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PROPERTY RIGHTS DEPRIVED AT AGRICULTURAL CPAS

PRESCRIBED ASSETS AND EXPROPRIATION WITHOUT COMPENSATION FOR COMMUNAL PROPERTY ASSOCIATION LANDOWNERS

2024

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Introduction

Since the introduction of the Communal Property Association (CPA) system of land ownership in 1996, there have been successes and failures. Evidence shows that the overwhelming majority have been failures, however, at such a high rate of dysfunction that any talk of a few "bad apples" either in select CPAs or in the state is insufficient to explain the systemwide disaster. CPA failure is so great that it effectively keeps an estimated 2.5 million hectares of valuable land commercially fallow, a scale that is great enough to impact the price of staples like maize significantly, and so functioning (in combination with other factors) as a *de facto* perverse subsidy to operating commercial farmers and concomitant surcharge for millions of South Africans.

The general outcomes of the CPA system are damaging to both CPA landowners and the broader public interest in successful land reform, growing agricultural productivity, jobs growth, poverty alleviation, and food security. Commercial farmers would be better off with 2.5 million hectares of "dead capital"[1] brought to life. This would significantly add to market competition and strike a political death blow to the call for EWC, promoting job growth, while infusing rural economies with much-needed new revenue streams.

However, rather than embark on the path to reform, the previous Parliament and current President, Cyril Ramaphosa, have set the stage for the CPA systemwide failure to get even worse.

The passage of the CPA Amendment Act in October 2024 strikes a legislative blow against almost half a million South Africans, some of the most hard done by landowners in the rainbow republic. The new law deprives CPA landowners of control over their own property. It specifically deprives CPA landowners of the right to lease or sell their own land without first acquiring "consent" from a government official.

To be clear from the outset – it is typical for landowners to have to provide documentation to the state before concluding a deal pursuant to rules of sale for various classes of major assets. As a rule, the purpose of such requirements is to secure the informed consent of both parties and the legality of the transaction, or to mitigate against harmful third-party effects.

However, CPA landowners must get "consent" for a different reason, as they now must show a government official that it is in their own interest to lease or sell their own property to a particular buyer at a particular price. This fundamental deprivation of control over their assets has radically transformed CPA landowners into second-class investors, with a status equivalent to that of minors (children) who need adult "consent" to sell immovable property held in their name.

The consequences to CPA landowners in the short run are undetermined. The relevant government office to grant "consent" for people to lease and sell their own property does not yet exist, even though the CPA Amendment has already been signed into force. However, as the next plan-to-plant window opens in 2025, commercial farmers that lease from CPAs may not be able to renew their contracts, and CPAs that wish to sell their own property may be blocked from doing so. That risks depriving much-needed income to households, while stimulating bribes to accelerate "consent" signoffs.

The second-order damage is to the fabric of property rights in South Africa. The precedent the CPA establishes is a direct contravention of the principle that property rights include the right to control over one's own assets absent third party harm. This facilitates a "prescribed assets" regime where banks, insurers, pension fund managers, and other major financial institutions could be compelled not to sell their own assets because in the state's opinion it is in their own interests to hold rather than sell.

If CPA landowners are deprived of the ability to lease their own land for a season, that amounts to the temporally bound Expropriation Without Compensation (EWC) of that lost income tied to that property. This in turn augments the risk of the Expropriation Bill's "temporary" forms of EWC.

Dysfunctional CPA System

The CPA system is universally understood to be predominantly dysfunctional in various ways. These include legal non-compliance; the absence of productive activity; hostility and lawlessness on CPA land; theft of equipment, crops, and stock; criminal cartels using CPAs as criminal havens; land invasion, and the illegal sale of CPA land by land invaders; arson, and other forms of violent extortion, and intimidation; and murder. The primary concern here is to establish the proportion of CPAs that are dysfunctional in the sense of legal non-compliance and non-productivity, as well as the extent of CPA land.

Official Statistics

Official Statistics are provided by the DRDLR. These data have significant flaws, as will be illustrated, but are the best available indicators of the general state of dysfunction in the CPA system.

Non-Compliance and Non-Productivity

According to the 2024 CPA Annual Report, issued every year by the Department of Rural Development and Land Reform (DRDLR) to Parliament, there are 184 CPAs that have legally complied with the pre-amendment version of the CPA Act in the last year. There are five measures of legal compliance: issuing an annual financial statement (AFS), conducting an annual general meeting (AGM), maintaining an executive (Exco) list, maintaining a membership list, and (in the case of land transactions conducted in the year) conducting land transactions legally.

In the past, CPA reports would tabulate the number of compliant and non-compliant CPAs; however, that has been discontinued. Now, the numbers must be calculated by going through the provincial lists of 1,740 registered CPAs to tally compliance. 10.6% of CPAs are reported as compliant, and 89.4% as non-compliant. Additionally, 81% are non-compliant in three or more of the five measures.

There is no official data on the relationship between legal compliance and agricultural productivity. However, practically all non-compliant CPAs are also non-productive. The reasons are practical, and simple to understand by categorising plausible circumstances. Either CPAs use or lease land, and if they use land then they must either pay for their own input costs or rely on the state. In none of those cases is it possible for a CPA that is severely non-compliant to produce value.

