



Commercial Law Team

Client Circular
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Our Cox Yeats Commercial Team is committed to keeping you informed on pertinent legal issues, as well as developments within our firm.

The Land Question

The Freedom Charter was adopted by the Congress of the People in Kliptown in June 1955. It was, of course, a different time but the statements made on land remain important.

The Charter stated that:

“Restrictions on land ownership on a racial basis shall be ended, and all the land redivided amongst those who work it to banish famine and land hunger;

The State shall help the peasants with implements, seeds, tractors and dams to save the soil and assist the tillers; freedom of movement shall be guaranteed to all who work on the land; all shall have the right to occupy land wherever they choose.”

In 1994, ownership and access to land was the most hotly debated issue. It was the last issue to be finalised when the Interim Constitution was adopted. Importantly, the ANC team tasked with finalising the land issue in the Constitution, was headed by our current President. Section 25 created the necessary compromise and balance between the protection of our economy based on private property and free market enterprise and the need to dramatically transform the economy following decades of oppressive laws and policies.

Ownership of property was protected, subject to 3 exceptions:

1. The State was conferred the right to expropriate property not only for public purpose but also for public interest;
2. Public interest included the nation’s commitment to land reform and to bring about equitable access to natural resources; and
3. Compensation would be just and equitable and not necessarily based on market price.

Two further sections were also inserted. Section 25(5) obliged the State to take reasonable legislative and other measures to enable citizens to gain access to land on an equitable basis. Section 25(8) stated that no provision of Section 25 would impede the State from taking legislative and other measures to achieve land, water and related reform, so as to redress the imbalances of the past. These measures, however, were qualified by Section 36(1) which provided that the limitations have

to be reasonable and justifiable to an open and democratic society based upon principles of dignity, equality and freedom.

Unfortunately, the State's track record over the last 27 years, in giving effect to land security, restitution and redistribution, has been poor. It adopted a willing buyer and willing seller policy when there was no need to do so. It has not used its expropriation powers to redistribute land. Very little progress has been achieved in ensuring security of tenure.

During the colonial era, all land in South Africa was set aside, either for the occupation by whites or by blacks. The 1913 Land Act identified those areas which were set aside for the occupation by blacks. This was further strengthened, in 1936, with the promulgation of the 1936 Land Act. These reserves were then held by the South African Development Trust for the occupation of black people.

Under grand apartheid, the land demarcated for occupation by blacks and held by the South Africa Development Trust was transferred to the government of the self-governing territory concerned. This represented roughly 13% of South Africa.

For several years, Parliament has been grappling with the introduction of a new law on expropriation and the amendment of the Constitution, so as to allow for expropriation without compensation. An impasse has been reached as a two thirds majority in Parliament is required so as to amend the Constitution. This means that the ANC needs the support of other political parties to give effect to an amendment to the Constitution.

The ANC would like to amend the Constitution, so as to allow for expropriation without compensation to occur in very limited circumstances and so as to give effect to land redistribution. This is over the land which was originally allocated for the occupation by whites. All of the other political parties, save for the EFF, are opposed to this. They contend that Section 25 of the Constitution, in any event, allows expropriation to occur in limited circumstances without compensation and there is no need to amend the Constitution.

The ANC have stated that they would like legal certainty and not leave it to the Courts to determine these circumstances. The EFF would like Section 25 of the Constitution to be amended but their proposed amendment goes too far for the ANC. They would like the amendment to provide, as occurred with our mineral and water law, that all land vests in the people of South Africa and that the State is the custodian of land on behalf of its people. This would mean that all land would no longer be privately held.

In a political deal concluded with the IFP in 1994, all land which was then held by the Government of KwaZulu, in trust, was transferred to the Late King Goodwill Zwelethini, in trust. The land was then held by the King, for and on behalf of the Zulu tribes, communities and residents. It comprises some 2.8 million hectares of land being 93% of the total area of the then Government of KwaZulu and one third of the total area of KwaZulu-Natal. It is over this land that the State was required to take measures to ensure the occupiers were granted legally secure tenure.

In 2017/2018, a special parliamentary high-level panel was formed to consider all land rights in South Africa. This high-level panel was chaired by former President Motlanthe. He concluded that there was an urgent need to address the tenure rights of the many millions of South Africans who occupied State or communal land. It was agreed that there was a need to confer individual land rights, recognising customary traditions, under a new form of title and that this should apply both to urban

areas as well as to rural areas. If this was achieved, significant investment in land and in the property sector, would result.

A key recommendation was to terminate the arrangement whereby “trust land” in KwaZulu-Natal was held by the Ingonyama Trust. The Motlanthe Panel Report concluded that the Ingonyama Trust did not provide the people of KwaZulu-Natal with secure tenure.

Prior to 1994, individuals on Trust land held rights under a permission to occupy (**PTO**) or under customary law. After 1994, the PTO system fell into disuse. No administrative capacity was in place to issue new PTOs.

The PTOs were also regarded as being a legacy of apartheid and a new form of tenure, consistent with the Constitution, was required.

As a consequence, the Ingonyama Trust spread the word to the beneficiaries and residents of trust held land that PTOs were no longer required and were invalid and would need to be replaced by leases. Throughout KwaZulu-Natal, residents on trust land then concluded leases replacing old PTOs. These leases provided for the payment of rent to the Ingonyama Trust and were generally for a period of 30 years.

In a judgement dated 11 June 2021, the full bench of the KwaZulu-Natal High Court set aside the practice of the Ingonyama Trust in replacing PTO or customary law rights with rights held under a lease. It concluded that the land was held for the benefit of its residents and the conversion of old customary or PTO land rights constituted a deprivation of existing rights. The Court held that the Board had unlawfully violated the Constitution by concluding residential lease agreements with those who were the true and beneficial owners of Trust held land under Zulu customary law and ordered that the Trust was obliged to refund all rent paid to the Trust under these leases.

The Minister of Rural Development and Land Reform was found to have breached her duty to protect the Constitutional right to property of these residents and in particular, their right to security of tenure. The Minister was ordered to ensure that administrative capacity was re-established so as to demarcate allotments and issue and register permissions to occupy. This capacity had fallen away since 1994.

Resolving the land question remains vital. Many argue that Section 25 of our Constitution provides the legal framework to achieve effective land reform. The current impasse on the issue of expropriation needs to be resolved and effective land redistribution permitted.

In KwaZulu-Natal (as also in the rest of South Africa), security of tenure needs to be provided.

There is still much to be done.

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