

Weeks 1-5: Wed 1 January – Thursday 31 January 2020

Welcome to 2020. We took a break for the holidays so we have packaged land news for January into a single update. From next week we will revert to our weekly update and linked podcast format.

Expropriation

The [Constitution 18th Amendment](#) Bill was gazetted on December 6, 2019 and the period for public comment closes on January 31, 2020. The amendment bill has drawn wide ranging comment. Late in December the Economic Freedom Fighters (EFF) expressed concern that the bill had been published just before Christmas, without “adequate publicity” and called on the public to share the bill far and wide. Agri SA released a statement calling for a three-month consultation period to enable submissions to be prepared and heard on the proposed changes to the constitution. The EFF were amongst the first parties to make the news in 2020 ([IOL 2 January, 2020](#)) with their concerns that the Bill would only bring about superficial changes and will not result in a fundamental restructuring of property rights in South Africa.

In his address marking 108 years since the formation of the ANC in Galeshewe township in Kimberley, President Ramaphosa promised that land expropriation was going to happen in South Africa and in the Northern Cape. According to the Northern Cape Premier white people constituted just 7% of the population in the province, yet they still owned 85% of the land. ([TimesLive 8 January, 2020](#)). Meanwhile ANC Treasurer General Paul Mashatile assured ANC youth that the party had not forgotten its Nasrec policies which included nationalising the Reserve Bank and enabling the expropriation of land without compensation. Mashatile ([IOL 9 January, 2020](#)) was quoted as saying:

If I’m asked if radical economic transformation is still the policy of the ANC, my answer is yes. If I’m asked if the Nasrec policy resolutions will be fulfilled, my answer will be yes.

From the middle of January newspaper articles warned of the approaching deadline for written submissions on the Constitution 18th Amendment Bill. At the same time pressure started to mount on Parliament to extend the comment period on the Bill, particularly because it was published during the festive season when many people were on holiday.

Around mid-January national conversation started to heat up with regard to the content of the Amendment Bill. [Businesstech \(17 January, 2020\)](#) drew attention to the fact that they had been no talks with South African banks on the likely impacts of land expropriation on property bonds and loans. At the same time President Ramaphosa was

reported as making an appeal to the business community to present “solutions to resolve the centuries old problem of land”.

Dr Simon Hull ([Daily Maverick 16 January, 2020](#)) argued in an op-ed that “We shouldn’t be too hasty to oppose this bill, because it might actually open the door to the very thing we need.” He notes that as the constitution currently stands “property is not limited to land and the purposes of expropriation are not limited to land reform”. In his view the “Amendment Bill will impose these limitations on the constitution” as it makes it “explicit that EWC may only apply to land and buildings expropriated for the purposes of land reform... which could be a good thing for property security”.

Hull goes on to argue along with many others that:

...the constitution is not the main impediment to land reform. It is ineptitude, mismanagement, maladministration, greed and corruption that are at the heart of the slow pace and, in some cases, failure of land reform.

His main concern is with the wording of Subsection 3a which leaves unclear the “specific circumstances” under which a court may determine that no compensation is valid. As he points out this is where the “rubber hits the road and where public comment will be crucially important”. In the end however it seems that Hull can’t quite make up his mind about whether to support the bill or not, due to the lack of clarity about the overall rationale and the vulnerabilities implicit in the unspecified “specific circumstances” highlighted above. Subsection 3a has since proved to be the focus of much commentary as it reiterates the need for a law of general application such as an expropriation law to be adopted by Parliament.

As Marion Merton has pointed out ([Daily Maverick 28 January, 2020](#)) to date “democratic South Africa has failed to adopt expropriation legislation, leaving the Apartheid 1975 Expropriation Act in force”. She provides important background on the Parliamentary process around the Expropriation Bill and the various versions this has been through, noting that in the 2019 version the Bill states that:

It may be just and equitable for no compensation to be paid where land is expropriated in the public interest having regard to all relevant circumstances.

Merton notes that the constitutional amendment cannot exclude recourse to the courts which would be unconstitutional. She rather unpacks the factional ANC politicking around the constitutional amendment and expropriation processes, which conveniently ignores that “Ministers have expropriation powers already, as do Premiers and Mayors” – powers they have not used.