Here is a brief consideration of the three headline possibilities. First consider a CPA that intends to produce value itself by providing its own input costs. If there are crops then variable costs include fuel, fertiliser, agrochemicals, seed, and labour. In addition there are capital (equipment) costs. If there is livestock, then variable costs include feed, veterinary care, labour, supplements (salt, minerals); and capital inputs include livestock (typically weaners). Fence maintenance is indispensable and particularly costly when criminals destroy property boundaries. It is extremely implausible to suppose that even a single CPA could succeed in covering such costs without complying with basics such as conducting an AGM, reporting an AFS, maintaining leadership and membership lists, and conducting transactions legally.

Alternatively, a non-compliant CPA could try to farm productively by relying on the DRDLR, which is nominally committed to supporting CPAs by providing goods and services that offset fixed and variable costs. However, the DRDLR is notoriously incapable (more on which shortly). More importantly, CPAs that are non-compliant cannot be legitimately or effectively supported by the DRDLR. That is because without legal compliance there is no practical safeguard preventing those who receive supplies from the DRDLR on behalf of the CPA selling them off for their personal benefit, as has been seen in several cases.

Finally, a non-compliant CPA could try to lease out its land. However, the lease contract would not be legally binding, since whoever signed it on behalf of the CPA would not be legally empowered to do so. Commercial farmers that entered such lease agreements would therefore have no way to enforce their rights should any corrupt actor try to extort them as they attempt to harvest what they have already paid to plant. As a result of this risk, commercial farmers do not enter lease agreements with non-compliant CPAs.

There may be minor exceptions in the second and third cases – non-compliant CPAs that might produce marginal amounts through DRDLR provision of goods and services, or through non-legal "lease" agreements that are really just personal promises. However, the general implication of legal non-compliance is non-productivity. As such, practically all non-compliant CPAs are estimated to be non-productive.

But what about the 10.6% of CPAs that are legally compliant? Are they all productive? Almost certainly not. Legal compliance is only the first basic step towards production. It is highly likely that many CPAs that are legally compliant are not currently able to farm productively, or have not succeeded in concluding lease agreements with entities that can.

As such, the provisional finding is that at least 90% of CPAs are not productive.

Extent

The 2024 CPA report makes no indication of the total extent of CPAs. The 2023 CPA report that the total land transferred to CPAs is 2,813,345 hectares.

This land is not only vast in extent, it is also likely to have a massive total productive value. CPA land is transferred to land restitution beneficiaries and land reform beneficiaries. Land restitution occurs where black people were forcibly removed from agricultural land by the apartheid state, which then provided that land to white beneficiaries through subsidised sale. Although the apartheid state had multiple purposes in its racist social engineering program, it is unlikely that it mainly took inferior land from black people to transfer to white people, given its racist preference against black people and for white people.

For some context, the latest official estimate for total area planted for white and yellow maize in South Africa is 2,636,250 hectares. The total area planted for summer crops (including maize, sunflower, soy, sorghum, groundnuts and dry beans) is roughly 4.5 million hectares.

The 2017 Motlanthe Report – the Report of the High-Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change, to give it its full name – stated that "4.3 million hectares, acquired through land reform, is currently out of production. Land reform has therefore provided few benefits for the majority of those accessing land through the programme."[2]

Roughly half of this was held under CPAs, and half under trusts. Of the two, the Motlanthe Report suggested that trusts were in an even worse state of dysfunction.

Conflicting Data

However, the extent of CPAs could be far greater, or smaller. The reported extent of CPAs has ranged wildly in annual CPA reports issued by the DRDLR, as shown by the following table.

Table: CPA Land Extent by province by year.

CPA Land Extent (ha)				
	2019/20	2021/22	2022/23	2023/24
Limpopo	886 978	3 578 860	491 583	-
Mpumalanga	487 473	543 261	534 261	-
Gauteng	11 810	17 723	17 723	-
North West	611 587	362 892	141 022	-
NC	919 306	335 508	335 508	-
Free State	73 926	129 145	129 145	-
KZN	331 030	5 547 091	554 709	-
WC	40 761	39 183	39 183	-
EC	132 329	335 508	335 508	-
Total	**3 495 200**	**10 889 171**	**2 578 642**	**2 813 345**

Source: DRDLR Annual CPA Reports 2020 – 2024.

Some of the changes seem to be clear typos, for example the difference between KZN in 2021/2022 and 2022/23. However, North West province has declined by roughly 450,000 hectares of reported CPA extent, and Limpopo has declined by roughly 390,000 hectares in just a couple of years, while CPA extent has risen between 2019/20 and 2022/23 in KZN by roughly 220,000 hectares. These are significant, but unaccounted for changes, suggesting the possibility of major floors in record keeping.

As the DRDLR has not been able to provide a reliable record of the most basic facts, the extent of CPAs, it should be no surprise that it has not provided more complex data, such as the accurate number of CPA members. Being unable to provide such records, it should further be no surprise that the DRDLR has failed to provide effective management support in realizing productive value on CPA land.

