the most negative threshold is a complete breakdown of the rule of law, where land reform takes place through land invasions and self-help. On the other end of the scale, we assume that the most positive legal outcome is one wherein the ideals of land reform set out in section 25 of the Constitution are achieved whilst maintaining the rule of law and respect for fundamental rights. From an economic point of view, the continuum stretches from a negative threshold, which is a significant decline in investment and thereafter agricultural output, to the positive threshold, where land reform is carried out in a sustainable way without negatively affecting confidence and investments in the sector. See Figure 1 below for a matrix representation of the four scenarios.

¹³ Wolf T, Brands C and Meissner P. 2010. A Scenario-based Approach to Strategic Planning. Tool Description – Scenario Matrix. Working Paper 4/2010. Leipzig Graduate School of Management, Centre for Scenario Planning.

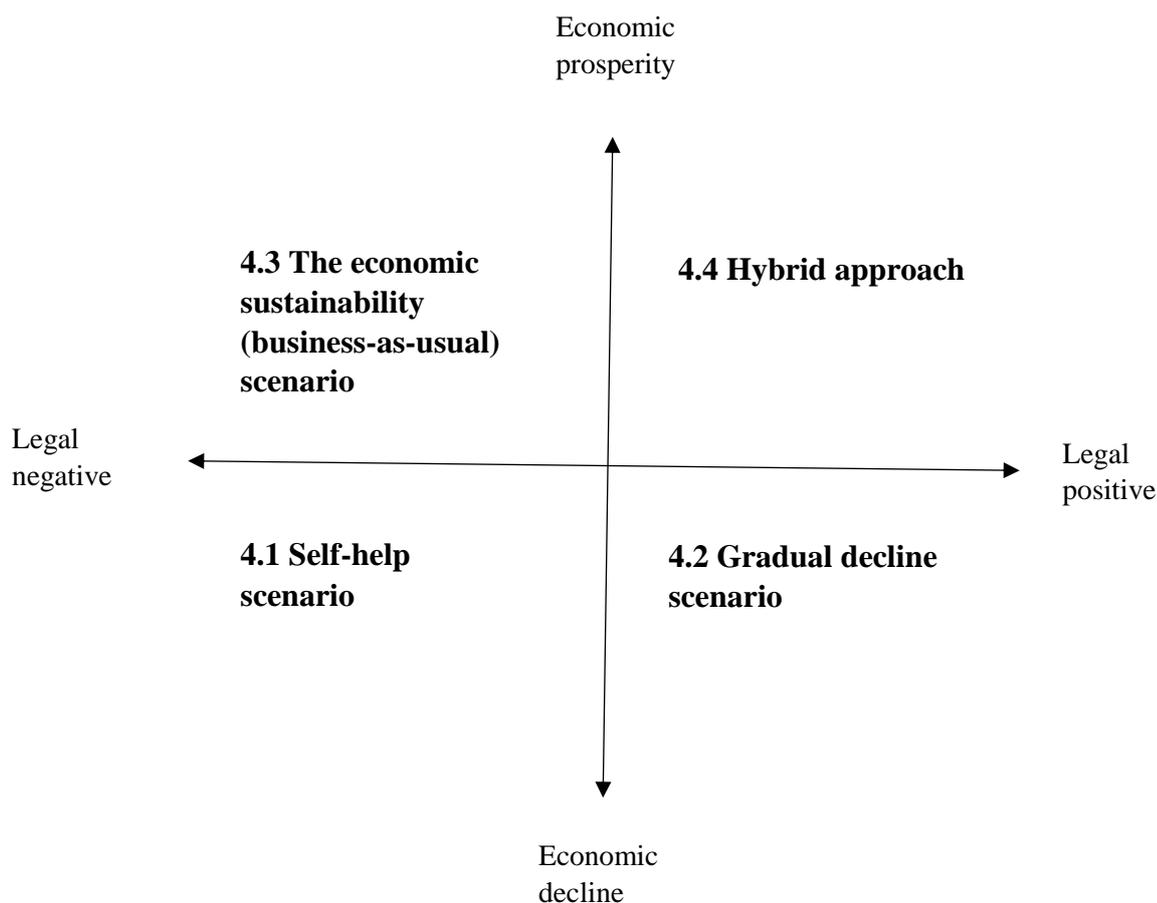


Figure 1: Scenarios of the land reform process

Source: Authors' deductions

4.1 Self-help scenario (economically and legally bad)

In this scenario we envisage a situation in which ordinary citizens' behaviour changes, triggered by political statements, resulting in them taking the law into their own hands in an unusual manner. In this scenario, a lack of clarity on what is meant by statements such as 'taking the land back' could prompt citizens to disregard the rule of law. As a result, incidents of illegal land occupation will escalate, coupled with farm invasions, subsequently making the agricultural sector non-functional and unproductive. Aside from human rights violations becoming commonplace, employment will decline, production will fade and imports will rise, leading to high levels of food insecurity. Strong reliance on imported food could be risky for the country, given the weakening multilateral trading system and the World Trade Organization (WTO) as a whole. The 2017 WTO biannual conference hosted in Argentina did not reach any tangible commitment on trade issues that affect international trade in agriculture, signalling the lack of commitment to a multilateral trade system. This scenario will rank poorly from both an economic as well as legal point of view.