Thando Maeko ([Mail and Guardian 17 January, 2020](#)) reports that the DA, the Freedom Front Plus and the African Christian Democratic Party have all called for this clause to be scrapped, cautioning that the current wording “it makes it possible for extremely

arbitrary circumstances to be proposed through legislation” which only requires a 51% majority to pass in the House of Assembly. Ina Gous, a political analyst from the University of the Free State, takes the opposite position to Simon Hull above, arguing that the amendment will create more uncertainty in the land reform process.

It is problematic that, in this amendment, property is not only limited to land and that any property – for example, cash, computers and vehicles – may be expropriated. It is also problematic that lawmakers, specifically the governing party in any administration, may change the circumstances of expropriation without compensation at any time.

According to Committee Chair Dr Mathole Motshekga:

South Africans want certainty. They want to know where we are going. We think if land is released, we won't be complaining about unemployment. There will be work for everyone to do. We think this is the key to the future.

There is a significant conceptual leap between the release of land and the eradication of unemployment. The irony to date is that it can be argued that land reform as currently implemented has probably contributed to a net loss of jobs in the economy, up and down the agricultural value chain.

Businesstech ([23 January, 2020](#)) reported on an interview with Dr Motshekga on ENCA where he is reported to have stated that the ANC does not support the Section 3a of the amendment which gives the power to a court to determine the circumstances under which the amount of compensation paid for land would be nil. He argued that this power should have been “given to the executive”.

Suren Naidoo ([Moneyweb 28 January, 2020](#)) reported that the Banking Association of South Africa (BASA) and Business Unity South Africa (BUSA) would strongly oppose any attempts to reduce the power of the courts to determine just and equitable compensation, and the circumstances under which nil compensation would be payable. The article also quotes Neil Gopal CEO of SAPOA as stating that:

If the courts are removed from this process, the protection of property rights in South Africa is likely to diminish, resulting in a downward investment in agriculture as well as in property investments.

BUSA acting CEO Cas Coovadia was critical of Dr Motshekga arguing that:

We can't have irresponsible statements at this crucial time, especially with ratings agency Moody's watching us so closely. The SA economy is facing less than 1% growth this year and investment is critical right now.

In the midst of all the politicking there is a helpful interview with Associate Prof Elmien du Plessis which you can listen to on [Capetalk](#). Du Plessis is an expert on constitutional and expropriation law who confirms that parties are unhappy with executive decisions has the right to approach a court for review. She notes that currently the amendment states that in all cases where nil compensation is payable this decision must be taken by a court, where as the ANC says no – a decision about nil compensation should follow the normal procedure and where party object they have still retained the right to approach the courts.

So is it all a storm in the proverbial teacup? That's not clear yet. After many months of stating that the deadline for submissions would not be extended beyond 31 January 2020 the ad hoc committee announced that the deadline would now be extended to 29 February. So, you can be sure that in the month ahead the debate will intensify over the pros and cons of the Constitutional 18th Amendment Bill. In the process it seems likely that the whole process of land reform itself, and its impacts to date will find itself increasingly under the spotlight.

Farmworkers

Very little news about farmworkers has made it into the media in the first month of 2020. A good news story promoted by GCIS and reproduced in Sowetanlive ([2 January, 2020](#)) profiles the case of Nitalfo Pty trading as Protea farm, a land reform initiative managed by Marilyn Siegel, a farmworker's daughter, who received the award of the 2019 Top Entrepreneur in Commercial Agriculture in the Western Cape.

Elsewhere in Mpumalanga it was reported that the Department of Labour was investigating illegal deductions by Cameron Boedery from farmworkers' wages. According to workers interviewed by the Sowetan ([14 January, 2020](#)) these deductions accounted for almost half of their wage bill. Interestingly however, the story indicates that one of the major deductions was for the cost of grazing livestock owned by the farmworkers. The story does not provide any indication of how many stock the workers were allowed to keep, or what the terms of the agreement was between them and the farm owner. Workers complaints prompted an inspection by the Department of Labour. Penwell Dlamini for the Sowetan reported that the owner of the farm was not available for comment on the matter.

