NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA

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SUBMISSION TO THE

PORTFOLIO COMMITTEE ON PUBLIC WORKS AND INFRASTRUCTURE

ON THE

EXPROPRIATION BILL, 2020

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EXPROPRIATION WITHOUT COMPENSATION – A BUSINESS PERSPECTIVE

Introduction

With the adoption of South Africa's Constitution in 1996, the country was set upon a new path, a promise that "never again shall it be that this beautiful land will again experience the oppression of one by another". The business community has always seen the Constitution as a guarantee not only for fundamental human rights, but also as the required framework to enable the private sector to create economic growth, jobs and wealth for all citizens.

Today, despite the pure intentions of the Constitution and the fundamental rights contained therein, it is becoming evident that even the epitome of legislature is being used as a vehicle to deviously promote and implement ideals that will derail the economy and society. The clearest example of this is the sustained attack on property rights.

As the prospect of history repeating itself looms over South Africa, specifically with the amendment of the Constitution and the consequent legalisation of expropriation without compensation, the chilling words of the late philosopher, George Santayana, comes to mind: "Those who cannot remember the past are condemned to repeat it."[1]

The Constitution of South Africa in its current form already enables far-reaching land reform.[2] This statement is based on the following factual analysis of the relevant subsections[3] of section 25, or the Property Clause, of the Constitution:

> Section 25(1) states that no person may be arbitrarily deprived of their property, whereas sections 25(2) and (3) allow for government to expropriate property for public purposes or in the public interest, subject to just and equitable compensation. Section 25(5) obliges the state to "foster conditions which enable citizens to gain access to land on an equitable basis". Where there are property rights which were rendered insecure as a result of past racially discriminatory laws, section 25(6) mandates the state to secure these rights. Furthermore, section 25(7) provides for the restitution of property that was seized during or after 1913.[4]

Despite the apparent sanctity of the Constitution and the rights enshrined therein, together with its progressive aim at fair land reform and/or restitution, Parliament, in February 2018, adopted the resolution that the need exists for government to have the ability and power to expropriate private property without the requirement of compensation. After this resolution and a suspect public commentary process, the Constitutional Review Committee tabled its report in Parliament in November 2018.

The report stated that during the countrywide consultations and hearings the public "demonstrated an overwhelming support for constitutional amendment and expropriation of land without

[1] Free Market Foundation, "Security of Property Rights in South Africa" (2020: viii).
[2] Free Market Foundation, "Security of Property Rights in South Africa" (2020: 1).
[3] "Relevant" in this context for purposes of a report on the economic effect of expropriation without compensation on business in South Africa.
[4] A short and adapted analysis of section 25 of the Constitution of the Republic of South Africa.

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compensation".[5] This result is not in the least a surprise, considering that the pro-EWC parties guaranteed their loudest supporters the podium. Where the intimidation and selectiveness of these EWC-supporters could not reach, such as the written submissions, the public clearly stated its opposition to EWC. Despite the majority of the submissions opposing the amendment of the Constitution, the Committee recommended that section 25 be amended to allow for EWC, in order to address the historic dispossession of land and the "promotion of food security".

This is, has been and will most certainly in future, remain a controversial and aggressively debated matter.

The subject that this report wishes to address, however, is not the debate itself, but the lack of business and private sector voices participating in the debate. The hypothesis for this phenomenon of private sector apathy, is the obliviousness of the private sector to the impact and effect that expropriation without compensation will have on business and the economy in general, as well as the specific effects on vital South African industries.

Report framework

This report will list and describe the specific impacts and effects on business, the economy and the private sector of South Africa, in order to highlight the crucial importance of the efforts and proactive participation of the private sector in the fight against the amendment of the Constitution and the implementation of EWC.

The considerations will be explored and discussed in the following order:

1. **Damage to consumer behaviour and business sector finances**
    - **1.1 Introduction**
    - **1.2 Impact of EWC on consumer behaviour**
        - **1.2.1 NEASA's point of view**
        - **1.2.2 Expanded arguments by business sector**
    - **1.3 Conclusion**

2. **Deterring of investment**
    - **2.1 Introduction**
    - **2.2 International investment**
    - **2.3 Local investment**
        - **2.3.1 Consumer supply chain**
        - **2.3.2 Real estate investor funds**
        - **2.3.3 Pension funds**
    - **2.4 Conclusion**

3. **Overall Conclusion**

[5] "Report of the Joint Constitutional Review Committee on the possible review of section 25 of the Constitution". (2028) Parliament of South Africa.