De Facto Commercial Subsidy

Several commercial farmers have pointed out that the CPA disaster is so great that it effectively functions as a subsidy. "Supply-control" is a well-known traditional form of state subsidisation of agriculture in which the state pays landowners to be unproductive. This throttles supply, which in turn raises prices. Typically, landowners have been paid to keep part of their land unproductive. Here is a summary of this historical practice in the European Union Common Agricultural Policy:

> *The 1992 Common Agricultural Policy (CAP) reforms instituted a system of supply control, through a mandatory, paid set-aside program to limit production, that was maintained until the CAP reforms of 2008 when set-aside was abolished. To be eligible for compensation payments in the 1992 reform, producers of grains, oilseeds, or protein crops had to remove a specified percentage of their area from production. Agenda 2000 set the base rate for the required set-aside for arable crops at 10 percent.*

This notion was partly inspired by the UK set-aside scheme of the Margaret Thatcher era:

> *'Set-aside' was a scheme designed to reduce the production of arable crops. It was introduced in 1988. Farmers in the scheme agreed to set-aside (that is to stop using for any kind of agricultural production) a percentage (originally at least 20%) of the land they had been using for growing agricultural crops. In return they received annual compensation payments.*

Subsequently, the EU shifted from "set-asides" to "quotas" that limited supply to keep up prices, specifically enforcing quotas on dairy and sugar. Those too have been reduced.

Though "set-asides" have not been removed from the EU, their rationale has nominally changed to soil management. EU farmers are paid to keep 4% of their land unproductive. However, the subsidy and the increase in price only offsets the opportunity cost of leaving 4% of arable land unproductive if imports are limited, since if imports are not limited then external suppliers merely fill the gap in supply. Since the EU lifted restrictions on agricultural imports from Ukraine to support its war effort there have been widescale farmer protests in the EU against the 4% set-aside. As such, the 4% set-aside has been exempted.

The point to draw here is that in various jurisdictions, at various times, government programmes have gone to great lengths to block agricultural productivity. An estimated 3.8 million hectares of land was forced out of production in the EU in 2007 by "set-asides".

That should dispel any false notion that it is unimaginable for any state to deliberately force a vast extent of agricultural land out of production. It should also dispel any false notion that it is unimaginable for any state to use force to impose higher prices on food for ordinary consumers. As noted in an article published by the Institute of Economic Affairs, explicitly forcing lower income people to pay more for food "would be incredibly unpopular, especially in times of rising food prices." Still, the EU "Common Agricultural Policy [had] precisely that effect" by raising food prices by 17% compared to greater world market prices.[3]

However, in cases of forcing agricultural land out of production such as the UK and EU, a small portion of (almost) every major farm is forced out of production, while each relevant farmer is compensated directly through subsidy and indirectly through higher prices at market (achieved additionally through tariffs on imports). That is "recognisable as an instrument of redistributing money from sales assistants and cleaners to wealthy landowners."[4]

What makes South Africa's case unique is that some farms are entirely blocked de facto from productivity, while other farms operate at full capacity. At an estimated 2.5 million hectares kept out of commercial productivity by the CPA system, South Africa's "set-aside" is far greater in scale (relative to total arable surface area) than the EU programme was at its peak. It is also radically different in that South Africa's programme effectively subsidises established commercial farmers at the cost of both CPA landowners and consumers, who pay higher prices than they would if CPA "dead capital" were allowed to come to life. Additionally, while tariffs are notable, the predominant obstacle to imports in many cases is the cost of logistics due to the partial collapse of rail and port infrastructure.

This is not to say that South Africa's commercial farmers have more to gain out of preserving the current system than they would from dismantling it. If rail and port infrastructure was improved viz the coastline, and road, bridge and border infrastructure continued to be improved into Africa, then increased production would not push the price down beyond export parity, determined by deep global markets. At that point, adding 2.5 million hectares of productive land to "SA Inc.'s" agricultural mix would have overwhelmingly positive effects through job addition, productive output, tax revenues, and stable businesses in rural areas. This all would reduce the burden on existing agricultural producers to maintain the social safety net.

Furthermore, domestic farmers are afflicted by extraordinarily high levels of violent crime and political threats to their property rights, which negatively impact property values. If the CPA "dead capital" is brought to life, the improved living conditions and reduction in unemployment particularly among young men is expected (following global trends) to make it more difficult for race-nationalist socialist political entrepreneurs to radicalise disaffected youth in pursuit of violent, or revolutionary, redistribution of wealth.

CPA Amendment Act

Original Landowner Protection

Section 12(1) of the original (1996) CPA Act stated that the disposal or encumbrance of CPA property must be done with the consent of a majority of CPA members present at a general meeting. Section 8 (original Act) also provided that a CPA could acquire, dispose or encumber property subject to the provisions of that CPA's own constitution, listing lease, servitude, and mortgage as forms of encumbrance; and Section 9 (original) stated that a CPA constitution must prohibit the selling or encumbrance of CPA property "without the consent of a majority of members present at a general meeting of the association".

In short, a CPA could, through majority vote, buy, sell, lease or mortgage its own land.

Steps were taken to protect CPA members from predatory transactions with more sophisticated commercial actors. Section 12(4) provided for CPA members to bring allegations of illegal sale or encumbrance of CPA property to the Director-General (DRDLR), and 12(3) stated that any transaction inconsistent with 12(1) "shall be voidable". This gave notice of materiality to buyers, lessors, and lenders: without a legitimate CPA majority vote *there would be no real deal.*

New “Consent” System

12(1) of the new The CPA Amendment Act (2024) states these new requirements:

- (for “any transaction”): “prior consultation with the Minister” of DRLDR;
- (for sale): “notice of intention” given to Director-General of DRDLR, who is given right of first refusal for three months of consideration and nine months to conclude;
- (for sale): if the property’s history or planned sale included financial assistance from DRDRL, then “the consent of the Registrar”;
- (for “any lease agreement”): “the consent…of the Registrar”.

