

Section 25 merry-go-round causing unnecessary uncertainty

The Ad Hoc Committee tasked with amending section 25 of the Constitution was due to submit its report containing key recommendations to the National Assembly on 31 May. It is now common knowledge that the committee did not deliver a report but asked for an extension, which was granted until the end of August. The mere fact that the committee requires additional time is nothing out of the ordinary but the issues that still need to be discussed have caused some waves in the agricultural community.

The Amendment Bill which was published for public comments has a fairly limited scope, namely to clarify that a court may determine that nil compensation is just and equitable compensation in certain circumstances. Not all political parties were happy with these changes. Some members of the committee wanted more radical changes to be applied throughout section 25 whilst others argued that no amendment is necessary in the first place. The political parties engaged in a series of bilateral meetings but could still not reach consensus by the 31st. As a result, they asked for an extension and requested the Parliamentary Legal Services to draft a Bill that includes all of the proposed wording from the various political parties. It was this draft that contained controversial proposals, including state custodianship over agricultural land, removing the 1913 cut-off date for land restitution and removing reference to the courts in relation to nil compensation.

The concept of state custodianship already exists in relation to water and mineral rights, but extending this to all agricultural land will be out of sync with international law concepts. The Public Trust Doctrine comes from American law. It basically implies that certain natural elements are the heritage of the whole country and should therefore not be privately owned. In the USA, this includes rivers that can be used as transport and natural wonders such as mountain ranges and other areas that are critical to the country's natural heritage. The logic is that these are common goods that no one person should have a monopoly over. In South Africa, the state is the custodian of our water rights as access to water is a fundamental right. We have also taken it a step further by making the state the custodian of mineral rights, which just about exhausts the 'public' aspect of this doctrine since it is allocated for private use. If it were to be extended to agricultural land, we may well stretch the concept way beyond its intention to safeguard public or common resources. The implications it may have on finance and investment in a globalised economy is another point that probably merits its own article altogether.

From a theoretical point of view, limiting land claims to 1913 does seem a tad arbitrary since it excludes large areas of conquest by colonial powers in the South-Western areas of our country. However, from a practical point of view, opening land claims to pre-1913 may just be counter-productive. Land Restitution has a symbolic role to provide social justice to families and communities who were the victims of forced removals. It is not, however, well suited to be the vehicle of choice to deliver large amounts of land to marginalised communities. Claims must be investigated and proved at great cost to the state in a bureaucratic process often involving litigation. If the aim is simply to deliver on land reform, an accelerated process of land redistribution would be far more efficient.

Finally, removing the word 'court' from the proposed amendments on compensation may just be a 'red herring'. The unamended portions of section 25 still require compensation to be determined by a court in the absence of agreement. From a drafting point of view, a second reference to the courts may simply have been redundant. As long as section 25 (2) remains unaltered, the courts would still have to decide on compensation in the event of a dispute.

These proposals understandably evoked a strong reaction as it would constitute a radical departure from the current debate which is only focused on compensation. However, and I cannot emphasise this enough, these concepts are being proposed by individual political parties. Nowhere is it recorded that any of these proposals have been agreed to by the committee nor that the committee has resolved to include these changes in any official recommendations. As the matter currently stands, the political parties are still driving their own proposals as they have done for years in the past. We will have to wait until the end of August to see whether any of these proposals enjoy majority support.