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Delivering on 'radical' change, if not on growth or jobs

In August 2012 the Cabinet adopted the National Development Plan (NDP) as South Africa's policy blueprint from now until 2030. The plan is supposed to boost the economic growth rate to 5.4% of GDP and help generate 11m jobs. At its national conference in Mangaung (Bloemfontein) in December 2012, the ruling African National Congress (ANC) also endorsed the NDP, adding to its apparent authority.

Many in the private sector and the media have hailed the NDP as a formula for market-driven growth. Yet since the plan's adoption, the ANC has been pushing forward with a number of statutes and bills that greatly increase the State's interventionist powers and clearly put the redistribution of the existing economic pie well before endeavours to expand it.

Examples range from new affirmative action and black economic empowerment rules to legislation affecting land, mining, oil, the security industry, and investors in general. All these are also examples of the 'radical' and 'decisive' action to which the ANC also committed itself at Mangaung in this 'second phase' of South Africa's transition.

This brief overview examines the most important statutes adopted or bills proceeding through Parliament, but cannot purport to cover all the shifts envisaged.

Affirmative action

The ***Employment Equity Amendment Act of 2013*** was signed into law by President Jacob Zuma in January 2014 but has yet to be brought into operation. It removes many of the defences on which designated employers (those with 50 employees or more, or annual turnover above specified thresholds) who failed to meet racial targets at management levels could previously rely. Instead, it shifts the onus on to them to prove they have acted 'reasonably'. The Act also cuts short enforcement processes and at least triples the penalties that can be imposed on firms that fail to discharge this onus. At worst, firms can be fined 10% of annual turnover, a penalty high enough to close down many businesses, as the Government's own regulatory impact analysis has warned.

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Under the amended Act, the minister of labour, Mildred Oliphant, has gazetted ***draft regulations*** stating that larger employers (with 150 employees or more) must use national demographics 'as a guide' in setting racial targets for top and senior managers, plus professional employees. Targets for skilled, semiskilled and unskilled workers must be based on the average of the regional and national profiles. For designated employers with 149 employees or less, national demographics are to be used for top and senior management, and regional demographics elsewhere.

This will prejudice coloured people in the Western Cape, who make up 51% of the economically active population (EAP) in the province but only 11% of the national EAP. Under these new rules, companies in the Western Cape might have to 'import' Africans to meet national targets, while coloured people will often be in 'over-supply', especially in senior posts. This, as the ANC seems to desire, will put pressure on them to move elsewhere if they want such jobs.

The regulations will also harm Indians in KwaZulu-Natal, who make up 11% of the provincial EAP but only 3% of the national one. Indians throughout South Africa may also battle to find management and professional posts, as they already hold more of these (6.6% at senior management level, for example) than their share of national demographics would allow.

The ***Women Empowerment and Gender Equality Bill of 2014*** (the Gender Bill) was adopted by the National Assembly in March 2014 and is likely soon to be signed into law. The measure applies to all public and private bodies with 150 or more employees (or annual turnover above specified thresholds) which are designated by the minister of women, children, and people with disabilities.

A director or chief executive may also be jailed for up to five years under the Gender Bill.

The Gender Bill requires all such bodies to 'achieve the progressive realisation of a minimum of 50 per cent representation' for women in 'decision-making positions and structures, including boards'. All economic empowerment laws must also aim at this 50% target, which is to override contrary targets in any other law.

The minister 'must' review the plans and implementation measures of designated public or private bodies to achieve these goals, and may 'recommend' steps to improve them. A private firm which fails to provide requested information or comply with the minister's 'recommendation' is guilty of an offence and punishable by a fine of up to 10% of its annual turnover. 'A director or chief executive' of such a firm may also be jailed for up to five years.

Those convicted of fronting may be imprisoned for up to ten years.

Black Economic Empowerment

The ***Broad-Based Black Economic Empowerment Act of 2013*** has received Mr Zuma's assent but has yet to be made operative. It criminalises 'fronting', or the misrepresentation of black economic empowerment (BEE) status, while defining 'fronting practices' in extraordinarily wide terms. Those convicted of fronting may be imprisoned for up to ten years or, in the case of companies, fined up to 10% of annual turnover. They may also be barred from doing business with the State for up to ten years.

A year after the amendments take effect, the new statute will trump all conflicting BEE laws already in force. Though the relevant wording is inconsistent and vague, this provision could allow the generic codes of good BEE practice to take precedence over the mining charter, for one.