1. Damage to consumer behaviour and business sector finances

1.1 Introduction

Before an objective analysis on the impact of EWC can be made, one needs to recognise the fact that there are three interest groups who will be affected by the Expropriation Bill:

- those who currently own land or private property and view the Expropriation Bill as a demise of security and legality of ownership rights;
- those who are not currently landowners under secure or legal tenure, and welcome the implementation of EWC and land reform; and lastly
- the government with property of its own, whether it be earmarked for distribution or not.

Despite there being probable, relevant arguments on all sides, to fairly evaluate the effect of EWC on consumer spending, savings and cost of living, the final outcomes must be weighed to produce the nett result.

1.2 Impact of EWC on consumer behaviour

1.2.1 NEASA's point of view

NEASA vehemently opposes the implementation of the Expropriation Bill for various reasons, one of which is the effect the Bill will have on the small business sector in its capacity of being both consumer and employer in this country. As the predominant voice of employers and small business in South Africa, NEASA strongly believes that fair and successful land reform requires a balance between existing land rights, food security and prosperous business on the one hand, and historical redress and redistribution on the other.

NEASA does not support any race-based policies which undermine the ability of small business owners and employers to function optimally in the economic environment of South Africa. Although "empowerment" at all levels is one of the key focuses of NEASA, we believe that expropriating the property of any private business owner through the Expropriation Bill (i.e. transfer of ownership, shares or stocks) will be devastating not only to those business owners, but in effect to their employees, investors and the entire economy as well.

This Expropriation Bill threatens business owners' core belief in their ability to thrive in a free market dispensation in South Africa. Without this belief, the motivation of entrepreneurs to start and run their own businesses will vanish. The Expropriation Bill destroys any safety measures the private sector has against an attack on property rights (which forms the basis of the free market) by government. Government's aim with the Expropriation Bill to "share the wealth", will not be accomplished by EWC. Instead, EWC is a method of socialist redistribution which has spectacularly failed globally.

1.2.2 Expanded arguments by business sector

A panel hosted by the Institute of Race Relations (IRR) economists Dawie Roodt and Lumkhile Mondi, and leading financial commentator, Magnus Heystek, concluded that land expropriation will have a direct impact on savings, investments and the cost of living for South Africans in general.[6]

One of the biggest and most threatening consequences of losing land or homes and farms, as well as businesses, is still bearing the responsibility to pay down bonds on the already expropriated property.

As correctly stated by the IRR's Herman Pretorius:

> The reality is that the ANC's model of so-called "sustainable wealth extraction" is already leaving South Africans worse off and that the blind ideological commitment to state power and state control in the form of expropriation without compensation is putting our nation and our people's finances at even greater risk. [7]

When borne in mind that the EWC Act not only refers to or affects farm or literal "land" but private property such as homes as well, a marked decrease in the value of property is an inevitable consequence of either an amendment to legislation and/or market uncertainty. The resulting reduced appetite from property buyers because of the EWC could furthermore destabilise the banking sector and have a disastrous effect upon the property sector and the country's credit ranking.

A BusinessTech article published on 26 February 2020, reports on the fact that the Banking Association of South Africa (BASA) already warned the government against a land expropriation process which is not undertaken in an orderly manner, as the fiscal damage thereof would be incalculable.[8]

BASA stated that the current exposure banks have in relation to land-based property is approximately R1.613 trillion in the form of mortgages. This amount excludes other types of non-mortgage loans afforded to borrowers based on their net worth, in cases where their land-based property constitutes much of their net equity base and provides support to lenders for such loans in the event of default. Currently, the market value of land-based property is estimated to be well in excess of R7 trillion.

