



## **THE IDEOLOGICAL BLINDNESS TO THE ECONOMIC DAMAGE OF EXPROPRIATION WITH NIL COMPENSATION**

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The deadline for comments on the draft amendment bill on section 25 of the Constitution (the so-called *Constitution Eighteenth Amendment Bill*) is fast approaching. Numerous organisations are busy putting their comments in writing. The majority of these will oppose it, while committing themselves to the urgent need for land reform in terms of the present Constitution.

The Amendment Bill proposes the following changes to section 25(2) and (3):

- Notwithstanding the present stipulation that expropriation is linked to compensation, “a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil”;
- “National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil”.

The fact that the amendment maintains the authority of the courts (and with that the Rule of Law), and that expropriation is limited to land, could be seen as positive. But the prescription that any and all improvements could also be expropriated with nil compensation is negative and cause for concern. In addition, the fact that ordinary legislation (that can be passed with an ordinary majority of 50% plus one) could tie down the courts with regard to the circumstances in which nil compensation would apply, is also worrying. If legislation stipulates that in the case of land held for speculative purposes, that land could be expropriated with nil compensation, and there is an appeal by the owner, the court would have no choice but to rule in line with that legislation. Only when the owner appeals and follows the long and expensive process to the Constitutional Court would there be relief.

Expropriation without compensation (EWC) formally became ANC policy in December 2017 at the Nasrec conference. The Ramaphosa grouping, under pressure from the Zuptas on EWC, countered with four conditions under which EWC could be implemented. The change of section 25 should not be implemented in a way that would harm agricultural production, food security, future investment in the economy and other sectors of the economy. The parliamentary motion on EWC in early 2018 had a slightly different emphasis: the change to section 25 should be implemented in such a way that it would increase agricultural production and strengthen food security.

Despite these two decisions, nothing is mentioned in the preamble of the Bill about agricultural production, food security and future investment in the economy. In fact, it seems that the economy does not play any role in the amendment of section 25 and its objectives. The governing party had therefore deviated from its own resolution at Nasrec, and Parliament from its own motion. The emphasis in the preamble is solely on the redress of historic wrongs



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and to ensure “equitable access to land” and to “empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programmes”. As noble and necessary as these objectives are, it is clear that they would not make an iota of difference to increased agricultural production and food security, and even less to attracting new investments, economic growth and job creation.

In fact, there are indications that the mere planning to allow EWC to happen, has already impacted agricultural production and food security negatively. This can be seen, amongst others, in the large number of farms that are for sale.

Even worse, there is proof that the plans to implement EWC have already harmed the economy. South Africa’s GDP for the past two years is the worst since World War II. The recent publishing of the World Heritage Foundation’s 2019 *Index of Economic Freedom* is further proof of this fact. The Index measures four factors in each country that are evaluated: the Rule of Law (specifically including property rights), the size of government, regulatory efficiency and the openness of markets.

The Index evaluates the degree to which a country’s legal system allows individuals to own and utilise private property, and how that right is protected by the state. The Index provides a measure on the way a country’s legislation gives effective protection to the right to private property, including the possibility of expropriation.

The *Index of Economic Freedom* ranks 180 countries in five categories:

- Economically free (8 countries, with an index point between 100 and 80);
- Economically mostly free (29 countries, with an index point between 79.9 and 70);
- Economically moderately free (59 countries, with an index point between 69.9 and 60);
- Economically mostly not free (64 countries, with an index point between 59.9 and 50);
- and
- Economically repressed (22 countries, with an index point of between 49.9 and 40).

At the end of 2019, South Africa was ranked 102 out of the 180 countries evaluated. Our index point was 58.3 and we fell into the category “mostly not free”. More importantly, South Africa fell 4.7 index points in one year, out of the category “moderately free” and is now considered to be “mostly not free”. According to the Index, the most important reason for this decrease is the worsening perception around property rights. In 2018 our index point specifically on property rights was 67.7. In one year, the year in which EWC became a strong possibility, we fell with 8.9 index points (or 13%) to 58.8. To put this in a broader context: in that same year, the world average increased from 51.5 to 52.3 and that of sub-Saharan Africa, from 38.3 to 38.9. South Africa’s fall is a dramatic one and can only be explained by the plans to make EWC a reality.

South Africa’s regression in economic freedom (read: property rights) is the third largest in the index. Only Tonga (5.4 index points) and Vanuatu (13.1 - an island in the South Pacific)



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fared worse. Other countries that regressed are not the best company: Tajikistan (2.7), Tunisia (3.5); Zimbabwe (3.6), Sierra Leone (4.3), Cuba (4.1) and Kiribati (3.5).

Why is this ranking important in the context of EWC? Investment, economic growth (including agricultural production and actually any economic activity) and the concomitant job creation, is first and foremost a question of perceptions. The investor or businessperson asks: “Will my investment grow?” and “Will it be safe?” If there is the slightest doubt, he/she would rather go elsewhere. Therefore, on the question of whether I would invest in a country where economic freedom has deteriorated and the perception of property rights has regressed with 13% in one year (the third most in the world), the answer will be a resounding “no!” And this same reasoning creates the situation where South African businesspeople (including farmers) also do not have confidence to invest locally and therefore some are hoarding millions of rand in cash.

The fact is that there is an almost one hundred percent correlation between economic freedom (of which property rights is an important part) and investment, economic growth and prosperity. The top 35 countries in the Index (“free” and “mostly free”) attract the best investments and have the best economic growth, and the lowest unemployment in the world. And this does not only include the bigger developed economies like Switzerland (4) and Singapore (2), but also some emerging economies such as Georgia (16), Chile (18) and Rwanda (32). On the other hand, the 10 countries at the bottom of the Index (economically repressed) have the highest unemployment, the lowest economic growth and the least investment. Amongst these are Zimbabwe (175), Eritrea (177), Cuba (178) and Venezuela (179).

South Africa’s regression in economic freedom and property rights already started while EWC was still in the planning phase. One shudders to think what will happen if it were to become reality. In its 2019 report on South Africa, the World Bank writes that economic growth was “anaemic” and that it fell to 0.4% per year. The World Bank ascribes this situation to “continued policy uncertainty” and “repressed business confidence”. The plans to make EWC a reality definitely play a role in this regard.

One has to be (ideologically) blind not to see the correlation between the protection of property rights and investment, economic growth and prosperity. It is clear that the governing party (and especially its left wing) and the EFF on its left have no clue as to how a modern economy functions. Their point of departure is that land is equal to prosperity. But as the late Harry Oppenheimer said to a young Cyril Ramaphosa: “A mine is only a hole in the ground” (without the knowhow to make more of it). In the same way, a farm is merely a barren piece of land - without the expertise to produce something on it. And at the heart of this is the property right on the land, leading to utilisation and improvement of that land. And this cannot be without protection of that property right by the State.

Despite all this international information and scientific proof, the *Constitution Eighteenth Amendment Bill* is being pushed through Parliament to enable expropriation with nil compensation. To make it worse, the ANC’s NEC has, at its recent Iekgotla, stated that it wants the Executive (read: ANC leadership) to decide on when expropriated land should be subject



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to nil compensation (and not the courts, as the amendment reads at present). All of this creates policy uncertainty (especially on the protection of property rights), prevents new investments and harms the economy. It will also harm agricultural production and food security. It will put South Africa back decades - and will place us in the company of Zimbabwe and Venezuela. But perhaps this is what the ideologically blind want.

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