The Department of Trade and Industry (DTI) has gazetted new ***generic codes***, which will come fully into effect in April 2015. These require all companies, including qualifying small enterprises with annual turnover of between R10m and R50m, to comply with all elements of BEE, including ownership. Changes to BEE requirements will make it much harder for firms to gain good BEE scores, which will affect their capacity to do business with the State and other companies.

Mining and oil regulation

The ***Mineral and Petroleum Resources Development Amendment Bill of 2013*** (the Mining Bill) was approved by the National Assembly in March 2014. This unsettles the 'first-in, first-served' principle governing applications for mining rights, while empowering the mining minister to demand the beneficiation of a prescribed percentage of mineral products at 'mine-gate' or 'agreed' prices. This last provision is an advance on earlier versions of the Bill, which would have allowed the minister alone to decide on a 'discounted' price — but agreement on prices may not be easy in practice to achieve.

The minister may also declare specified minerals as 'designated' or 'strategic'. Designated minerals may not be exported unless producers have first supplied the proportions prescribed for local beneficiation. Strategic minerals may be subjected to both export and price controls, it seems. The Bill gives the minister unprecedented discretionary powers in many spheres, and threatens mining companies with maximum fines exceeding 10% of annual turnover, plus jail terms of up to four years, for failing to fulfil the ambitious demands laid down in the revised mining charter of 2010.

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The ***Mining Bill*** also applies to off-shore oil and gas exploration and production. It gives the State a 20% 'free carried interest' (or free stake) in all new ventures of this kind. It also 'entitles the State to a further participation interest' of an unspecified percentage, to be attained either via 'acquisition at an agreed price' or through a 'production sharing agreement' obliging the petroleum company in question to 'share…the extracted resource' with the State. An earlier version of the Bill put this additional interest at 30% and expressly limited the State's potential stake to a maximum of '50% per petroleum operation'. Now, this ceiling has fallen away, leaving it open to the State to demand as much as an 80% additional share, over and above its 20% free carry. Since the Government will be 'entitled' to this additional stake, oil companies may find it difficult to negotiate an adequate price.

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'We are on the path of changing the mining and petroleum industry whether you like it or not,' the mining minister, Susan Shabangu, told MPs on the day the ANC pushed the Bill through the National Assembly. 'Change is painful, change is bitter, especially when you are stuck in the past.' She claimed the Bill is 'about the people of South Africa', but its more likely effect will be to deter further investment and thereby prejudice the poor.

Cancellation of bilateral investment treaties

The new powers given to the State under the Mining Bill could amount to indirect expropriation under the ***bilateral investment treaties*** South Africa signed with some 13 European nations soon after 1994. The DTI is now busy terminating these treaties, saying they limit the country's sovereignty and play little part in attracting direct investment. The DTI also claims that the international arbitration to which foreign investors are entitled under these treaties yields unpredictable and often unfair results — and that foreign investors will be adequately protected by South Africa's own courts.

However, representatives of the European Union (EU) have broken their usual diplomatic silence to say that they are 'not amused by South Africa on these treaties'. Where treaties are terminated, the foreign investors currently protected by them may have no remedy against damaging policy changes of the kind contained in the Mining Bill. They are also likely to receive less than the 'prompt, adequate and effective' compensation promised by the treaties. They may in fact receive zero compensation if a taking of property by the State is not recognised as an 'act of expropriation' under the Promotion and Protection of Investment Bill of 2013. This Bill is also to have retroactive operation, in an attempt to bypass the 'survival' clauses in the treaties now being terminated, which are supposed to protect existing investments for between ten and 20 years after the relevant agreements have come to an end.

Representatives of the European Union say that they are 'not amused by South Africa on these treaties'.

A new expropriation bill by another name

The ***Promotion and Protection of Investment Bill of 2013*** (the Investment Bill) is supposed to apply equally to both foreign and domestic investors, but in fact will make it more difficult for foreign investors to claim compensation for expropriation by saying they must first be able to demonstrate full compliance with all domestic laws, including unrealistic employment equity and BEE requirements.

However, the main risk in the Investment Bill is not that domestic and foreign investors will be confined to 'just and equitable' compensation falling somewhat short of market value — but that they will receive no compensation at all. This danger stems from a clause in the Investment Bill stating that various actions 'do not amount to acts of expropriation'. According to the Bill, there will thus be no expropriation where the Government's actions result 'in the deprivation of property' but 'the State does not acquire ownership' and 'there is no permanent destruction of the economic value of the investment'.

This situation could arise, for example, where the State takes commercial farm land under claim as 'custodian' for land claimants, and then invites them to apply to it for licences to use portions of this land for specified periods. In these circumstances, commercial farmers would be deprived of their property, but the State would acquire it as custodian rather than as owner — and there would be 'no permanent destruction of the economic value' of the land, which would continue to be farmed by others. This means there would be no 'act of expropriation' under the principles established by the Investment Bill, and no compensation would be payable.

