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EWC OR ECONOMIC RECOVERY?

By Dave Steward, Chairman of the FW de Klerk Foundation

The Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution convened a “constitutional dialogue” in Cape Town on 6 November 2019 to which it invited members of the public and civil society organisations - including the FW de Klerk Foundation’s Centre for Constitutional Rights (CFCR).

The Ad Hoc Committee was appointed by Parliament following a resolution by the National Assembly on 6 December 2018, “to initiate and introduce legislation amending section 25 of the Constitution”. The Ad Hoc Committee was tasked with making “explicit that which is implicit in the Constitution” regarding expropriation without compensation (EWC) and was required to finalise its work by 31 March 2020.

Civil society organisations and members of the public were courteously welcomed by the Ad Hoc Committee’s Chairperson, Dr Mathole Motshekga. He was assisted by former Constitutional Court Judge Johann van der Westhuizen - who acted as the facilitator of the dialogue.

Dr Motshekga called on all present to put aside their vested interests and stressed the need for dialogue on the draft constitutional amendment. He said that the land problem had been created by the British - and specifically by Cecil Rhodes - who had “left all his worldly goods to a secret society to spread British domination throughout Africa”. It was not an African/Boer problem. It should not be seen as a black/white struggle - although there would inevitably be some “pain” for some of those (whites) involved. Consultation was at the heart of nation building. The original sin lay in colonisation and in the entrenchment of racial colonial rule. This unhappy legacy was the root cause of South Africa’s current triple crises of unemployment, poverty and inequality.

Dr Motshekga invited the dialogue to consider two amendment options (in italics). The first would amend subsections 2(b) and 3 of section 25 to the effect that expropriation would be:

“subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those effected or decided or approved by a court: provided that a court may determine that no compensation is payable in the event of expropriation for the purposes of land reform. Where payable, 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 the relevant circumstances...”

The second option was a little blunter: it would insert a new subsection 4(a) to the effect that:

“Notwithstanding the requirement for compensation contemplated in subsections (2), (3) and (4), land may be expropriated without payment of any compensation as a



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legitimate option for land reform in order to redress the results of past racial discrimination.”

All this was, however, still too tame for Floyd Shivambu of the EFF. He rejected out of hand Dr Mothsekg'a's efforts to exonerate the Boers - and introduced an amendment to the effect that:

“The State should be the custodian of all South Africa's natural resources, inclusive of land, mineral resources and water, and relevant legislation should be passed to clearly define and contextualise State custodianship of natural resources.”

Some of the non-ANC participants in private discussions thought that the first option might not be too bad because the Courts would decide whether compensation should be paid. Others were more skeptical because the ANC intends to introduce ordinary legislation to prescribe the circumstances under which no compensation would be payable, and also because of the growing tendency of the Courts to find in favour of the State in transformation cases.

In terms of the amendment timetable, a draft Bill will be presented to the Ad Hoc Committee by 27 November 2019. It will then be referred to the National Council of Provinces and to the National House of Traditional Leaders. It is envisioned that the draft Bill will be published for public comment early in January 2020, in a process that will last “at least three weeks”. Public hearings will be held in February and the Bill will be tabled for finalisation by 31 March 2020.

Representatives of some of the NGOs present asked what the purpose of the dialogue was: was it simply to discuss the proposed amendments - or could they also question the need and desirability for the amendment of section 25, in the first place? Dr Motshekg'a replied that the dialogue was intended to deal only with the nature of the amendments, since Parliament had already decided that the Constitution must be amended.

Judge Van der Westhuizen said that everyone present would nevertheless be welcome to make a contribution. He recalled that he had been one of the principal drafters of the Constitution and that the property clause had been one of the most difficult provisions to negotiate.

In the subsequent discussion, representatives of Agri SA and the Transvaal Agricultural Union pointed to the catastrophic consequences of EWC for property rights, the future of the agricultural sector and the economy. What would the impact be of an EWC constitutional amendment at a time when Minister Tito Mboweni was warning that South Africa was staring down a financial cliff - and Moody's has just downgraded South Africa to its lowest investment grade - with a negative outlook?

The response of the ANC and EFF members present was defiant. Nothing should be permitted to stand in the way of the resolution of the land issue.



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At the very time that the Ad Hoc Committee was considering legislation that will seriously dilute property rights, President Ramaphosa was hosting the 2nd South African Investment Conference at the Sandton Conference Centre. He succeeded in securing investment pledges of some R363 billion. This is a wonderful achievement for which the President should be warmly congratulated.

But how much of this investment will materialise if the ANC persists with its plans to amend the property clause - or if it goes ahead with its ruinous NHI proposal? How will Moody's react to the proposed constitutional amendment when it gives its next assessment of our credit-worthiness on 22 November?

All this has created a major dilemma for President Ramaphosa: on the one hand he is committed to reviving the economy; on the other he has to implement the resolutions that the ANC adopted at NASREC and in Parliament. Many observers hope that he will somehow manage the EWC constitutional amendment in such a manner that it will have the least possible impact on property rights and on the economy.

However, the message from the Ad Hoc Committee dialogue was clear: the ANC and EFF members present were deadly serious about amending the Constitution to redress what they fervently believe was the humiliating dispossession of "their" land during centuries of colonial and apartheid rule. The amendment of the property clause is - and always has been - a core article of faith in the ANC's National Democratic Revolution ideology.

We should have no illusions: for them this is clearly a black/white struggle. For non-ANC South Africans, the amendment of section 25 would be another body blow to the constitutional accord that we South Africans negotiated 25 years ago.

The crunch will come with the amendment of the property clause early next year: the ANC can either proceed along the road of economic recovery and social cohesion that we saw displayed at the Investment Conference - or it can continue along the road to economic collapse, social crisis and racial exclusion that was so clearly mapped out at the Ad Hoc Committee's dialogue.

President Ramaphosa must decide: he can no longer travel down both roads at the same time.