The test that the Registrar must apply is whether “in his or her opinion” the lease is “in the best interest of the community” that owns the land to be leased, and which has voted to do so.

In short, CPA landowners have been degraded to **second-class ownership**.

Amendment Text

Here follows the relevant text of the CPA Amendment Act (with emphasis):

> Approval for certain transactions 12. (1) An association may not without the consent of the majority of members present at a general meeting of members—
>
> *(a)* ***sell, donate or encumber communal land or immovable property of the community or any real rights in respect thereof, or conclude any transaction including any prescribed transaction in respect thereof, or purchase any immovable property, without the prior consultation with the Minister*** *and without a resolution supported by no less than 60% of the members of the association having a right to make decisions as contemplated in item 8 of the Schedule: Provided that if an association decides to sell immovable property,* ***notice of such intention shall be given*** *to the Director-General and the* ***Department shall have the first option to purchase such immovable property:*** *Provided further that the Department shall, within three months from the date of receipt of such notice, inform the association whether it intends purchasing the immovable property or not, and if it decides to purchase, such purchase shall be concluded within nine months from the date of receipt of the notice;*
>
> *(b) sell, donate or encumber any movable property, or purchase any movable property, without the consent of the majority of members of the community present at a general meeting of members and, if such movable property was bought or is to be bought through financial assistance provided by the Department, without the consent of the Registrar; or*
>
> *(c)* ***enter into any lease agreement in respect of any immovable property without the consent*** *of the majority of the members of the community* ***and the Registrar: Provided that the Registrar may only provide such consent if, in his or her opinion,*** *the provisions of the lease agreement, including the lease period, the rental to be paid and the purposes for which the property is to be used, are reasonable and* ***in the best interest of the community.***
>
> *(2) The requirement of consultation with the Minister referred to in subsection (1)(a) and the requirement of consent referred to in subsection 1(b) and (c) may be given in respect of a series of transactions, without identifying each individual transaction.*

(3) Any disposal, mortgage, encumbrance, purchase or prescribed transaction in contravention of subsection (1) shall be voidable.

Prior Consultation

It is worth noting that Section 12(1) imposes the requirement of "prior consultation with the Minister" of DRDLR. This could impose delays if consultation is read to involve not only the submission of information to the Minister, or her or his functionaries, but also the receipt of a response and some actual or possible further consultative exchange of views. The practical effect could, therefore, in many cases be equally detrimental to CPA landowners. However, the principle is different. The principle of "consultation" leaves discretion with landowners to determine their own best interest, while the principle of "consent" presupposes (absurdly) that landowners cannot determine their own best interest.

CPA Landowners Treated Like Children

CPA Landowners have been degraded to the status of children. As summarised by a law firm (with added emphasis): "Under South African law, a minor child may not enter into contracts without the express or implied **consent** of their natural or legal guardian i.e. the minor child's parents or appointed guardian by the courts / specified in a will...[A] minor child may only sell his / her immovable property if such alienation has been authorised by the Master of the High Court or High Court as upper guardian of all minor children."

Section 80 of the Administration of Estates Act states (with added emphasis) that "no natural guardian shall alienate or mortgage any immovable property belonging to his minor child ... unless he **is authorised thereto** by the Court or by the Master".

In summary, children require the consent of a court's representative, or a court directly, in order to lease or sell their property, because the state must determine whether it is really in the child's best interest to sell that property. Adult CPA Landowners are degraded to the same status by Section 12 of the CPA Amendment Act.

Direct Impact

The deprivation of such a fundamental right for over 450,000 owners is unprecedented in the rainbow republic's thirty-year history. Internationally, the precedent is not good, which will be evaluated shortly. First, inevitable direct impacts and likely direct impacts of the new CPA legislative system are evaluated.

No legal lease currently possible

Sale and purchase of immovable property is possible without the Registrar where the state has not, and will not, finance transactions related to the relevant land. However, all leases of CPA property are governed by 12(1)(c) of the CPA Act, which requires the "consent" of the Registrar, to be determined by "his or her opinion" of the "best interest" of the CPA landowners. As that registrar does not exist, no lease contracts on CPAs can now be entered into legally.

Furthermore, practically every CPA's original land is acquired through financial support from the DRDLR. One argument made by Members of Parliament (names withheld) is that since the state provided support it should have the power to deprive CPA landowners of more control than other landowners. By analogy, if the state subsidises a particular business, then it might likewise limit the way that business is operated to a greater extent than would otherwise be consistent with the business owner's liberty. For example, if the state bought someone a pizza oven it might also reasonably insist on the owner only selling relatively healthy pizzas.

The analogy fails, however, in cases of land restitution. Land restitution occurs when black South African families were deprived of their property rights during white supremacist rule at any time from 1910 to 1994 on the basis of race. In such instances the state buys land, with some preference that it is the same parcel of land from which black families were originally dispossessed, and then returns it to the victims or their direct descendants. The is not like the state buying someone a pizza oven, or subsidising a business, or going into a public-private partnership. These are cases of returning people's own property back to them. It is a morally serious fact that those same victims of dispossession have had their property rights abused once more.

