



Land Reform in South Africa

By Charles Matseke | Peer Review

Abstract

For the past two to three decades, since the transition to democracy, policy orientation in South Africa has predominantly been centred on redressing the inequalities and legacies of the apartheid regime. This was broadly defined as social justice, with the land question often treated as a highly state-centric matter reserved for government,

until Julius Malema became president of the African National Congress Youth League (ANCYL) and then leader of the Economic Freedom Fighters (EFF). This article explores some of the dominant narratives around the land question in post-apartheid South Africa and presents some recommendations on how the issue of land should be dealt with in the immediate future.

Introduction

When the African National Congress (ANC) came into power in 1994, one of its immediate undertakings was to resolve the disparities which the Black masses were subjected to. However, to this day, the spotty efficacy of the ANC's land redistribution efforts have seen barely a quarter of the land in question restored to Black farmers, according to AgriSA. During the 2019 general elections, the debate around the redistribution of land became more pronounced. Fast forward to the 2021 upcoming municipal elections: the renewed promise of meaningful and long-overdue land redistribution is at the top of the ANC's to-do list and represents a significant political juncture. The country's failure to address the land question reflects not only on the various disparities Black South Africans are facing, from poor economic growth to spiralling unemployment, but also on the broader inability to introduce practical solutions that would create a just society in which the backdrop of apartheid's legacy is addressed. The question of land reform, particularly the taking of land from white farmers, has become widespread not only in South Africa but has also reached the shores of Canada, Britain, and the United States. Unfortunately for the majority of South Africa, the question of land redistribution is a complex one, characterised by a long history of failed state policies such as the RDP, GEAR, and ASGISA. This is also coupled with rampant corruption and a lack of political will that spans successive cabinets. In the debate's most recent incarnation, the ANC proposed a constitutional amendment that would allow government to seize unused private land without compensation – a process popularly known as the expropriation of land without compensation – widely echoed by EFF Commander in Chief, Julius Malema. Through this popular agenda, the ANC continues to convey vague promises that this would have far reaching economic benefits. Yet, it still remains unclear how the ANC's proposed policies would be implemented. Moreover, its draft legislation also provides no clear guidance for dealing with customary and communal forms of land ownership. This chapter explores some of the dominant narratives around the land question in post-apartheid South Africa. For decades, many South Africans have continued to live in poverty and have hoped that things would turn one day through their democratic right to vote. The first section of this paper will provide an overview and background of the land question.

The next section will subsequently follow some of the new debates around the land question and, finally, some recommendations will be provided on how the question of land should be dealt with in the immediate future.

Background and Contextualisation

Post-colonial societies must immediately address the question of redress because the dis-location and dis-ownership of land from a conquered people is a key feature of any colonial conquest. The indigenous people of South Africa are no exception to this historical injustice. One of the core functions of the colonial project is the justification of the interests of the occupying force. In South Africa particularly, the British utilised race, lineage, and development to fully implement the colonial project. However, the official use of race for discriminatory purposes has become obsolete. Race on its own is no longer the primary, definable, and explicit instrument that it was during the 19th century. Yet, its footprints – racism and racial discrimination – still stand. Access to property is significantly determined by culture and structural racism. One of the founding constitutional mandates of post-apartheid South Africa is redress. The redress of property relations, the land in particular, was a key issue during the transitional negotiations into a post-apartheid and democratic society.

In this setting, the entrenchment of property rights as an unqualified right is reaffirmed. The Constitution thus provides for the creation of property rights to be underpinned by a need to transform the relations of the indigenous people to their ancestral land. A number of elements in the Constitution's property clause, which legislate for these intentions, include the explicit power of the state to expropriate land without compensation in the interest of public benefit, the right to land restitution for the victims of forced removals, and the right to equitably access land. Given that the art of politics, war, and economic power has been used to decide the fate of the native people, new laws can be introduced and enacted under the constitutional democracy. In this regard, the first item was land, the formalisation of conquest. At the time, it was unlawful for native people to register land in their own names.

