

# Contextualising 'expropriation without compensation' debate

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With present government's renewed vigour to speed up and enhance land redistribution and amend the Constitution to permit expropriation without compensation, an overview of current legislation places the debate in context.



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## What is Land Reform?

Land reform is the process driven by the government, in terms of which previously disadvantaged persons who have either lost land or access to land or some form of security of tenure through Apartheid, or who do not presently have any such access or tenure as a result of the disadvantages they suffered under the Apartheid system, are given some form of access to land or rights or tenure in land.

There are a number of different programmes aimed at enhancing and protecting and restoring rights to land for those who suffered under Apartheid. Some of the better-known examples would be the process of the restitution of land via the Land Claims Court, the automatic upgrading of rights of leasehold to rights of ownership, and the redistribution of land (for example, of RDP houses by municipalities). In the latter process, the government purchases land from those who have it and distributes it, at no cost, to those who do not. The latter is the topic of the most controversy.

## Expropriation

Expropriation occurs when a government takes property from a person. The South African government is authorised in terms of the Constitution, read together with the Expropriation Act 63 of 1975, to expropriate land or rights in land from anyone in South Africa. Land or rights in land can only be expropriated for a public purpose or in the public interest. This prohibits expropriation for reasons that are not for the benefit of all South Africans.

## **Compensation**

As it stands, the Constitution provides that all expropriations are subject to the payment of just and equitable compensation, but nowhere in law can one find an explanation of what “just and equitable compensation” actually means. The courts have developed several guidelines over time and the Constitution lists that courts must take into account when determining what “just and equitable” means in any given situation.

Even with these guidelines and factors, the meaning of “just and equitable” is so vague that it is very difficult to predict what a court will determine as “just and equitable” on a case by case basis.

## **Debate over compensation**

Some people are of the view that any title to land or any right to land acquired by white persons under the Apartheid government should be expropriated at no or very little compensation, because the beneficiaries benefited unduly at the expense of the balance of the population for so many years whilst the Apartheid government remained in power.

A contrary view is that expropriation should be done at as close to market value as is just and equitable in the situation, to avoid the situation where the government could justify cheap land grabs (or expropriation without any compensation whatsoever) with a simple reference to the owner being white, or having acquired title under the Apartheid government.

This debate has been raging for almost 20 years and is likely to continue raging for many years to come unless the Constitutional Court lays down more concrete guidelines as to what exactly “just and equitable” means.

## **Willing buyer, willing seller myth**

Many people mistakenly think that land redistribution has halted because expropriation can only occur where there is a willing buyer and willing seller. This implies that the sale price will be market related (otherwise the seller would not be willing) and that the government has the funds and is willing to pay the market related sale price. This is incorrect.

The first part of the expropriation process is to attempt to negotiate a sale with the owner of the land, but if this fails, the government is authorised to exercise its rights in terms of the various laws and expropriate the land subject to the payment of compensation that it deems just and equitable.

The owner of the property will need to refer the matter to court if he/she/it is not satisfied with the amount of compensation. However, the expropriation process is certainly not prohibited by the disagreement between the parties on the amount of compensation.

## **ANC calls to amend the Constitution**

The ANC has made no secret of its intention to arrange a vote calling for an amendment to the Constitution to allow

expropriation to take place without compensation. The ANC is of the view that this would speed up land redistribution. However, in order to achieve this, two thirds of the national assembly (Parliament) would need to vote to accept this amendment and thereafter a majority of the nine Provincial Councils would need to vote to adopt this amendment.

Such an amendment would almost certainly scare off all foreign investment, return our hard-fought and hard-won democracy to the position where a portion of our population is discriminated against on the basis of skin colour and would open the litigation floodgates if it were passed. The authors are of the view that it is very unlikely that this will eventuate during our lifetimes.

That being said, plan for the future carefully. We would wager that those severely affected by the land grabs in Zimbabwe did not see it coming or reacted too late, to avert disaster.

## ABOUT THE AUTHOR

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