Processing delays of leases

Lease agreements in agriculture turn on meeting plant time windows. However, the CPA Amendment threatens to delay the processing of permission to lease to such an extent as to render proposed lease contracts commercially non-viable. First, the CPA must achieve a vote of 60% to approve the deal. Then the DRDLR Minister must be given prior consultation. Additionally, the Registrar must receive an application for consent. The Registrar must then form an opinion on "the provisions of the lease agreement, including the lease period, the rental to be paid and the purposes for which the property is to be used".

As there are over 1,700 CPAs, and as the vast majority are incapable of operating commercial farming directly, the number of lease applications that the Registrar might have to consider is substantial. Additionally, some CPAs are large, with over 10,000 hectares of land, and so might conclude multiple lease contracts on different portions of land in any given season.

Furthermore, for the Registrar to produce an informed opinion on all the relevant factors including price, duration and purpose is likely to be laborious. Even with a highly functional department the risk of delay in granting consent is considerable.

Delays that push past the plan-to-plant window would render a lease commercially non-viable for the lessee. No lessee is likely to sign a final contract and pay for a lease before the CPA has received consent, so the lessee will be able to exit the negotiation if the delay annihilates commercial viability. This in turn deprives the CPA as lessor from the income they would have received under the current system. If the lessor is not able to find alternative land of equal productive value, the net effect is a reduction of the overall national agricultural production for a season. This hardly has any price effect at the level of a particular farm, but as hundreds of thousands, or millions, of hectares of land is held under the CPA system, the price effect is considerable.

Processing delays of sales

The Minister must be given prior consultation, the DG must be given three months to consider whether to exercise first right to purchase, and the Registrar must give prior consent before any sale goes through. Delays reduce the appeal for the buyer and risk sinking the deal. Additionally, the purchaser cannot lease the land while the red tape is being navigated without having to navigate the lease consent requirements noted above.

Incompetence

Considerable administrative competence is needed to make the new system work effectively. For example, the Registrar is required by the new CPA Act to evaluate the duration, price, and purpose of every lease involving any CPA in the country. There is a risk of irrational denials of consent.

Bribes

Because the Registrar acts as a gatekeeper, there could be inducements for bribery to get the acceptance of applications accelerated within a window of commercial viability.

Finance

The direct finance concern is as follows: consider a commercial farmer applying to a bank for a loan to purchase new equipment and variable input costs. The bank does its required due diligence. The farmer wants to plant 3,000 hectares, but only owns 2,000 hectares of land. She explains that the remaining 1,000 hectares will be leased from a CPA. The farmer has good relations with the CPA and has leased from them before. They have a written contract for an amount for the season.

However, the bank's attorneys are aware of the CPA Amendment, and therefore aware that the contract between the farmer and the CPA is not legally enforceable, since no "consent" was provided by the Registrar, who does not even exist. The bank will not be able to provide finance to the farmer on that basis. As such the farmer will have to find other land to lease or purchase.

Lease Disputes

Consider a farmer with close relations to a CPA through many years of renewed lease contracts. After the CPA Amendment the farmer and the CPA leaders agree to renew their lease agreement as a personal promise that is not legally enforceable, on trust. The farmer pays monthly and begins to plant. Come harvest time, however, corrupt members of the CPA assert their right to prohibit the farmer from entering the property to harvest what he claims to be his crop. The farmer's "lease" right is not legally enforceable, while the CPA's ownership right is legally enforceable. The corrupt CPA actors tell the farmer that he can enter if he pays extra. The farmer could try to resolve the dispute in court, which would take time and cost money, and may only conclude after the crop's value has extinguished, even in the unlikely event that the farmer wins. Alternatively, the farmer could pay the *de facto* extortion.

More likely, however, the farmer will refuse to enter a lease contract in the first place.

Nazi Precedent

A notable precedent for the CPAs "consent" to buy regime is in Nazi Germany. Recognition of the precedent must be cautiously parsed. Simply because the Nazis passed a particular law does not make it necessarily unacceptable. For example, the Nazis might have passed some reasonable regulations on speed limits. However, the precedent is important as it indicates the kind of political argument that has been made in the past for depriving people of the right to determine their own interest in ownership of land. The following extract comes from an article in the Journal of Economic History entitled "The Role of Private Property in the Nazi Economy":

> *"[One] way in which the Nazis restricted property rights was to subject to the consent of the authorities the sale or lease (including the forced sale) of agricultural or forest land amounting to more than five acres – thereby controlling the amount of purchase money or rent. Permission had to be obtained even for the removal of implements. The law was intended to prevent land from being sold to 'unsuitable' elements, and from being used for purposes not in accord with Nazi policy. In the typical manner of National Socialist legislation the law enumerated a series of reasons for which consent could be refused, such as the violation of political and racial principles, and concluded by authorizing refusal on the grounds of 'public interest,' or in plain language for any or no reason at all. This law reflects the Nazi obsession with the idea that the farming population must be 'rooted in the soil.' By setting prices very low the authorities were easily able to prevent farmers from selling."*

There are two points of caution. First, the prohibition of sale can be effected by arbitrary governmental determinations of what the appropriate price is for sale. In South Africa's case the more likely route to obstructing sale or lease agreements would, by contrast, be to set the prices too high for commercial viability. Second, the obsession with race is notable. It is a point of major concern that the DRDLR does not provide any explicit basis on which the Registrar might deny consent for a sale under 12(1)(b), however there is little room to doubt that the some officials DRDLR would prohibit black people from being allowed to profit by selling their land to white people, due to a political ideology of race "rooted in the soil". The Burger King sale prohibition is one case in point.[5] Moreover, while headline grabbing deals like the Burger King sale could arguably be salvaged without a net cost for asset owners, applying the same racially exclusive rule to sales of millions of hectares of land held by 1,700+ CPAs is not likely to enjoy the same benefits of media scrutiny and topflight effort by the best talent in the state. As such, CPA landowners are far more likely to be left in a position where they are not able to realise the value of their own property due to state policies of racial separate development.