With the enactment of the Native Land Act of 1913, native people were formally restricted into small and overcrowded native reserves. Apartheid as a state policy was implemented in 1948. Those supporting this policy referred to it as the diplomacy of separate developments. This policy perpetrated racial segregation and the balkanization of the country into various homelands from 1963 onwards, with the Transkei being the first ever Bantustan created. The struggle for freedom was thus a struggle for land to be returned to its rightful owners. During the 1980s, the apartheid regime started to be unpopular and thus felt pressure, both internally and externally, which ultimately led to its collapse. A new promise for the land to be returned thus emanated. However, it came with different conditions, as opposed to those that underpinned the struggle for freedom. A new kind of struggle erupted: one that would be led by the principles of constitutional supremacy. For example, land was one of the most contested issues at the Lancaster House when Zimbabwe negotiated for its independence in 1979. The questions under discussion included: Should the land taken from the native people during colonisation be returned? If so, on what conditions should this land be returned? This happened because the Constitution's property clause protected the white population of Zimbabwe, allowing them to retain all the land stolen during the colonial era. Nevertheless, the democratic state could forcibly take the land it needed for public benefit, which included the resettlement of persons without land. Twenty years later, after some trials and error, the model collapsed, with the failure of the central government to utilise the legal instruments available to them constitutionally. Ironically, when the late Robert Mugabe's administration established a draft property clause in 2000, it failed to overrule the Lancaster House agreement, meaning that the country's land reform would largely follow a market fundamentalist approach. Since then, the return of land to the native people remains a shattered dream.

A new struggle awaits, not controlled from the centre but arising from the ground itself, posing some difficult questions regarding the unfinished business of the liberation struggle. Until and unless there is a confrontation with the negotiated settlement of the transitional period, it is impossible to speak of freedom, equality, and dignity, the most cherished of values, during the negotiations. Property relations

were at the centre of the transition talks. Nonetheless, in retrospect, it can be deduced that neither Zimbabwe's nor Namibia's governments' constitution schemes allowed for land reform rights. The return of ancestral land has since been watered down into a farfetched dream. A new quest, accompanied by quibbles about the definitions of who is entitled to the land, seems to dominate the debate about land reform and land expropriation without compensation. Commercial and agricultural land remains in the hands of the white minority group in South Africa.

The Road to 2021

On the road to the 2021 municipal elections, both the EFF and the ANC have the front seat in leading the debate around the implementation of the expropriation without compensation bill. Subsequently, the ANC adopted the policy of expropriation without compensation, together with parliament contemplating the amendment of Section 25 of the Constitution in order to expropriate without compensation. As one can imagine and understand, property rights are indeed one of the pillars of our developing economy. South Africa finds herself in a peculiar and self-perpetuated status quo, with the highest rates of service delivery protests (predominantly related to housing), a widely vast gap between the rich and the poor, and staggeringly high rates of youth unemployment which escalated to 26.7% during the first quarter of 2018 (Stats SA, 2018).

The expropriation of land without compensation for the poor majority seems like a tailor-made answer for the masses. The recent illegal land grabs around South Africa can perhaps resemble the thorn of desperation that people have to bear, at least in their own sense. There are a number of possible consequences that the expropriation of land without compensation bill could bring, including but not limited to: food insecurity, job loss, communal violence (potentially along ethnic lines), and an economic meltdown. Meanwhile, the Land Summit that took place in Boksburg in May 2018 and the subsequent parliamentary hearings on how to go about crafting the bill, as well as discussions around whether the Constitution needs to be amended, did very little to map out what the implications could be for a democratic developmental state within a market system and for a globally traded currency and an import-oriented consumer base such as South Africa.

In July 2018, after the intentions to expropriate without compensation made their rounds in the media and parliament, Property24 listed about 4,840 farms for sale in Gauteng, 998 in Kwa-Zulu Natal, and about 1,544 in the Free State. One may question if the leadership could have a legitimate justification for putting an already fragile economy at considerable risk in pursuit of political mileage and populism? It could perhaps be blamed on the momentum gained from the socio-political system, which has once again brought identity politics to the fore.