4.2 The gradual decline scenario (bad economically, but better legally)

In this scenario, a view is that the ANC, possibly with assistance from the EFF,¹⁴ would amend section 25 of the Constitution, thus paving the way to implement expropriation without compensation at government level. Land reform still takes place within the ambit of the rule of law. Although no compensation is payable for the land, compensation is still paid for incidentals related to the going concern, as the intention is for the beneficiary to continue with the farming enterprise. Land acquisitions still take place within the law and follow a fair administrative procedure, disputes are settled in the courts, and no one is evicted without a due court process. In this scenario, illegal land occupation and rights violations are prevented, but the protection of property rights in South Africa diminishes, as does investment in agriculture. This scenario also gives rise to the agricultural, financial and agroprocessing sectors being the biggest losers in terms of production, exports and employment. The expected effects of this scenario are expressed in the economic sustainability scenario below.

From a legal point of view, the scenario is slightly better than the ‘self-help’ scenario, as land reform takes place within the rule of law and without the human rights abuses. It also scores positively because effect is given to section 25 (5) of the Constitution. The negative legal aspect is that it requires a Constitutional amendment, and a decision to weaken the protection of property may place South Africa at odds with similar developmental constitutions in foreign jurisdictions. From an economic point of view the outcome is negative, as the reduced recognition of property rights leads to disinvestment and consequently a gradual decline in the agricultural, agroprocessing and financial sectors.

4.3 The economic sustainability (business-as-usual) scenario (Good economically, but mixed legal merits)

This scenario prioritises the significance of sustaining the agricultural and food system, as well as not harming other sectors of the economy – as stated in the ANC’s decision. Accordingly, the decision is taken not to amend the Constitution, nor to use the existing powers of expropriation, but rather to continue with the current mechanisms of acquiring land for redistribution out of fear that a departure from these could adversely affect the economy. The first step is to conduct a land audit to determine who the current owners of South African land are and the amount of land that has been transferred since 1994. Such an audit shall include all social partners (government, business, labour, traditional authorities, communities and other interested groups). In this scenario, the balance between the significance of distributing land to correct the injustice of past laws and the need to sustain the food system in order to boost food security and promote inclusivity is skewed slightly toward the latter. This scenario could lead

¹⁴ Economic Freedom Fighters secretary general, Godrich Gardee, announced on 20 December 2017 that the EFF would offer their 6% representation in the National Assembly to the ANC to meet the required percentage to change section 25 of the Constitution:

https://twitter.com/GardeeGodrich/status/943558507365838849?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.thenewage.co.za%2Fanc-agrees-to-speed-up-land-expropriation-process%2F

to the long-term sustainability of the food sector, but in the short term might not meet the demands of those calling for the rapid redistribution of land.

With that said, the inclusion of previously disadvantaged individuals in the formal food system remains relatively low, despite a growing amount of land being transferred to previously disadvantaged individuals through government and private sales. This indicates that there are many factors other than land scarcity that sustain the food production system. Access to markets, the availability of financing, infrastructure, training and skills, as well as access to information are much more regressive to the inclusivity agenda than the scarcity of land.

This scenario is aimed primarily at economic sustainability and therefore scores very high on the economic scale. From a legal point of view, the merits are mixed. Whilst it provides strong protection for property rights and upholds the rule of law, there are differing opinions as to the extent to which the current mechanisms as implemented by government will deliver on the constitutional obligation to foster conditions that enable citizens to gain access to land on an equitable basis. Whilst we note that there are differing opinions regarding the extent to which the state-led land reform programmes have delivered on their constitutional mandates to date,¹⁵ the public discourse leading up to the ANC's elective conference has been aimed at accelerating land redistribution and to expedite the realisation of the constitutional mandate to enable equitable access to land.

4.4 Hybrid approach

In this scenario, a plurality of mechanisms is used to speed up the pace of land reform. A blended financing model and AgriBEE are used to transform productive farmland, and land that is unbonded, unused and uninhabited by the owner is targeted for expropriation so as to reduce the economic impact.

Policymakers realise that it might be possible that a nominal amount of compensation still needs to be paid for relocation costs and other incidentals, even if the Constitution were to be amended. This is based on a number of untested legal assumptions, but it is argued that the public interest would require compensation to be significantly less than market value in instances where land is unused, unbonded and uninhabited. As such, the decision is taken to test the theory and determine whether such an approach would result in a similarly discounted amount of compensation being awarded, without facing the potential litigation and socio-economic upheaval that may result from amending section 25 (2) & (3) of the constitution.