Domestic Precedent

In terms of the Native Land Act (1913), farmland was not permitted to be sold except in accordance with racial classification. In addition, lease contracts and similar encumbrances were prohibited except in accordance with racial classification. In the record of Sol Plaatje, who travelled the countryside to study the implementation of the Native Land Act, much of the greatest damage was done by prohibiting black farmers from leasing land from white farmers on the basis of race. A repeated argument for this was to prevent white people from taking advantage of black people under the false (and hateful) assumption that white people are innately superior to black people.

This should weigh as a heavy caution against repeated state intrusion into the rights of informed, consenting adults to conclude voluntary contracts under the pretence that the state knows better than black people how to adjudicate an owners' own best interest.

There is a second notable precedent, which is, by contrast, more benign. Under the Subdivision of Agricultural Land Act (SALA) (1970) ministerial consent is required for all sales or encumbrances (including leases over 10 years) that have, or are likely to have, the effect of subdividing agricultural land. The consent requirement even extends to leaving a single farm to multiple children as an inheritance. It also extends to a prohibition on advertising portions of agricultural land without prior consent to subdivide.

However, delays have occurred, and attempts at circumvention have thus resultantly occurred too, which sometimes result in burdensome court trials.[6] SALA was repealed by Parliament in 1998, but that repeal has not yet been put into force, and so the Act remains in force.

Even the relatively more benign precedent, grounded in the genuine public interest in preventing negative third-party effects through subdivision of agricultural land, is worrisome in terms of practicality. The concern over a new Registrar being empowered to deny consent of sales (without any statutorily defined grounds) and of leases (on the childlike "best interest" test) is all the more concerning.

Second-order Impact: Usufruct Expropriation Without Compensation

The Expropriation Bill (2020) was passed by Parliament in 2024. This allows for EWC. It has not been signed into force by President Cyril Ramaphosa, but this could happen any day. This statute states that the "power to expropriate includes the power to acquire a right to use property temporarily".

Temporary EWC runs counter to the Constitution, Section 25(2) which states: "Property may be expropriated only in terms of law of general application—...(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", and Section 25(3) which states that compensation determinations "must be just and equitable".

Temporary EWC is neither just nor equitable.

On the other hand, it is a universal truth that in real liberal democracies state action imposes costs from time to time that are not directly compensated. For example, if the state blocks traffic in one direction to allow ambulances to access a building with many injured persons, and someone stuck in the resultant traffic is unable to conclude a deal, which as a result means missing out on a significant income of millions of rands, there is no doubt that the relevant person would be unsuccessful in any attempt to sue the state for compensation.

To find the balance between cases where the deprivation of a property right is so clear and longstanding that it amounts to temporary EWC, which is unlawful, and a case such as the traffic incident described above, is inevitably a matter that courts will struggle to settle.

However, should any High Court find that a CPA has no claim to compensation *having lost an entire year's income* because the DRDLR was too slow to determine what was in the CPA's "best interest" in time for the lease to be commercially viable, that would be a harmful transgression of the constitutional protection against temporary EWC.

Put another way: few commercial farmers would expect more sympathy at court than a CPA landowner. So if a CPA landowner can be harmed by temporary EWC for a season, commercial landowners would be unlikely to expect better treatment.

Second-order Impact: Prescribed Assets

The ANC 2024 Election Manifesto stated that "The ANC will: engage and direct financial institutions to invest a portion of their funds in industrialisation, infrastructure development and the economy, through prescribed assets"[7].

Since then, there has been a notable cooling on the idea of prescribed assets, including from the South African Communist Party deputy secretary general, and deputy finance minister, David Masondo.[8]

However, should the balance of forces change in 2026 with a collapse of the present coalition due to pressures around the National Health Insurance (NHI), Black Economic Empowerment (BEE), and the 2026 national municipal elections, there is a high risk that a renewed attempt to impose "prescribed assets" will take place.

To be clear, there are already limitations on how investors can trade. For example, pension funds that enjoy tax benefits are limited under Regulation 28 of the Pension Fund Act to limit their exposure to foreign assets, and are limited in terms of how far they can concentrate investments within particular classes of assets and sectors of the domestic economy. This ensures diversification and clearly involves the state's judgment that it is able to set guardrails to secure the investors' own best interests better than would occur in an unregulated market.

However, that is fundamentally different from the relationship that the state has to minors (children) and CPA landowners, since in the former case there are abstract guardrails that are imposed against all parties equally. These are like speed limits. They also have the effect, like speed limits, of reducing the risks of negative third-party effects from reckless behaviour. However, CPA landowners and children also face the judgment of an individual official's opinion of their particular case to be determined on a discretionary basis. This power is not like the setting of a speed limit. Rather, it is like a backseat driver who has override control abilities.