As President, Cyril Ramaphosa is faced with an array of complex issues, ranging from effectively curbing the spread of Covid-19, to redressing the government's failures in dealing with institutional corruption and nepotism. On the other hand, attracting investor confidence and growing the economy is particularly challenging under the dark cloud of a party divided by factionalism, populism, and a winners-take-all attitude. The lineage of these painstaking issues can be found in the Zuma rogue administration, with their populist mantras such as targeting 'white monopoly capital,' and enacting 'radical economic transformation' under the pursuit of 'inclusive growth'. With the 2021 municipal elections only a few months away, both the EFF and the ANC have seen the land question as a benchmark of transformation and political discourse. The EFF has mounted pressure that will either force the ANC to amend Section 25 of the Constitution, or be exposed as disingenuous and grandstanding and even in cahoots with the minority.

Generally, the land question has invoked identity politics, which in turn has seen the rise of hostility between Black Africans and minority white and Afrikaner communities (Riaan, 2018: 42). This has at times resulted in racially sparked tensions, going so far as to reach the farmers, as well as civil unrest, particularly in the North West province and the Free State, mainly due to land issues and equal access to service delivery. Therefore, the real question is: how seriously do the ANC and the EFF take the land question as a policy issue? And how can its intended and unintended consequences be mitigated? For a moment's pause, we may try to envisage a scenario entertained by an ordinary South African living below the poverty line. How are they to comprehend and interpret statements made by prominent figures such as Julius Malema, encouraging the illegal

occupation of land? Could such a person be expected to realise that they are being used as bait to pursue electioneering and political grandstanding?

These critiques are still making their rounds even within the divided ANC itself. While the masses, or at least those who claim to be the voice of the poor, support land expropriation without compensation, the elites still believe in moderating the current systems without any detriment to the stability of the economy. To take a short detour on the two-fold nature of the ANC: the South African media seems to be overwhelmingly conveying the narrative that figures such as Jacob Zuma are designed to divide the ANC by introducing factions and using populist ideals to set the course for today's political climate. The present analysis argues otherwise, however. These figures are given too much credit. A history often shied away from is the fact that in 1912, when the ANC was launched, the likes of Alfred Mangena, Pixley Ka Isaka Seme, and George Montsioa fought for the accommodation of 'Black intellectuals' into the newly created Union of South Africa.

These were mostly Cambridge- and Oxford-trained lawyers. We can thank Henry Sylvester Williams for his influence and rigour in founding Pan-Africanism. Towards the mid 1900s, the mass character of the ANC arose, especially after 1948 with South Africa adopting apartheid as a state ideology and policy. Well, growth is not always good, is it? Throughout history, we have seen companies and organisations that have collapsed after merging with others and thus expanding. For some, like the ANC, it took almost a century to fully realise the two-fold character deeply embedded in the face of the movement. The mass character, plus the structures and systems of the electoral systems and party structures, have naturally given the masses an upper hand over the elites. Even amongst Black South Africans themselves, the poor and destitute outnumber the few Black middle class and elites. Therefore, the evidence seems to point overwhelmingly to the fact that the ANC has always been divided and that factionalism is just a side effect of this origins story of the liberation- movement-turned-government.

As one would imagine, if the land expropriation without compensation is translated into policy action, the government will have to revive the Department of

Rural Development and Land Reform and substantially increase the budget and invest in research and policy development to improve the land bank and their long-failed ineffective systems. This is the type of rhetoric and process that the government of the day and their consultants grapple with, but history always has more to say. Take the land expropriation without compensation programs in Namibia. When this tune was being sung at the height of electioneering in 1989, the people resonated with it; it was the right thing to talk about and believe in. But years later, the masses are confronted with a harsh reality. Government has finally introduced the criteria for how it will distribute the land it expropriated and, unfortunately, the poor do not make the cut (Eyewitness News, 2018). The beneficiaries of the land until the present day remain those in the Black elite and upper-middle classes; the same happened in Zimbabwe (Clara, 2018: 37).

South Africa has also flexed with her abilities to follow Namibia and Zimbabwe. Remember the Dairy Farm in the Free State that was lawfully expropriated for the so-called common good? Well, that land landed in the hands of the controversial Gupta-Zuma axis. For those who live in faith, land expropriation in South Africa will mean two things: economic freedom and the end of poverty, even though the people of Namibia and Zimbabwe would beg to differ. For the pragmatists and the level-minded, this may also mean two things: economic suicide and civil unrest. Needless to say, perhaps for the politicians the land question is just the right dosage of euphoria to gain popularity and relevance in contemporary political discourse.