From the above it is clear that the EWC would cause tremendous uncertainty in the property sector in general. This fear regarding the security of property rights, supposedly enshrined and protected in the Constitution, will cause a massive shying-away from buying and owning any property. The consequent reduced appetite, as described, will be the factor which

[6] BusinessTech, "Land Expropriation will put people's finances at risk", 26 February 2020.
[7] BusinessTech, "Land Expropriation will put people's finances at risk", 26 February 2020.
[8] BusinessTech, "Land Expropriation will put people's finances at risk", 26 February 2020.

ensures the significant drop of property prices, which will have a devastating effect on the property and banking sectors simultaneously.

The government would be wise to learn from the many banking crises around the world historically, which had their roots in the decline in land-based property and the effect thereof on market confidence. The 2007/2008 global financial crises is a perfect example of the consequences of a downturn of land-based properties in the USA.

The Expropriation Bill would negatively impact the capital adequacy and stability of both commercial banks and private-sector lenders.

The private sector lenders could[9]:

- withdraw from providing loans where land-based property is being offered as security for the loan; and/or
- adopt a more conservative approach to the extent of the loans they would be prepared to provide as compared to land-based property values (so-called maximum loan to property value); and/or
- increase borrowing interest rates to compensate for the additional risk in the event of expropriation.

As loan agreements concluded with banks do not usually consider the scenario in which property seizures result in the forcible change of ownership at below market value, widespread expropriation at zero compensation (expropriation below market value) has the potential to create systemic risks for the banking sector.

It is unclear how any lender will be able to recover the losses incurred on loans granted if the loan then gets defaulted upon, due to expropriation at nil compensation. Without further clarity from government and the fiscal authority, it seems that a borrower would still be held fully liable for any debt incurred, irrespective of expropriation of the underlying asset.

1.3 Conclusion

There is, judging by the above findings and various expert opinions on the subject, no doubt that the acceptance and implementation of the Expropriation Bill spells disaster for South African consumers, lenders and borrowers alike.

As aptly summarised by the macroeconomic impact assessment of the EWC policy – performed by University of Pretoria Gordon Institute of Business Science (Gibs) academic, Roelof Botha, in association with University of Johannesburg Professor, Ilse Botha – the policy will cause, amongst others, a downgrade of the country's sovereign bonds to junk status, higher interest rates, a sharp decline in taxation revenues and a deep recession.[10]

[9] BusinessTech, "Pay your bond but lose your property – South Africa's big land expropriation problem", 7 February 2020.
[10] BusinessLIVE, "Land expropriation without compensation spells 'economic disaster'", 12 November 2018.

No business owner or person functioning in the private sector would go unaffected by these impacts of the EWC being implemented. It is therefore in the entire business sectors' interest to join the fight against EWC.

Small and large businesses depend on loans and good credit for financing or start-up capital. Without the security in their property, whether it be land or other, they will be left without liquidity to function.

The definition of property in the Bill states that "property is not limited to land", intentionally indicating that all assets are targets for expropriation. This means that a situation is foreseen where government could have the power to take any form of ownership from citizens. If residential property, shares, savings and any other assets can be targeted under the undefined auspices of so-called public interest, the decrease in new business creation and increase in economic uncertainty will destroy whatever is left of the South African economy. Business growth and investment will stall completely due to the lack of economic trust.

2. Deterring of investment

2.1 Introduction

It is ironic that the government motivates the amendment of the Constitution and the implementation of the EWC policies under the flag of "increased agricultural production, stronger food security and attracting future investment in the economy", yet the Expropriation Bill's preamble makes absolutely no mention of these aims.[11]

It seems, in fact, that the economy does not play any role nor does it obtain any consideration with regards to the amendment of section 25 and its objectives.

The emphasis in the preamble is solely on the redress of historic wrongs and to ensure "equitable access to land", which lacks any form of guarantee of food security or economic development.[12]

As noble as these objectives may appear, the implementation of EWC would not make a jot of difference to agricultural production, food security or job creation without attracting new investments and job creation.

There is, unfortunately, proof that the mere plans to implement EWC have already harmed the South African future of investments, both locally and internationally.

The above statement will be discussed further below.

[11] Polity, Theuns Eloff: Chair, FW de Klerk Foundation, "The ideological blindness to the economic damage of expropriation with nil compensation", 31 January 2020.
[12] Preamble, Expropriation Bill.