That also tracks the difference between "prescribed assets" in their clearest form, and traditional liberal safeguards. During apartheid the state required pension funds to invest in particular entities, and the same argument has been made in the rainbow republic in relation to Eskom and other state-owned enterprises[9]. Again, this is not so much like the state setting a speed limit and more like the state being able to override the destination you have chosen for your investment, if some official judges that your "best interest" lies in going to some specific destination. This violates Section 25 of the Constitution, since it deprives CPA landowners of a crucial aspect of their property rights.

To date, the clearest widescale precedent establishing the state's power to usurp property rights by determining on a discretionary basis what the "best interest" of an owner is, is the CPA Amendment Act. With nearly half a million landowners having been effectively placed under a system of prescribed assets, where the assets prescribed are the land that they already own to be held, or disposed, only as consented by the state, other asset holders are in a more precarious position.

There is, however, a clear difference between the CPA consent system and prescribed assets as called for by the ANC, since the latter considers forcing the purchase, and not just refusing the right to sell, of particular assets.

Masondo's Argument

As noted above, senior South African Communist Party leader and cabinet member David Masondo recently articulated a direct rejection of the ANC's manifesto pledge to impose prescribed assets. This is worth dwelling on, not only because it points to the fact that pressure works, i.e. sustained political opposition to policy results in changes in policy outlook from political actors. It is also important because of the intelligent articulation that Masondo provides of the respect owed to property owners as well as the problem with prescribed assets generally. This argument should count in favour of CPA landowners too, and would, if only they were given similar levels of attention in political centres.

Said Masondo:

> *"There is no government intention to interfere with the investment mandates and discretionary powers of the investment managers. Money owners must provide mandates to money managers, who must in turn generate good returns for clients and impact the socioeconomic transformation [sic]. The government respects the investment mandates of pension plans, the fiduciary duties of trustees and their desire to maximise portfolio returns within acceptable risk tolerance levels."*

That level of respect ought to be paid to CPA landowners, where the analogous system of incentives applies: CPA landowners must provide mandates to CPA estate managers, who must in turn generate good returns for CPA landowners thereby positively impacting their socioeconomic development. The government **ought to** respect the investment mandates of CPA landowners, the fiduciary duties of CPA Exco members, and their desire to maximize returns on capital within acceptable risk tolerance levels.

It is important not to be naïve, and to be precise about the form of respect that the state ought to show to pension funds and CPAs and all adult owners. Pension funds have vast amounts of resources, and so are able to hire highly effective lawyers, accountants, and other service providers. Furthermore, money owners might not individually be particularly wealthy, but the number of pension investors in any particular fund is typically large enough that in the event of fraud class action suits, or analogous legal action, is highly incentivized. By contrast CPAs that are only worth a few million rand with hundreds of members, so that the net asset value is in the order of tens of thousands of rand per member, may not be so well protected by the incentives of civil litigation. So, CPAs deserve protections that might be inappropriate at large pension funds, especially protections to ensure that CPA landowners that CPA elections are properly conducted. It would be absurd for the state to sponsor board elections for investment funds, but it is highly necessary for the state to sponsor transparent leadership elections at CPAs. There are similar arguments for additional protections through information transparency requirements at CPAs.

But what is common between CPAs and pension funds is that when informed "money owners", whether value is owned as land or bonds or shares or annuities etc., make a decision to sell, in part or in whole, for a time, or permanently, then that decision is respected. For Mr Masondo, or anyone, to apply one rule of ownership to money owners in cities and towns, but a different rule to rural black landowners, is inconsistent with the rainbow republic's founding principles.

Masondo continued to identify the problem with violating this principle:

> *"The problem with prescription is that recipients of the prescribed funds may be incentivised not to manage the entities, for example, SOEs, municipalities, etc. effectively and efficiently as they would be guaranteed to get funds regardless of how they are managed. If these entities were to continue to be ineffective and inefficient, they would be boosted by prescription in the short term but would fail in the medium to the long term and fail to give any return and to repay the retirement funds, which will in turn lead to the failure of the retirement funds."*

This holds precisely for CPAs. CPA leaders are able to "get funds" from the state to support CPAs, including through "training", fuel, and farming equipment that can be sold off without being used, " regardless of how they are managed". If CPAs continue to be ineffective and inefficient they would be boosted by an amendment to the law effectively prescribing CPA assets by introducing a mechanism to halt their sale. In the short term, this boosts the security of CPA leaders, legitimate or not, but in the long term they can continue to fail without CPA members being able to cash out.

It is politically noteworthy that after years of calling for prescribed assets the ANC gave up this call just at a time when President Cyril Ramaphosa effectively imposed a form of prescribed assets against 470,000 black land reform "beneficiaries".

Battle of Ideas: Maternalist Attitude to Poor Rural Black South Africans

"Every title deed will be meaningless and the state will be the custodian of all the land. The government will then outline what use will land be for." – Julius Malema, EFF Leader, MP, 2018.[10]

From its inception in 1910 until 2024, the single most distinct and consistent quality of the South African state is probably its interest in treating healthy adult black, poor, rural South Africans like children in its custody. The fascist rhetoric of apartheid lives on in the Blut und Boden politics of contemporary race-nationalist militant parties. Julius Malema, who has chanted "kill the boer" in a packed stadium, refused to remove the threat of genocide from his political armoury, and describes himself in infantile terms as a "black child" and "son of the soil", is one obvious example.

