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## **PROPERTY RIGHTS: ARE WE APPROACHING THE END GAME?**

*By Dave Steward: Chairman, FW de Klerk Foundation*

Earlier this week, Jackson Mthembu, the ANC Chief Whip, announced that contrary to expectations, the government intends to amend section 25 of the Constitution before the May election.

He also indicated that the revised *Expropriation Bill* (published in December) will be considered by Parliament “very soon” and will be “passed without hesitation.”

All this comes on the heels of remarkable explanation of South Africa’s land reform plans that was given to participants in the recent Davos conference by Mr Masiphula Mbongwa - the Director-General for the War Against Poverty in the Department of Rural Development and Land Reform. In reply to a question on how South Africa planned to avoid a Zimbabwe scenario, he said that:

“The ANC wants

A) to include section 25(4) of our Constitution in the expropriation law (*the section states that property is not limited to land and gives a very broad definition of ‘the public interest’*);  
B) a National Land Act that is like our *National Water Act 36 of 1998*; our *National Environment Management Act 108 of 1998*; and our *Mineral and Petroleum Development Resources Act 28 of 2002* (*all of which incorporate the concept of state custodianship of national resources*).

C) An amended section 25 of the Constitution to

- a. vest land in the people of SA;
- b. affirm the rights of everyone (*presumably by granting present freehold owners leasehold rights?*);
- c. have land value tax on section 25(3) land values;
- d. have a statutory entity for land administration systems; and
- e. remove the 1913 restitution cut-off date. (*my comments are in italics*)

Unsurprisingly, those present at Mr Mbongwa’s Davos briefing were not reassured. Was he misquoted? Did he misspeak - or was he misunderstood? Apparently not: he has since then proudly posted exactly the same message on Twitter.

Most observers thought that the constitutional amendment that the ANC had in mind would be fairly innocuous - perhaps an inclusion in section 25(3) that under some of the listed circumstances zero compensation might be paid.

Can it be possible that the Government is seriously contemplating a constitutional amendment that would, in effect, transfer ownership of all land in South Africa to “the people” with the State as its custodian?

The implications would be truly appalling and could precipitate exactly the type of Zimbabwe scenario that Mr Mbongwa tells us it would be intended to avoid.



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And yet Mr Mbongwa's scenario would be perfectly in line with the ANC's National Democratic Revolution (NDR) and its latest iteration - Radical Economic Transformation.

The redistribution of land, property and wealth has been a central theme of ANC/SACP ideology since 1956, when the *Freedom Charter* declared that "all the land shall be redivided among those who work it." The NDR calls unambiguously for the "deracialisation of ownership and control of wealth, including land". "Radical Economic Transformation", the latest iteration of the NDR, is defined as "a fundamental change in the structure, systems, institutions and patterns of ownership, management and control of the economy in favour of all South Africans..."

Although the soon-to-be-adopted *Expropriation Bill* is more closely aligned to section 25 of the Constitution than its predecessors, it still includes a number of very problematic provisions:

- The definition of expropriation as "the compulsory acquisition of property by an expropriating authority or organ of State" might open the way to deprivation of property without compensation in situations where the State assumes custodianship - and not acquisition - of property - in line with the 2013 Constitutional Court judgment in *AgriSA v Minister of Minerals and Energy*. This would seem to be what Mr Mbongwa has in mind.
- The definition of "property" follows the very broad definition in section 25(4) and could thus include any property that the State might wish to acquire in the "public interest".
- The definition of the "public interest" - also taken from section 25(4) - is so broad as to be meaningless. In terms of section 25(4) "the public interest includes (*and therefore is not limited to*) the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources." Could it include any transformative action or policy that the State might deem to be in the public interest?
- The *Expropriation Bill* also deviates from the Constitution by listing circumstances under which zero compensation may be paid for expropriated property that are not included in the circumstances listed in section 25(3) - particularly "where land is held for purely speculative purposes." The Bill states that the circumstances under which zero compensation might be paid are "not limited" to those that it lists - and are therefore presumably unlimited.

The Bill's definition of expropriation raises the possibility that the whole debate about expropriation without compensation may be a smoke-screen to conceal the government's real plan to vest all land "in the people". It has already vested water and mineral resources in the people (with the State as custodian) and has indicated in the *Preservation and Development of Agricultural Land Bill* that it also wants to do so with regard to agricultural land.

The problem is that according to the Constitutional Court in the 2013 *AgriSA v Minister of Minerals and Energy*, if the State becomes the custodian of resources on behalf of the



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people there has been no acquisition by the State and compensation might therefore not be payable.

Nevertheless, it is surely incomprehensible that President Ramaphosa - who is so intent on attracting foreign investment; stimulating higher economic growth rates and tackling poverty and unemployment - could possibly approve of a constitutional amendment that would so comprehensively nullify all these crucial objectives.

So, what is going on here? Mr Mbongwa's views cannot be ignored: he is after all a Director-General in the Department responsible for land reform. Is he simply a loose cannon? Is all this another manifestation of the power struggle within the ANC between pro- and anti-Ramaphosa factions? Or is this the ANC's first step in luring the EFF back into the ANC fold? After all, the EFF vociferously supports the idea that all land should be vested in the people of South Africa.

The phrasing of the ANC's forthcoming constitutional amendment could be a make or break issue for South Africa. Experience throughout the world and throughout history has shown that that property rights are essential for economic growth, prosperity and social development and for the maintenance of free and democratic societies.

This is a question that will affect the property rights of all South Africans - including the 7.4 million black households that own their own homes and the 1.16 million black households that own agricultural land.

It has nothing to do with real - and needed - land reform.

So, what is to be done?

- Organised business, NGOs, the media, opposition parties and foreign governments should urgently ask the government for clarification of Mr Mbongwa's statement.
- If it transpires from the Government's response - or from the wording of the proposed constitutional amendment - that Mr Mbongwa has correctly described the government's intentions - all South Africans who are concerned about the future of their country should mobilise all their resources and use all the powers they enjoy under the Constitution to oppose the government's plans with every fibre of their being.
- They should make it clear that even in terms of the ANC's own strategic analysis the 'balance of forces' are not propitious for such a radical move.
- They should subscribe to the online petition against the *Expropriation Bill* that is being circulated by the Dear South Africa website - and they should urge all their friends to do the same.