Land governance and administration

An editorial in the Mail and Guardian ([31 January, 2020](#)) reflects on progress with the implementation of resolutions taken at the 45th National Congress of the ANC in December 2017. Among these resolutions was a commitment to secure the tenure of 18 million South Africans living in communal areas. This included an undertaking to "democratise control and administration of areas under communal land tenure". The

editorial revisits recommendations made by the reports of the Motlanthe High-Level Panel and the Presidential Advisory Panel, both of which recommended that the legislation which created the Ingonyama Trust either be repealed or substantially amended. As highlighted in a previous weekly land news update, the Minister for Agriculture, Land Reform and Rural Development Thoko Didiza had sidestepped this recommendation in her statement made in December, which set out government's response to the panel's proposals.

The editorial reports that at the Cabinet planning session held earlier in January, which set out to identify priorities for the year ahead, "the issue had been returned to the backburner, where it has stewed for the past quarter-century". The editorial concludes that once again "political expediency has trumped principled action".

An op ed in City Press ([10 January, 2020](#)) by Zakhele Mthembu of the Free Market Foundation reviews the implications of the signing into law of the Traditional and Khoisan Leadership Act in 2019. He focuses in particular on the significance of section 24 "which gives traditional councils the power to enter into agreements with third parties, such as mining companies, on behalf of the community. Mthembu argues that "the effect of this section will remove property rights from individuals and give them to a council. This is an injustice that may include deprivation of land".

Land ownership

The ongoing saga around 79-year-old David Rkgase's bid to buy land he has leased from the Department for decades returns to the news. Business Day ([19 January, 2020](#)) reports that while the Department of Agriculture, Land Reform and Rural Development had abandoned its appeal against the judgement that required it to sell Mr Rkgase the land, it now sought a price nine times more than that indicated by the Pretoria High Court as just and equitable.

Land -related laws

Moneyweb ([29 January, 2020](#)) reports how "72 year old Agnes Sithole went to court to challenge a sexist law – and won not only a share of her husband's property but a legal victory that will protect some 400,000 other black South African women". The article notes that black women married prior to 1998 were subjected to a discriminatory clause within the Matrimonial Property Act of 1984 and subsequent amendments. This gave the husband ownership of all matrimonial assets and the right to sell them without consulting his wife. The Legal Resources Centre assisted Sithole to challenge this outdated law and to assert her independent rights to property accumulated during her marriage. The LRC is planning to hold workshops in rural areas to educate people about this important ruling which advances the property rights of women.

Land policy

The Department of Agriculture, Rural Development and Land Reform gazetted a new draft [Policy for Beneficiary Selection and Land Allocation](#) on 3 January 2020. The policy document is prefaced with a problem statement that:

Currently within the land redistribution programme vulnerable groups and the marginalised have not been given sufficient opportunities to have access to land. It is therefore critical for the state to prioritise the most marginalised and the vulnerable groups.

The document also highlights “the lack of a credible and transparent process for land allocation and beneficiary selection which has resulted in the manipulation of the process”. Importantly, the document acknowledges that “the lack of access to land by poor municipalities in rural and peri-urban areas for commonage and settlement purposes has resulted in a lack of access to land for production and settlement by vulnerable groups”.

The policy seeks to:

- ensure equitable access to land;
- address diverse land needs;
- promote urban agriculture;
- create credible and transparent system for land allocation and beneficiary selection;
- target the rural poor, landless, poor municipalities and peri-urban residents to gain access to land;
- create an independent selection panel for land allocation.

The policy seeks to privilege online applications for people seeking access to land, but undertakes to provide walk in support for those without access to the Internet, or the requisite skills to complete the application. The policy identifies four categories of land need and proposes that all applicants will be “subjected to a skills audit and assessment before being allocated land to inform training requirements and to ensure sustainability and utilisation of assets being allocated”.

Despite the undertaking to address the needs of local municipalities for commonage, the policy explicitly states that the Department will not acquire new farms for commonage, but will release existing state land to support these applications. This of course assumes that there is sufficient and appropriately located state land to release. There does seem to be some contingency provision as the policy later notes that “qualifying municipalities and communities in communal areas may apply directly to the Department for the acquisition of strategically located properties to address particular and urgent needs”.