However, not all efforts to treat healthy black South African adults like children have been spat out with rage in the traditional "paternalist" model of illiberal custodianship. Often, a "maternalist" model of illiberal custodianship has dominated, which is more soft-spoken. The terms do not point to the different genders of political actors that support the infantilisation of CPA landowners specifically and poor, rural black South Africans generally, but rather the development of a different form of political advertising, which emphasises care and empathy over structure and order – to the same effect.

In 2019 IRR Head of Media Michael Morris reported an encounter that fits this view, in my opinion. “I nearly fell off my chair in a recent radio debate when the host put it to me with levelling confidence: Isn’t the problem with giving poor black South Africans rights to property that they might just go and sell it the next morning?”

The speaker presented a maternalistic attitude towards poor black South Africans, a *mother-knows-best* type presumption.

In the book “Untitled: Securing Land Tenure in Urban and Rural South Africa”, professors Donna Hornby, Rosalie Kingwill, Lauren Royston, and Ben Cousins take intellectual custody of poor black South Africans and argue against the responsibility of private property under a system of title deeds being applicable to that group under maternalistic assumptions. Kingwill, for example, finds a case where a gambler squandered his inheritance, and extrapolates an argument against title deeds in rural South Africa more broadly.

The Motlanthe Report, an otherwise excellent document probably held in the highest esteem of any report to the Presidency in the last two-and-a-half decades, provides another indication of this problem in its most astonishing lapse in judgement. It stated (with added emphasis):

> *The CPA Amendment Bill (‘the Amendment Bill’) was recently introduced in the National Assembly. The substantive amendments introduced relate to the introduction of the office of the Registrar of CPAs, the requirement of a land use plan and* ***the requirement for consent from the Department by the community should they intend to encumber, lease or sell their property.*** *The amendments propose that the state retains ownership over the property and CPA’s [sic] role* ***be downgraded*** *to that of land management,* ***as opposed to ownership.***

To its credit, the report clearly described the proposal as a “downgrade” to CPA landowners. However, it described the state as “retaining ownership”. To be accurate, the report should have said that the amendment proposes that the state **seizes** ownership. However, the notion that poor, rural, black adults of healthy body and mind are somehow second-class citizens is so deeply ingrained that even when 470,000 landowners exist and elite politicians contemplate the seizure of their property it is not described as such, but rather it is styled as if these 470,000 were never owners in the first place as the state was their custodian all along.

Against this kind of thinking there is a small, but growing commitment to treat people with respect regardless of their race. However, the scant attention received by the CPA Amendment Act indicates that where the victims of state attacks on property rights lack the wealth to hire their own lobbyists directly, civil society leaves a rather wide, and lamentable void of (relative) silence.

Remedy

The first step to remedy the CPA Amendment is for the executive to indicate that it will not appoint a Registrar with the power to deny consent to CPA landowners. The second step is to strike down the statute. This should be done by the fast passage of a repeal of the relevant parts of Section 12 of the CPA Amendment Act. Short of this, court action will be required to vindicate the rights of CPA landowners.

Beyond that, the CPA system reform must allow CPA landowners to sell their properties on the open market. The Motlanthe Report indicates that many CPAs are unlikely to ever succeed: "where claims have been 'bunched' and artificial CPAs created, they stand little chance of success".[11] Furthermore, the 2023 report admitted that over 120 CPAs "will never be compliant" for reasons including "no economic activities". The number of CPAs that will never be compliant is much higher, but the fact that the state is willing to admit that 7% of CPAs will never work is, itself, telling. Severely and enduringly non-compliant CPAs, roughly 80%, should also have the practical option to cash out. Whatever social engineers in the Union Buildings think, landowners cannot, under the Constitution, be deprived of their property arbitrarily, and the denial of one's right to lease or sell is a clear deprivation.

That is not to say that state passivity is the solution. The state should sponsor rapid, transparent, and effective elections and facilitate membership list clarification. The state should also establish a special police task force to tackle unlawful CPA conduct, including the operation of cartels on CPA land.

Endnotes

1. Economist Hernando de Soto popularized this phrase in his ground-breaking book The Other Path: The Invisible Revolution in the Third World (1989).
2. Pg 257, High Level Panel Report, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf
3. https://iea.org.uk/blog/abolish-the-cap-let-food-prices-tumble
4. Ibid.
5. https://www.news24.com/fin24/sale-of-burger-king-south-africa-blocked-over-lack-of-black-ownership-20210601#:~:text=The%20Competition%20Commission%20has%20prohibited,equity%20fund%20for%20R593%20million.
6. https://www.fasken.com/en/knowledge/2021/07/26-the-repeal-of-the-subdivision-of-agricultural-land-act
7. https://www.anc1912.org.za/wp-content/uploads/2024/02/ANC-2024-Elections-Manifesto.pdf
8. https://www.businesslive.co.za/bd/markets/2024-09-18-pic-chair-stands-firm-on-over-prescribed-assets/
9. https://www.news24.com/fin24/economy/its-about-eskom-transnet-anc-official-on-plan-to-pursue-prescribed-assets-after-polls-20240307
10. https://www.citizen.co.za/news/south-africa/in-10-years-zimbabwe-will-be-better-off-than-sa-malema-believes/
11. Pg 234, High Level Panel Report, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf

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