There may be no compensation where the State takes farm land under claim as 'custodian'.

Land laws

The Restitution of Land Rights Amendment Bill of 2013 has been adopted by the National Assembly and is expected soon to be enacted into law. It extends the period for lodging land restitution claims from December 1998 to June 2019. The Government expects some 380 000 new claims to be made within this period, and says it could cost some R180bn to settle them. Since it lacks the money for such purchases, the Investment Bill could provide it with a means of taking land under claim as 'custodian' and without having to pay any compensation at all.

The Property Valuation Bill of 2013 (the Valuation Bill) has also been adopted by the National Assembly and is soon to become law. Under this Bill, a valuer general appointed by the minister of rural development and land reform and accountable to him will be responsible for determining the value of land needed for land reform purposes, as well as any movable property 'contemplated to be acquired with the land' in question. Valuations must be based on market value, less the four 'discount' factors listed in the Constitution (which include the property's current use and the history of its acquisition). However, the minister is empowered to lay down further principles to guide the valuation process.

If the Investment Bill is adopted in its current form, the Government will have less need of the Valuation Bill to make expropriation cheaper for the State.

The Government expects as many as 380 000 new land claims to be made by June 2019.

Other erosions of property rights

The Expropriation Bill of 2013 (the Expropriation Bill) allows the State to take ownership and possession of property of virtually all kinds by notice to the owner. Compensation is to be based on market value, less the four discount factors in the Constitution, but no compensation will be payable at all until its amount has been agreed with the State or decided by the courts.

This will put great pressure on expropriated owners to agree to the amount of compensation offered by the State, rather than remain without the benefit of either the property or its value in money. In practice, this means that the option of applying to court to decide a different measure of compensation is likely to benefit only those with deep pockets – the few who, despite the loss of their property to the State, can afford the cost of lengthy litigation with no guarantee of success.

If the Investment Bill is adopted in its current form, the Government is likely to abandon the Expropriation Bill as the Investment Bill will give it more extensive powers.

The Private Security Regulation Amendment Bill of 2013 (the Security Bill) was adopted by Parliament in February 2014 and is soon to be signed into law. A controversial provision reintroduced in the closing stages of the parliamentary process requires that 'at least 51% of the ownership and control' of security companies must be 'exercised by South African citizens'. The Government says that the 445 000 guards employed by the industry far outnumber the country's 270 000 policemen and soldiers, making foreign control of security companies a threat to national security. But this supposed threat is not credible, especially as the guards in fact employed by foreign companies number fewer than 45 000.

Under the Security Bill, foreign-owned companies will be forced to sell 51% of their shares to South Africans.

Under the Security Bill, foreign-owned companies will be forced to sell 51% of their shares to South Africans. Yet this contradicts South Africa's bilateral investment treaty with the United Kingdom, which still remains in force and thus protects the two biggest foreign-owned security companies (ADT and G4S). According to the Security Bill, the disposal of any excess shareholding is to be carried out 'in accordance with' the Investment Bill, so adding to investor concerns.

The ***Infrastructure Development Bill of 2013*** (the Infrastructure Bill) was adopted by the National Assembly in February 2014 and is also soon to become law. It gives statutory authority to the earlier creation of a Presidential Infrastructure Coordinating Commission, which has identified 18 'strategic integrated projects' aimed at speeding up the development of vital energy, logistics, and social infrastructure.

To fast-track implementation and remove obstacles to progress, the commission (acting through its council) has been given the power to expropriate land or rights in it. This power is governed by the Expropriation Act of 1975, which currently guarantees expropriated owners full market value and additional damages for consequential loss — but is likely soon to be overtaken by the Investment and/or Expropriation Bills.

The 'radical' measures to which the ANC has committed itself are now coming thick and fast.

The impact of the new rules

The full ramifications of these new rules are impossible to predict. All that is clear is that the 'radical' measures to which the ANC committed itself at Mangaung are now coming thick and fast — indeed, at an unprecedented pace. Moreover, the common denominator in these diverse measures is that they weaken property rights, reduce private sector autonomy, threaten business with draconian penalties, and undermine investor confidence. In combination, they seem calculated to choke off investment, reduce economic growth, and worsen unemployment.

All these measure have also been proposed or pushed through Parliament since the NDP was adopted. If the NDP is genuinely a blueprint for 11m jobs and an annual growth rate of 5.4%, the ANC could not be doing worse at implementing it.

— **Anthea Jeffery**

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