The policy provides a long list of those who are disqualified from accessing land, including employees of the state and state owned enterprises, although it seems to make an exception for traditional leaders, provided that they disclose their status and remuneration by the state, and can prove that they are involved in farming. In this instance the Minister makes the final determination.

With respect to beneficiary selection, the policy document acknowledges the recommendation of the Presidential Advisory Panel that the beneficiary selection process should follow the guidelines set down by FAO on the responsible governance of tenure of land, fisheries and forests.

The policy proposes that all agricultural graduates applying for land will be subjected to a three-year apprenticeship programme and will be placed on a farm under a “Master Farmer who has gone through a master training programme and qualified”. Who qualifies to be a master farmer remains unclear.

The policy proposes the establishment of a national and provincial land allocation and selection panel established as a non-statutory body with diverse representatives. The national panel has responsibility for the allocation of land worth more than 50 million Rand, whereas the provincial panels may allocate land under this threshold.

The centralisation of the selection panel may have the unintended consequence of excluding poor and vulnerable applicants, who would be better identified and assessed at local municipality scale, as part of a localised land reform, land acquisition and agricultural development planning process, undertaken as a sector plan within the municipal IDP.

The public have 60 calendar days from 3 January to submit comments on the draft policy, which represents an important development with some potential to begin to address the corruption and elite capture which has increasingly overwhelmed the land allocation process.

Redistribution

The Citizen ([21 January, 2020](#)) reports on a statement by the Democratic Alliance Spokesperson on Agriculture and Rural Development Jacques Smalle in which he stated that of 818 farms acquired through land reform in Limpopo province, only 218 (26%) were leased to beneficiaries, while the remaining 609 (74%) had not been leased. The rental income obtained from the 218 leased farms was just R252,391. The article does not make clear whether this was an annual or a monthly rental figure. It also does not clarify whether the 74% of farms remain unutilised, or allocated by means of caretaker agreements and other such mechanisms. These details notwithstanding, such data, if it is accurate (no data source is disclosed) represents a very worrying trend.

Restitution

A number of stories focus on restitution in the month of January. The DispatchLive ([6 January, 2020](#)) reports on the loss-making Fish River Sun Hotel which was purchased by the Department of Rural Development and Land Reform in 2017 for 75 million Rand as part of the Prudhoe restitution claim in Peddie, Eastern Cape. The hotel had closed in December in November 2017 but the Department reopened the resort in 2018 despite having received advice not to buy the facility. According to the article the department had been warned that “the price and terms of the purchase from Sun International would cost the state 33.9 million Rand annually in operating losses. This was projected to be four times as high as projected income. The Department was reportedly inviting new service providers to lease and operate the facility.

District Six is back in the news. IOL ([9 January, 2020](#)) reports that the City of Cape Town is in talks with the Department of Agriculture, Rural development and Land Reform to discuss the redevelopment of the area and the infrastructure required for its

redevelopment. A plan submitted by Minister Thoko Didiza contains details of 954 housing units which are to be allocated to individual claimants and leaves 13 ha available for other high-density developments. This plan seeks to finally address the claims lodged in the first round of restitution in 1998. Apparently an additional 1500 claims were lodged when former President Zuma reopened the land claims process – only to have the lodgment of new claims halted by a judgement of the Constitutional Court.

Michelle Nel writing in the Mail and Guardian ([21 January, 2020](#)) reviews the implementation of South Africa's largest and most expensive land claim on the Mala Mala exclusive game reserve. The claim was settled in 2013 in a deal which saw the state pay R1.1 billion – 300 million Rand more than the asking price to the private owners of the reserve. So, what has happened since then? According to Nel, there were 960 claimants eligible for compensation from the payout, but apparently an elite group of 250 people have captured the majority of these payments.

Right from the outset there were question marks over the identification of the claimants and the packaging of the claim. Emeritus Prof Peter Delius, one of South Africa's leading historians with in-depth experience of forced removals and land restitution claim verification stated that "our research team argued very specifically in the original land claim that the group of claimants was not a true community". It seems that the Commission on Restitution of Land Rights had batched a number of separate land claims into a single settlement agreement. Those in the group of 250, claim that the remainder of the verified claimants have been "foisted" on them by the Land Claims Commissioner.

