IS LAND REFORM A POLITICAL or LEGAL QUESTION?

In 2018, the Economic Freedom Fighters ("the EFF"), the third largest political party in the South African National Assembly or Parliament, triggered a process of immense constitutional significance since commencement of the Constitution of the Republic of South Africa, 1996 ("the South African Constitution"), on 4 February 1997.

The EFF did so when it sponsored a motion in the National Assembly for the review of section 25 of the South African Constitution and other clauses where necessary, to make it possible for the state to expropriate land in the public interest and without compensation, and propose the necessary constitutional amendments where necessary.

Section 25 of the South African Constitution deals with property. It reads as follows:

"25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application-

- ***(a) for a public purpose or in the public interest; and***
- ***(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.***

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

- ***(a) the current use of the property;***
- ***(b) the history of the acquisition and use of the property;***
- ***(c) the market value of the property;***
- ***(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and***
- ***(e) the purpose of the expropriation.***

(4) For the purposes of this section-

- ***(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and***
- ***(b) property is not limited to land.***

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6)."

Since the EFF's motion, the National Assembly has entrusted the Constitutional Review Committee ("the CRC") – a standing committee of Parliament established pursuant to section 45(1) of the South African Constitution the mandate of which is to review the Constitution at least annually by considering proposals for possible constitutional reforms – to facilitate public consultation on this policy issue.

Since its establishment, the CRC has considered many public submissions about sections of the Constitution that the public feels need to be reviewed by the CRC for purposes of amending the Constitution. I have attended and addressed the CRC in previous years.

Since the CRC completed its work in November 2018 in relation to the amendment of section 25 of the South African Constitution, two important events have taken place. Firstly, general elections were held in May 2019, which brought in the sixth administration. Secondly, in July 2019, Parliament established an Ad Hoc Committee to initiate and introduce legislation to amend section 25 of the South African Constitution.

In this piece, it is argued that the land question in South Africa should be settled through democratic compromise and not through a judicial process as some have advocated. There are two reasons for this argument: (1) First, the question of whether or not the Constitution should be amended is a political question, not a legal question. (2) When courts get involved in what are clearly partisan political questions, they risk the only measure of their credibility, namely, the public trust.

Significance of the Public Participation Process

Section 74 of the South African Constitution, which deals with the process of amending the Constitution, provides, among other things, that a bill amending the Constitution must be tabled together with any written comments received from the public. The section must be read with sections 72 and 59 of the Constitution, which impose an obligation on Parliament to facilitate public involvement in the legislative processes of Parliament.

There can be no doubt that the constitution making process triggered by the EFF is a legislative process, and that the obligation to facilitate public involvement is implicated in this process. In the landmark judgment of ***Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399; [2006] ZACC 11*** [*"Doctors for Life (2006)"*], Justice Ngcobo (as he then was) declared that

> ***"the obligation to facilitate public involvement is a material part of the law-making process ... failure to comply … renders the resulting [law] invalid."***

This means no amendment to the Constitution can be valid without public involvement.

It is important to mention that in his judgment, Justice Ngcobo also declared that the Constitution contemplates that Parliament has considerable discretion to determine how best to fulfil its obligation to

facilitate public involvement. It is this constitutional imperative that explains why Parliament mandated the CRC to go around the country and garner the views of the people on whether or not to amend section 25 of the Constitution.

The majority of South Africans who participated in this process do NOT want section 25 to be amended. In fact, some media houses have reported that 59% of the written submissions received by Parliament are against the amendment of section 25 whilst 40% are in favour of amending that section. But is Parliament bound by the views or submissions made in a public participation process? The Constitutional Court addressed this very question in ***Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC); [2008] ZACC 10*** ["the *Merafong* case (2008)"], and it is to this question that I now turn my focus.

Public Participation and Political Decisions

Some observers might recall that in 2005, Parliament adopted a policy to abolish cross-boundary municipalities, which was given effect through the 12th Amendment to the South African Constitution and the Cross-Boundary Municipalities Laws Repeal and Related Matters Act of 2005. This policy decision meant that the Merafong Municipality was moved from the Gauteng province into the North West province. The decision led to violent protests within the Merafong Municipality, especially in the township of Khutsong. The matter ended up in the Constitutional Court.

The main issue in dispute was that during the public participation processes, the Gauteng provincial portfolio committee agreed with the people's view that the Merafong Municipality should remain in Gauteng and not be moved to the North West province. However, when the Gauteng province formulated its position on how to vote in Parliament, it decided to vote contrary to the views expressed by the people in the Merafong communities during the public participation process.

In resolving the dispute, the Constitutional Court ruled in favour of the Executive and Parliament. Again, Justice Ngcobo explained in that case that:

> ***"The purpose of facilitating public involvement under … the Constitution is not to have the views of the public dictate to the elected representatives what position they should take on a bill. The purpose of facilitating public involvement is to enable the legislature to inform itself of the fears and the concerns of the people affected. The decision as to how to address those concerns and fears is, by our Constitution, that of the elected representatives."***

Similarly, if the majority of the people of South Africa, who made submissions to the CRC, are opposed to the proposed amendment of section 25 (or vice versa), as it is claimed to be the case, it would seem that Parliament is not bound by those views. Alternatively, the South African Constitution leaves the decision to the exercise of political judgment by Parliament on whether or not section 25 should be amended to provide for expropriation of land without compensation. In other words, the decision of whether or not section 25 should be amended is a political question.