2.2 International investment

The South African GDP for the past two years has been the worst since World War II.[13] Further proof of this fact is the recent publication of the World Heritage Foundation's 2019 Index of Economic Freedom. This index measures four factors in every country that is evaluated:

- The rule of law (specifically including property rights);
- The size of the government;
- The regulatory efficiency; and
- The openness of markets.

The index indicates to what extent a country's legal system allows individuals to own and utilise private property and how those rights are protected by their state, including the possibility of expropriation.

This Index of Economic Freedom ranks 180 countries in five categories:

a) Economically free;
b) Economically mostly free;
c) Economically moderately free;
d) Economically mostly not free; and
e) Economically repressed.

South Africa, at the end of 2019, ranked 102nd out of the 180 countries. Our index point was 58.3 and qualified under the category of "mostly not free". South Africa fell 4.7 index points in a single year, and there should be no disbelief that the index concluded that the number one reason for this decrease was the worsening perception around South African property rights.[14]

To understand the horrific economic picture painted here, consider the following:

In the same year that South Africa dropped dramatically in index points and categories, the world average increased from 51.5 to 52.3 and that of sub-Saharan Africa, from 38.3 to 38.9. Our regression in economic freedom (or property rights) is the third largest in the index.

The question is: Why is this ranking important with reference to the impact of the EWC on investment? This is so because investment, economic growth, job creation and financial security are first and foremost, influenced by perceptions.[15]

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[13] Polity, Theuns Eloff: Chair, FW de Klerk Foundation, "The ideological blindness to the economic damage of expropriation with nil compensation", 31 January 2020.

[14] Polity, Theuns Eloff: Chair, FW de Klerk Foundation, "The ideological blindness to the economic damage of expropriation with nil compensation", 31 January 2020.

[15] Polity, Theuns Eloff: Chair, FW de Klerk Foundation, "The ideological blindness to the economic damage of expropriation with nil compensation", 31 January 2020.

Any investor or businessperson will ask the following questions:

- Would I invest in a country with uncertain property rights or repressed economic freedom?
- Will my money be safe?
- Will my investment grow?

As Theuns Eloff, Chair of the FW de Klerk Foundation, wrote:

> If there is 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!”.

It is common knowledge, and common sense for that matter, that countries that have economic freedom and security of property rights attract the most and best investments, have the best economic growth and the lowest unemployment statistics.

In the World Bank’s (WB) 2019 report on South Africa, it labelled our economy as anaemic, due to a growth rate of 0.4% per year. The WB, unfortunately, ascribed this result to continued policy uncertainty and repressed business confidence as well. A shuddering realisation should take effect through all businesspeople in the private sector, regarding the true effect of the EWC implementation on their future prosperity in a country with an already dying economy.

2.3 Local investment

There are three specific key points which will be discussed with regards to the effect of EWC on local investment. The first is concerned with the consumer value chain, the second focusses on real estate investor funds and the last emphasises pension funds.

2.3.1 Consumer supply chain

Covid-19 has clearly indicated what the effect of consumer uncertainty can have on the production, delivery and price of consumer goods. This recent health disaster, and the consequent disruption in the local supply chains, quickly turned South Africa’s breadbasket into a basket case. History has always proven that a free-market dispensation is the ideal environment for the production and provision of the best quality, affordable products and services to consumers. However, should anything, such as the Expropriation Bill, create uncertainty, fear and mistrust, this ‘ideal environment’ will become hostile and dysfunctional.

A free-market dispensation’s foundation is premised upon the principles of security of ownership rights, freedom of economic choice and decision-making by business owners, entrepreneurs and consumers. The Expropriation Bill will undermine this freedom, because:

- asset owners will have no security or guarantee of the safety of their assets;
- without this security, they will not be able to participate in economic activity through or with said assets;
- by means of their absence in the economy, there will be a tremendous loss of business creation, growth, innovation and job creation;
- competition among business will disappear, which, in turn, will cause a massive rise in consumer prices.

Once the consumer prices soar to unattainable hights, the need to import will increase – this is a further blow to the South African economy and local businesses throughout the country. As South Africa cannot afford any further job losses, business closures or economic injuries, the implementation of this Bill must be stopped at all cost.