Given the revenue flows coming into the CPA it's clear that the stakes are high. Between 2014 and 2017 the CPA was paid 36 million rand in rentals and earned 5, 5 million rand through community tourism levies. A further 40 million Rand dividend was received in 2018.

A recent High Court judgement was obtained against the Communal Property Association which had been set up to manage the funds. The CPA executive had been accused of "running the CPA like their own spaza shop". The judgement handed down by Judge NV Khumalo directed that the CPA must be subjected to forensic investigation and that all financials of the Mala Mala deal must be made public. The judge also ordered that the beneficiary list must be properly verified and the interim committee should be replaced through a new committee elected at an annual general meeting to be held within 60 days of the judgement. However, Nel reports that six months later nothing has been done and that the Department is in contempt of court.

According to Prof Delius:

Mala Mala is a critical example of state capture. There should be no political interference in land claims. The Mala Mala restitution should be stopped in its tracks and sent back to the Land Claims Court.

Much of the news about the Public Protector has focused on proceedings launched in Parliament to challenge her fitness to hold office. However Rebecca Davies writing in the Daily Maverick ([28 January, 2020](#)) examines a new Public Protector report on another bungled land restitution claim in Limpopo province. In this instance the Tshwale people lodged a claim in 1996, but it appears that the land which they claimed was awarded to their neighbours of the Pheeha community. Davies describes this as an “absurd saga”. Reading through the article one can only agree. Apparently in a memorandum dated 2010 the then DRDLR acknowledged that the wrong portions of land were given to the Pheeha community and recommended that they should be negotiations between the two groupings to enable the restoration of the land to those entitled to it.

However, since receiving the Public Protector’s report it appears that the Chief Land Claims Commissioner backpedalled on this admission and now claims that in fact the land was correctly allocated after all. The Public Protector was unconvinced by this explanation and has found that the DRDLR acted improperly and has ordered the Commissioner to apologise in writing to the Tshwale community and to refer the matter to the Land Claims Court for adjudication within 30 days.

Rural development

The ongoing foot-and-mouth epidemic continues to attract news coverage with the reported arrest of a Limpopo auctioneer on charges of violating the foot-and-mouth ban and a statement by the Democratic Alliance that the government’s inadequate response to the epidemic has been damaging to the country and the economy.

Perhaps the most fantastical story to appear in this section for a while, appeared in DispatchLive ([31 January 2020](#)) where Adrienne Carlilse reports on government’s grand plans to turn the bankrupt Magwa and Majola tea estates near Lusikisiki into “a new Dubai”. The MEC for Rural Development and Agrarian Reform in the Eastern Cape Nomakhosana Meth was reported as saying: “I feel like today is Christmas; I have never felt this good. The kind of development I have seen has pumped me up and given me confidence and energy to speed up the process”.

Meth announced plans for diversification of crops, including “avocado hemp and macadamia nuts, the construction of a majestic glass bridge over the Magwa Falls, a lift to enable tourists to move up and down the gorge, an 18-hole golf estate, amphitheatre, cultural village, conference centre and a five-star multi-storey hotel with an infinity pool”. Given the experience of the Fish River Sun outlined above, one could be forgiven for asking what MEC Meth has been smoking.

Urban land

Any doubt that urban land has become the priority for land reform can quickly be put aside after a scan of stories appearing in January in our urban land section. In Johannesburg the MEC for Human Settlements, Corporate Governance and Traditional Affairs vowed to evict people illegally occupying flats in Mamelodi Extension 15. This followed a court action which the occupiers lost and according to IOL ([21 January, 2020](#)) subsequently torched the office of the municipal councillor in the area.

The City of Cape Town is under enormous pressure from housing activists after it reportedly renewed the lease for a 45.99 ha golf course for a token sum of R1000 a year ([News 24 18 January, 2020](#)). Housing activists have long argued that land allocated for golf courses provides a means of creating buffer strips which continue to segregate the city. Meanwhile the city has argued that the land in question is not suitable for residential development.

A range of other reports curated on this page examine other cases of land occupation and eviction in different parts of the country. We will cover more information on these trends in next week's land-use update.