

Press Release

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South African Institute of Race Relations
The power of ideas

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IRR to launch legal challenge over major procedural shortcomings in EWC process

The Draft Bill to amend Section 25 (the property clause) of the Constitution to allow expropriation without compensation (EWC) has been published. It is to be gazetted next week for public comment over the December holidays, and then again for a short period in January.

Contrary to all the assurances provided by the ANC – and the mandate given to the Ad Hoc Committee charged with formulating the amendment – the Draft Bill does far more than merely ‘make explicit that which is implicit’ in the existing wording of Section 25.

First, the Draft Bill makes it clear both land and ‘any improvements thereon’ are to be subject to EWC. However, the Ad Hoc Committee’s mandate is to deal with land alone. Buildings are, of course, immovably attached to land that may be expropriated, but the additional value of these structures can always be calculated. Compensation for such investments must at least be paid to strike the ‘equitable balance’ required by Section 25.

Second, the Draft Bill empowers Parliament to adopt any number of subsequent statutes (all of which could be passed by a simple – 51% – majority), which will set out ‘specific circumstances where a court may determine that the amount of compensation is nil’.

This sub-section vastly extends the circumstances in which ‘nil’ compensation could be paid. In fact, it opens up an endless vista of potential EWC takings. For this reason too, the sub-section does far more than make ‘explicit that which is implicit’ in the existing Section 25.

If the Draft Bill is enacted into law, at least three possible statutes could be adopted under the new subsection 3(A). First, Parliament could enact the current Expropriation Bill of 2019, which has a vague and easily expandable list of five instances in which nil compensation may be paid.

Second, in keeping with proposals put forward by the Presidential Advisory Panel on Land Reform and Agriculture, the current Expropriation Bill could be amended in two ways. Its vague and expandable list could be doubled from five to ten instances where nil compensation is merited. In addition, a new clause could state that ‘nil’ compensation may be paid whenever a local municipality has identified land as suitable for redistribution but its owner has refused either to donate it, or to sell to the municipality at a ‘minimal’ price.

Third, Parliament could enact an additional statute, also by 51% majority, which vests the custodianship of all land in the state – and adds this expropriation is a ‘specific instance where a court may determine that the amount of compensation is nil’.

The proposed changes in the Draft Bill are anything but minimal. Nor are they consistent with the Ad Hoc Committee’s mandate. In addition, the way in which Section 25 is being amended is contrary to Section 74 of the Constitution, with its important procedural rules for amending the Bill of Rights.

Contrary to Section 74, a two-stage method is being used to adopt this EWC amendment. The Constitutional Review Committee effectively decided that an EWC amendment was needed, while Parliament is now confined to deciding on the wording to be used. Yet Section 74 clearly requires a ‘one-stage’ process, in which Parliament itself must fully consider the need for an amendment to a guaranteed right, as well as what the wording of any new clauses should be.

This unconstitutional conduct and abuse of the parliamentary process cannot go unchallenged – and especially not when the resulting damage to confidence, investment, employment, growth, and prosperity is likely to be so great.

The IRR therefore plans to challenge all these major procedural shortcomings in litigation due to commence in January or February 2020.

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