The Future of Land Reform in South Africa

This section zooms into the future of land reform in South Africa and considers how best the state can move forward. The lineages, cultures, traditions, and racial complexions of the people from which the land was taken have changed over time. With regard to the structural transformation of the economy, it is not clear if the significance of land has remained constant. In the case of South Africa, the Constitution serves as the catalyst for change in land relations. The first step in understanding its role would be to examine how best the land can be returned to the hands of the rightful beneficiaries. The notion of expropriation of land without compensation has gained momentum in the public imagination recently. At its 54th National

Conference in December 2017, the ANC adopted the idea of expropriation without compensation as amongst the key tools for land redress and redistribution. This prompted a Parliamentary Committee which held public hearings on the possibility of amending the Constitution to allow for the expropriation of land without compensation. The focus is on how to handle any expropriation proportionally and without imposing any undue hardships. Those who are against this constitutional amendment have thus far relied on a combination of the slow pace of land reform, high prices of land, entrenched and racialised poverty, and historical land dispossession. Also under consideration is the text of the Constitution that refers to the amount of compensation in the current quest for expropriation.

However, to begin with this process, a distinction must be drawn between expropriation and the deprivation of rights over land. A deprivation of rights is defined by two elements: a substantial interference in or limitation of the rights of a person to access or exploit their property and for that limitation to exceed the standard regulations of property use and enjoyment of freedom in a democratic society. Expropriation, on the other hand, is a subset of deprivation, although different in scope and magnitude. In the case of expropriated land, the owner loses the right of ownership completely to the state. Common law provides for the deprivation of property without compensation only for the benefit of the people. During the 1915 Appellate Division, the then-high court of appeal granted that parliament could pass laws to restrict any persons of their property without compensation, even though it ruled that there was a presumption against it.

The former Chief Justice Ismail Mahomed once wrote that a Constitution reflects the shared aspirations of a nation and the values that bind its people (see Ngcukaitobi, 2021: 3–7). He went on to say that in the case of South Africa, the Constitution is a rejection of the past that arbitrarily denied citizens, on the grounds of race and colour, the right to access and acquire land. The future should be founded by the values of democracy, universalism, care, and aspiration towards an egalitarian society. Under normal circumstances, the primary focus of a constitutional change is the courts, as they develop the law to reflect the nuances of the needs of a society.

“

The former Chief Justice Ismail Mahomed once wrote that a Constitution reflects the shared aspirations of a nation and the values that bind its people (see Ngcukaitobi, 2021: 3–7). He went on to say that in the case of South Africa, the Constitution is a rejection of the past that arbitrarily denied citizens, on the grounds of race and colour, the right to access and acquire land.

”

While the text of the Constitution serves as a departure point for interpreting the law, it is never an end point on its own. The end point is primarily indeterminable; interpreting a statute is never truly the dogmatic approach of precedent, but rather an exercise in imagination.

Legal experts often argue that the Constitution, like any other law, is not beyond change. Of the 17 constitutional amendments that took place in the past 25 years, no proposed amendment stood out more than the inaptly named Property Clause in Section 25 of the Constitution of South Africa 1996. This was largely because the dispossession of land from Africans by Westerners was a key feature of the colonial quest. The struggle for freedom was underpinned by a quest to alter the inherent unequal access to property relations. As the Constitution was being negotiated during the transition into post-apartheid South Africa, the key focus of the previously dispossessed people was changes to the unequal access to landholding. When looking at the state of politics and transition in South Africa, one should keep in mind that the present format of the Constitution was not the result of a consensus: it was in fact heavily contested, even when it was adopted in 1996. The position of the ANC during the negotiations, as reflected in its 1991 Draft Bill of Rights, was rigid on the right to own property (Ngcukaitobi, 2021: 21). The Draft Bill reads as follows: ‘All men and women, lawfully constituted bodies, are entitled to the peaceful enjoyment of their possessions, including the right to acquire, own or dispose of property in any part of the country without distinction based on colour, language, lineage or creed’. The Bill also provides for the payment of compensation in the cases of rights

to property, including land that has been deprived.