As former Chief Justice Ngcobo correctly pointed out in ***Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC); 2011 (7) BCLR 651(CC); [2011] ZACC 6*** ["the *Glenister* case (2011)]:

> ***"Under our constitutional scheme it is the responsibility of the executive to develop and implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy. And it is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation. This judgment is political and may not always coincide with views of social scientists or other experts. As has been said, '(i)t is not for the court to disturb political judgments, much less to substitute the opinions of experts'."***

The theory behind Justice Ngcobo's proposition (both in his incarnation as Justice in *Merafong* and as Chief Justice in *Glenister*) is that Parliament can only be held politically (not judicially) accountable and this is how the Constitution ensures a government based on the will of the people.

To illustrate this point, let us go back to the 2005 amendments. Following the 2005 constitutional amendment, there were a number of court challenges some of which ended up at the Constitutional Court, where the government prevailed. However, the politics of the day or political compromise (and not the law) forced the governing party – the African National Congress – to reverse the 2005 policy decision by adopting the 16th Constitutional Amendment Act of 2009. A few weeks before the 2009 general elections were held, the Merafong Municipality was returned to the Gauteng province. What this demonstrates is that under the South African Constitution, the remedy against discretionary political decisions made by any of the politically accountable pillars of the State lies in the political process (and not judicial process). The *Merafong* case, ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC); [2012] ZACC 18*** ["the *Etoll* case"] and other cases demonstrate this principle.

Specifically, in the *Etoll* case, where in dismissing the Opposition to Urban Tolling Alliance's claim to scrap e-tolling in Gauteng, Justice Froneman emphasized this point when he declared that

> ***"[93] . . .The playing field for the contestation of executive- government policy is the political process, not the judicial one.***
> ***[94] The main thrust of the respondents' review is the alleged unreasonableness of the decision to proclaim the toll roads. But unreasonable compared to what? The premise of their unreasonableness argument is that funding by way of tolling is unreasonable because there are better funding alternatives available, particularly fuel levies. But that premise is fatally flawed. The South African National Roads Agency Ltd has to make its decision within the framework of government policy. That policy excludes funding alternatives other than tolling. It is unchallenged on review. But the high court order effectively went against it. Since the making of the policy falls within the proper preserve of the executive and was, on the papers before the court, perfectly lawful, the order undermining it was inappropriate.***
> ***[95] No fundamental rights of the respondents beyond that of just administrative action are at stake here. The courts of this country do not determine what kind of funding should be used for infrastructural funding of roads and who should bear the brunt of that cost. The remedy in that regard lies in the political process."***

In similar vein, in a dissenting opinion in ***Mazibuko NO v Sisulu and Others NNO 2013 (6) SA 249 (CC)***, Justice Jafta correctly declared that:

> ***"Political issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution."***

Thus, it could be concluded that the principle from these and others cases should apply to the proposed land reform policy being debated in the country.

Therefore, the proposition that the judiciary should be the vehicle through which to achieve partisan political ends, and that the current land debate in Parliament should be subjected to judicial examination, cannot reasonably be applied here. Whether or not section 25 should be amended is not an appropriate question for the judiciary to determine.

As a substitute, the views held by some jurists, which were probably best articulated by Justice Posner in his book *How Judges Think,* that compromise is the lifeblood of democratic politics and hence a sensible approach to resolving indeterminate constitutional questions charged with political passion, makes more sense. This should be the preferred approach of resolving the current substantive land debate in South Africa, namely, subjecting it to democratic compromise as opposed to judicial imposition. After all, it was the enterprise of democratic compromise that enabled South Africa to emerge from political deadlock in the 1990s and beget the Constitution that is cherished (by many) today.

"Courts deal with bad law; voters must deal with bad politics."

So, what is likely to happen to the broad land question in South Africa? On the authority of the *Merafong* case, Parliament is not obliged to decide this matter based on the popular public submissions, but only to listen to the people's concerns and fears. However, due to the emotions that have been raised in the public participation platforms in yesteryears, it is very likely that (just as in the *Merafong* case) the governing party with the support of other parties may be compelled to amend the South African Constitution lest they be held politically accountable (by the electorate, not the courts) in the next elections and beyond.

The leader of the EFF put it bluntly when he said in a recent op-ed piece that the people may react strongly against any political decision not to address the land question. Presumably he was referring to the legitimate expectations that have been created by the resolutions adopted by some political parties including the current national governing party. But it needs to be stressed that the substantive remedy for those in favour or against the amendment of section 25 will and should not lie in the judiciary as some believe, but rather in the political process. As Justice Van der Westhuizen highlighted in the *Merafong* case, if South Africans feel that their politicians have disrespected them or failed to fulfil their promises made, then the people should hold them politically accountable through the available constitutionally sanctioned means, such as the ballot box, peaceful demonstrations and others.

Aside from individual land claims that must be dealt with based on existing law, the broad substantive land debate, at the level that it has reached, is not one that can or should be resolved by the judiciary for fear of being smeared or appear to take sides, thereby risk losing the support and trust of the public. The late Justice Skweyiya once correctly observed that ***"courts deal with bad law; voters must deal with bad politics."*** The law of separation of powers does not permit the judiciary to intervene in the lawful exercise of authority by the legislature, such as whether or not to amend section 25 even if this may involve bad or dishonest politics.

Lastly and to add to this, while the South African Constitution is expressed as the supreme law of South Africa, there is an inherent indication in the text and theory of the Constitution that the policy which informs or should inform substantive legislative acts, or the desire to enact a constitutional amendment, are matters for the politically accountable branches of government to determine. It is only the interpretation and/or enforcement of the law, once adopted by Parliament, which should fall within the domain of the judiciary.

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