¹⁵ Although the Constitution does not prescribe fixed targets for land redistribution, a deduction can be made from the fact that the numerical targets for redistribution have repeatedly been reviewed and extended (the target of 30% was originally set for 1999, it was thereafter moved to 2014 and finally revised to 20% in each district as per chapter 6 of the NDP). This indicates that the acquisition and transfer of land for redistribution has taken longer than originally anticipated when the Constitution was drafted. Be that as it may, (reference Wandile and Tinashe) argue that substantial land acquisitions have taken place during this period both by the state and private persons although much of the land acquired was not transferred to beneficiaries. The High-Level Panel also identifies the state's reluctance to transfer title to beneficiaries as one of the key constraints to successful land reform. Poor post-settlement support and a variety of other factors leading to the relative failure of many land reform beneficiaries' agricultural enterprises can also be argued as a key factor driving the public perception of a 'failed' or 'slow' land reform programme to date.

As far as productive land is concerned, stakeholders work towards public-private partnerships (PPP) in line with Chapter 6 of the National Development Plan (NDP). As the NDP suggests, the identification of transferable farms and beneficiaries takes place at a district level, facilitated by District Land Reform Committees (DLRCs), which were already established in 2015. The PPP models are flexible and can take a number of forms, including the following:

1. Farms for sale are identified by the DLRC and a leading successful farmer.
2. This farmer is appointed as mentor/co-investor to acquire new land together with a qualified beneficiary.
3. Beneficiary will only be selected by farmer investor (not by the State) to ensure a good working relationship.
4. In acquiring the farm, the State can contribute 30% of land value in grant money to the beneficiary. Another 30%, to make 60%, can be a loan from the Land Bank in the names of the beneficiary and farmer (50/50), and the 40% remaining is a cash contribution by farmers (with a turnover of R3 million a year). The contributing farmers would then be exempted from future land reform claims.
5. The farm could be operated via the farmer's existing operation to ensure the success of the redistributed farm.

With regard to the Land Bank loan, a subsidised interest rate is provided and backed by a State guarantee in the spirit of risk sharing.

Aside from the financial models used to acquire land, it is necessary to maintain the rule of law and to ensure that the right to an administratively fair process (s33), access to courts to resolve disputes (s34) and the right not to be evicted without a court order (s26(3)) remain respected so that the process does not degenerate into a 'land-grab' scenario of self-help.

This scenario can be described as moderately good, both legally and economically. Legally it achieves increased access to land, thereby promoting the objectives of section 25 (5) whilst maintaining the rule of law and respecting fundamental rights. Much, however, relies on the outcome of the test cases and the extent to which the public interest argument influences the calculation of expropriation with regard to the land targeted for expropriation.

Affluent individuals and companies who bought land for recreational purposes or as investments for future development may suffer economic losses. Land is quickly made available for settlement, but substantial investments are still required to make the land usable and habitable. Ownership of productive agricultural farms is transformed using AgriBEE transactions and public-private partnership funding models, thereby minimising the disruptive effect on production and investment confidence in the sector.

5. Conclusion

The scenarios outlined above are not intended to be recommendations, but simply four distinct possibilities that could arise, depending on which mechanisms are pursued. The scenarios above deal primarily with the financial aspects related to acquiring land for redistribution, but there is general consensus amongst authors and stakeholders¹⁶ that there are other issues related to the policy design that also need to be addressed.

In this regard, the High-level Panel¹⁷ recommended legislative interventions that are required to recognise a continuum of rights in communal areas. Secondly, the Panel recommended enacting framework legislation to guide the implementation of all land reform programmes towards a common goal of inclusive agrarian transformation. Such framework legislation would entrench the overarching principles to be applied in the application of all land reform legislation, akin to the approach followed by the National Environmental Management Act and its ancillary legislation. Finally, there is a need to tackle barriers to market for communal and smallholder farmers, as well as access to inputs and seeds for sustainable production. Distributing and increasing access to land without addressing the market access barriers, and input supply constraints coupled with a lack of infrastructure for smallholder and communal farmers, will not yield to production growth, but subsequently will exacerbate the food insecurity problem in the country. Food insecurity in the country is already at unacceptable levels¹⁸ and could get worse if land is distributed to previously disadvantaged individuals without putting proper mechanisms in place to increase access to markets, financing, inputs and infrastructure.

¹⁶ This can be seen from the consensus comments arising from the land reform workstream of Operation Phakisa.

¹⁷ See footnote 4 above.

¹⁸ Hendriks S and Olivier N, 2015. Review of the South African agricultural legislative framework: Food security implications. DSAJ 99(1):27-45. Available online:

<http://www.tandfonline.com/doi/abs/10.1080/0376835X.2015.1044075>