Compensation should be just, taking into account the need to establish a balance between the public interest and the interests of those affected. Disputes over compensation should be resolved independently by tribunals or courts. Furthermore, going ahead, the purpose of land reform should be to reconcile three main issues: addressing the injustices of history, confronting the continued inequalities to land access, and securing an equity based future for all those who live in South Africa. The programme for land restitution by the state has been in disarray since its introduction. Instead of providing a rational anchor around which previous land dispossessions could be excused, the cut-off date of 19 June 1913 has aggravated the prevailing dispossession. The inefficiencies of the law to address the land question is thus exposed by the continued struggle for access to landholding. Those who believe in the historical legitimacy of their claims were disappointed to find out that their claims, according to law, are not valid because their forefathers lost their land before 19 June 1913. Furthermore, applicants believe that they were a community at the time of their dispossession, in which ‘community’ was defined differently. Despite the public’s dissatisfaction about government’s inability to reform land, a directionless situation arises within the bureaucracy. The overlapping and concurrent mandates, inefficient institutions, and a lack of community support organisations have exacerbated the decline in implementing the law (Ngcukaitobi, 2021: 77).

Conclusion

The 2019 general elections have added value to the land debate thus far, and it is likely that it will be yet again a major issue in the local government elections of 2021. The EFF appears to be in full gear, particularly in terms of its firm stance on the land question. On the other hand, the ANC is at war with itself: the toxic environment that Jacob Zuma left for Cyril Ramaphosa still has a long way to go towards the elections, and to rub salt into the wounds is the court battles by the ANC Provincial Electoral Commissions and, most notably, the political killings in the embattled Eastern Cape and Kwa-Zulu Natal provinces. One would assume that South Africa is yet to face the worst political violence since the 2019 general elections on a

nation-wide scale. The South African government will thus be tasked with the major duty of first reviving the Ministry of Rural Development and Land Reform, should this debate be transformed into policy action. The history of tribalism as a troublesome factor is unfortunately deeply rooted within the ANC itself and will thus not come as a surprise should there be any transfer of land after the 2019 general elections. The people of South Africa have not only lost hope in government itself, but also in the institutions that are supposed to mirror a commitment and a people-centred user service delivery network. This is to say that there is a lot that must be done to government institutions and processes by government before a challenge as major as land transfer can be trialled and tested.

References

Eyewitness News, (2018). 'Namibian President Urges Peaceful Land Reform Debate'. *Eyewitness News* [online]. Available at: <https://ewn.co.za/2018/08/27/namibian-president-urges-peaceful-land-reform-debate>

Herman, P. (2017). 'Radical economic transformation arose from the ANC – Zuma'. *News24* [online]. Available at: <https://www.news24.com/SouthAfrica/News/radical-economic-transformation-arose-from-the-anc-zuma-20171109>

Ngcukaitobi, T. (2021). *Land Matters: South Africa's Failed Land Reforms and the Road Ahead*. Cape Town: Penguin Random House South Africa.

Property24, (2018). 'Land reform and expropriation: What it actually means for SA'. *Property24* [online]. Available at: <https://www.property24.com/articles/land-reform-and-expropriation-what-it-actually-means-for-sa/27561>

Statistics South Africa, (2018). 'Youth unemployment still high in Q1: 2018'. *StatsSA* [online]. Available at: <http://www.statssa.gov.za/?p=11129>

Visagie, R. (2018). *Struggle(s) for Self-Determination: Afrikaner Aspirations in the Twenty-First Century*. PhD Thesis: Stellenbosch University. [online] Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/103344/visagie_struggle_2018.pdf?sequence=2&isAllowed=y

Walther, T.C. (2017) 'Land reform: Will Zimbabwe's economic downfall be repeated in South Africa?'. *DW* [online]. Available at: <https://www.dw.com/en/land-reform-will-zimbabwes-economic-downfall-be-repeated-in-south-africa/a-41972001>