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DOWN THE RABBIT HOLE OF EWC

President Ramaphosa's late night statement of 31 July is now well-read and known. It has been criticised, lauded and discussed in detail. The issue of why the statement was delivered at that time, and whether there was a good reason to do it, despite the Parliamentary review process being ongoing, lies in the realm of political commentary. As a Foundation with a mission of protecting and promoting the Constitution, we must take the statement and its intention on face value and point out what its consequences are and could be. In the Foundation's statement of 1 August we have already commented on the statement's unacceptable procedure that undermined the parliamentary process and the independence of the SABC.

The first important issue is the intent of the statement - to provide more certainty on the ANC's view of section 25 and its amendment. It may have done so for the ANC supporters on a philosophical level, but for other South Africans and especially business people, farmers and landowners, it has raised even more questions. By way of detail, there is nothing new in the statement, apart from the vague comment that the ANC will, *"through the parliamentary process, finalise a proposed amendment to the Constitution that outlines more clearly the conditions under which expropriation of land without compensation can be effected"*. This does not bring more certainty for those persons and the four presidential envoys seeking multi-billion-dollar investments for the country.

Secondly, this does not mean that the statement is exactly in line with the Nasrec resolution of December 2017. It differs from that in important aspects. The Nasrec resolution had four qualifications for the implementation of expropriation without compensation (EWC) - it should not harm agricultural production, food security, investment in the economy and other sectors of the economy. The 31 July statement has no qualifications, but some goals. The amendment to allow EWC should *"promote redress, advance economic development, increase agricultural production and food security"*. Redress is a new and not unsurprising addition. The irony that section 25 already makes explicit provision for this, is inescapable. The problem is that these goals are vague and take the measurement on EWC out of the hands (so to speak) of the stakeholders that must drive the economy. The harm that must be avoided as per the Nasrec resolution was a test that would have resided with investors, farmers and property owners. These are now taken out of the equation, as the new goals are in the party-political realm of promises and rhetoric. This is bad news for the economy and the country.

A third issue is the question of whether the details that the President outlined to be included in section 25, belong in the Constitution. The Constitution is not meant to be an ordinary act with several stipulations and a lot of detail. This should be done through legislation, just as section 25 intended when it stated that the State must pass legislation to effect land reform. It would be much better to put the detail in a new *Expropriation Act*, rather than amend section 25.



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Fourth, the way in which the statement interprets the Constitution is of major concern. *“The ANC reaffirms its position that the Constitution is a mandate for radical transformation both of society and the economy”*. It is undeniable that the Constitution has a transformative approach, but to interpret it to support and even mandate a political party’s ideology of radical socio-economic transformation goes too far. Ironically, the ANC clearly wants to bring the Constitution more in line with its own ideology, by amending a section that protects the existing property rights of all South Africans. They are apparently not satisfied with the “mandate” but want to radicalise it even further.

The fifth issue is, if an amendment makes EWC possible, what could its implications and consequences be? Section 36 makes it mandatory for any law to have “general application”. This means that the State may not make a law that applies only, for instance, to people with blue eyes and forbid them to drive motorcars. Such a law would not be one of general application and would be unconstitutional. It follows that if amendments to section 25 - based on the view of the people that the Constitution must be “more explicit” about EWC - target only certain groups of people (such as white South Africans), it would be in contradiction with section 36 - and therefore unconstitutional. In addition, if the amendments were to be such that EWC is allowed and that the oversight of the courts in respect of what is “just and equitable” compensation is removed altogether, it would be against the principle of the Rule of Law, the hallmark of our Constitution. And ironically, President Ramaphosa also confirmed this as the case in a “proper reading” of the present Constitution. It must also be stated that “just and equitable compensation” for expropriation is a universally accepted legal and moral principle. A change to section 25 affecting the Rule of Law would need a 75% majority, according to section 74(1) of the Constitution. These issues will have to be kept in mind by the governing party in their approach to amending section 25.

In the sixth place, the concept of EWC is a drastic departure from the National Development Plan (NDP) - of which President Ramaphosa was the deputy chair. The NDP notes the dual purpose of the property clause; preventing the confiscation of property without due compensation while providing a moral basis for redress measures, including land reform. The NDP has previously found broad consensus across party political lines as a blueprint for South Africa’s shared future. This departure from the NDP suggests a governing party abusing its dominant position, despite multi-party democracy being a feature of South Africa’s foundational values. Importantly, the NDP establishes firm targets for land redistribution, as well as concrete measures to achieve land redistribution. Such measures include the identification of transferable farms, and beneficiaries - taking place at a district level, with the facilitation of district land reform committees. These recommendations of the NDP have never been implemented.

The dilution of property rights does not bode well for either the country or its economic growth. An immediate consequence of the resolution to amend the Constitution has been an increase in the number of unlawful land occupations - many of them leading to violent clashes between groups with competing interests over the same piece of land. Such occupations have obvious implications for farmland where crop production is threatened,



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which in turn may have dire consequences for South Africa's food security. In any event, investors are lured by both stability and certainty in a country's policies - key features which President Ramaphosa's announcement lacked. A cursory reading into the ANC position on EWC reveals contradictions and opaqueness. Compare the ANC's two-day Land Summit in May, in which the party resolved not to amend the Constitution, to that of the President's late-night announcement. Given this track record - how much trust and be placed in the ANC to guide the country adroitly through this morass?

Finally, as so many commentators have already stated: there is no proof or even an inkling that the lack of adequate land reform since 1994 is due to section 25. On the contrary, it has been shown (amongst others, by the Motlanthe High Level Panel Report commissioned by Parliament's Speakers' Forum) that the problem lies with the government's capacity, the corruption in the relevant departments, a lack of a legislative framework and the lack of political will. The question arises: is the Report of the High Level Panel now dead in the water, or would it also be taken into account when the Constitutional Review Committee finalises its own report?

The amendment of section 25 will not result in proper land reform but will have all the negative effects listed in the ANC's Nasrec resolution: harm to agricultural production, harm to food security, harm to other sectors of the economy and harm to international and national investments. As *City Press* editor, Mondli Makhanya, eloquently stated over the weekend: *"We will rue the day (and it was last Tuesday) we chose populism over the rule of law."*

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