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WHAT ARE THE ANC'S OPTIONS FOR CHANGING SECTION 25?

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Now that we know the ANC will support an amendment of section 25 to enable expropriation without compensation (EWC), the question is, what potential changes can be proposed? There are views that together, the ANC and the EFF will get a comfortable two-thirds majority, and be able to change section 25 "as they like". There are others who believe that any change to section 25 will require not only a two-thirds majority but because property rights are so central to economic prosperity and the achievement of other individual rights such as dignity, any change to section 25 will require a 75% majority. Where lies the truth?

The most important part of section 25 that can be amended to achieve the political objectives of the ANC (and the EFF) is section 25(2):

*"Property may be expropriated only in terms of law of general application -
(a) for a public purpose or in the public interest; and
(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."*

The two key issues are "law of general application" and "compensation... which [has] been... agreed to... or approved by a court". Law of general application essentially means that a law must apply to everyone, not for example, just to a particular race group. And the compensation for expropriation must, if not agreed upon, be determined by a court. The courts thus have an oversight role in expropriation, to determine if the compensation is "just and equitable" (section 25(3)).

There are, broadly, three scenarios for amendments to section 25(2). The first is that the principle of EWC is proposed as an exception to the general rule of section 25(2) (that compensation must be paid) but that the details are fleshed out in a new *Expropriation Act*.

Considering comments of ANC leaders and experts, there are four categories proposed here, namely land:

- Abandoned by the owner(s);
- Where owners have permitted non-owners to inhabit or work the land for long periods;
- Which is unused; and
- Which is underutilised.

These exceptions will then be expanded upon in a new *Expropriation Act* and may be subject to EWC. The application of these exceptions as per the *Expropriation Act* will automatically be left to the oversight of the courts (as is the case with all legislation).



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The second scenario is that the details of the exceptions are included in section 25(2), while retaining the court oversight and without amending the “law of general application” of section 25(2). The effect of this scenario will be basically the same as scenario one.

In both of these scenarios, it is possible that section 25(4)(b), which states that property is not limited to land, could also be amended to make it clear that EWC is only applicable to land. This assurance has been offered numerous times by ANC leaders to those who fear that savings, shares and intellectual property can also be expropriated without compensation. This may give the ANC a way to get buy-in from parties like the DA for a nuanced amendment of section 25(2).

The third (and worst) scenario is where section 25(2) is fundamentally amended to make EWC the norm, at least in respect of land. With such an amendment, the oversight of the courts regarding EWC could be removed from section 25(2); which means that section 25(3), which states that compensation must be “just and equitable”, will also be changed. In addition, it can be stated that EWC is specifically applicable to land owned by white South Africans.

How realistic is it that these changes could be made by Parliament? The ANC, with 249 out of 400 votes in the National Assembly (62%), does not have the required 66.6% (267 votes). They need 18 votes from other parties to reach 267. In scenarios one and two, it is unthinkable that the EFF will offer their 6% (19 votes) to support the proposed amendments, because these do not at all resemble what their party is trying to achieve. And retaining the oversight of the courts and law of general application will never fit into the EFF's wheelhouse. It is also highly doubtful whether any other party will support the ANC in EWC. The DA with 89 votes (22%), COPE, the ACDP and the FF+ (each with three votes) are strong opponents of amendments to section 25. The IFP has 10 votes (4%) and will only support such proposals if the land of the Ingonyama Trust is safe. Together, the other smaller parties have 17 votes, one too few for the 18 that the ANC needs to get the two-thirds majority.

With scenario three, the ANC - probably following assurances and other concessions - could possibly count on the EFF's support. It is close enough to what the EFF wants, especially if they can show their supporters that they also received other concessions from the ANC - all in the pursuit of their own policy of complete nationalisation of land. However, if scenario three (or any permutation thereof) is passed by a two-thirds majority, the matter is far from over. The reasons for this are mentioned above, namely the *oversight of the courts* and the principle of *law of general application*.

Chapter 1 of the Constitution contains several values, which, according to section 74, may only be amended with a 75% majority. Included are the supremacy of the Constitution and the Rule of Law. To remove the Rule of Law (i.e. the oversight of the courts) from the protection of one of the basic human rights in chapter 2 (right to property), means that the Rule of Law itself is affected. For this amendment, a mere two-thirds majority is not sufficient, and a 75% majority is required. For example, in scenario one or two, the courts



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can objectively determine whether land is underutilised or unused, otherwise it will be left to the politicians and officials, and we will find ourselves on the road taken by Zimbabwe. If this oversight is omitted from an amended section 25, objectors will have grounds for appeal to the Constitutional Court that a majority of 75% is required, and the Court can make such an order.

Section 36 of the Constitution further states:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justified in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors..."

The right to own property and not to be deprived thereof in an arbitrary manner, may therefore only be limited in terms of law of general application, i.e. something which applies to all South Africans - and not only a certain racial group. Chapter 1 refers to this as the constitutional value of non-racialism (1(b)). If this is affected because EWC becomes applicable only to white South Africans, the requirement for a 75% majority kicks in.

In summary: if an amendment to section 25 results in the review of the courts being removed from the expropriation process and/or that the EWC process does not apply to all citizens, but that only one racial group is targeted, that change requires a 75% majority.

It is therefore clear that the proposed change of section 25 is by no means simple. President Ramaphosa must surely be aware that this is not just about the amendment, but also about how to phrase it in such a way as to achieve a two-thirds majority, or 75% support, and that such an amendment could have serious legal consequences. Ordinary South Africans who are concerned about the amendment of section 25 to allow EWC can also be assured that it will not easily be done. However, all need to remain involved and continue to voice their opposition, loudly and clearly.

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