The disruption that will be caused will leave unspeakable disaster in its wake and the "wealth-sharing" that the government envisioned with the implementation of the Bill, will become a "wasteland sharing".

2.3.2 Real estate investor funds

There are a number of reasons why the South African Real Estate Investment Trust Association (SAREIT) and the South African Property Owners Association (SAPOA) are convinced of the negative effect that the amendment of Section 25 of the Constitution, which allows for EWC, will have on local investors and the private property sector of South Africa.

SAREIT represents all South Africa's listed property companies (REITs) on the Johannesburg Stock Exchange (JSE), while SAPOA is the representative body and voice of commercial and industrial property in South Africa.

The commercial property industry is valued at around R1.3 trillion compared to residential property, which is currently valued at around R3.9 trillion.[16] The total estimated value of South Africa's property industry, excluding agriculture, is around R8 trillion which includes all private and state-owned property.[17]

Estienne de Klerk, Chairman of SAREIT, explains why the property sector is of utmost importance when considering the effect of EWC on the private sector:

> The listed property sector is the groundswell of commercial real estate in the country and is also the most liquid and tradeable way to own real estate in South Africa. It represents pretty much every man in the street because the bulk of the investors into this sector is the pension fund. Every person in our country that has a job, and even some of those who do not, contributes in some way, shape or form to annuities or

[16] Property Sector Charter Council (PSCC).
[17] Estienne de Klerk, "Why EWC in principle is problematic", 12 March 2020.

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retirement funds – with 100% certainty some of that money will be in the listed REIT sector.

The first issue from EWC which threatens the property sector, is the fact that the word "property" in the Constitution is not confined to agricultural or other land. It merely denotes property, which could be interpreted to include everything a person owns. This includes residential and commercial property as well.

Investment in both commercial and residential property requires confidence and a lot of capital.[18] However, if the EWC policy is implemented and consequently causes uncertainty in terms of ownership and the right and title to the land the property is on, confidence will be undermined. The degree of policy uncertainty created by the amendment of section 25 of the Constitution by government, leads to immense investor insecurity and a detrimental effect on the domestic property sector at large.

Once investors have shied away from the property sector, the number of sellers shall outweigh the number of buyers, which will inevitably lead to an implosion of the entire sector. This will be catastrophic for not only private or individual owners, but for banks and other financial lending institutions that provide the funding for the sector as well.[19]

Without local investment in the property sector, there will be no funding for new development. In the normal course the private sector will carry the economy as follows:

- The state guarantees safety and protection of property rights;
- Local investors fund new development;
- New developments create jobs and therefore stimulates economic growth;
- Unemployment decreases;
- GDP increases due to economic growth;
- International or foreign investment is encouraged; and
- Infrastructure improves through private-public partnerships with foreign investors because of South Africa's Economic Freedom Index climb.

Unfortunately, if EWC is implemented, the opposite is true:

- EWC is implemented;
- Local investors refuse to invest in new development due to insecurity caused by government policy;
- Economic growth stagnates and unemployment increases;
- GDP decreases as a result of the stagnant economy and unemployment;
- South Africa drops in ratings and index points for economic freedom; and
- Foreign investors withdraw or remain absent.

[18] Estienne de Klerk, "Why EWC in principle is problematic", 12 March 2020.
[19] See discussion in: 1.2 Impact of EWC on consumer behaviour.

2.3.3 Pension funds

Apart from the obvious negative impact that a failing real estate market will have on South African pension funds, as most pension funds invest the predominant number of investors' funds in commercial real estate or developments, there is another dark shadow looming over local pension funds and government policy.

To sketch a background: the ANC's election manifesto of 2019 indicated that it will "investigate the introduction of prescribed assets on financial institutions' funds to mobilise funds within a regulatory framework for socially productive investments (including housing, infrastructure for social and economic development and township and village economy) and job creation while considering the risk profiles of the effected entities."[20]

This in essence could mean that EWC, if passed, would destroy the real estate market as possible investment vehicle for pension funds and furthermore, the ANC could attempt to force the investment of pension funds into failing SOEs or state-owned property (as obtained through EWC). Everyone must realise that this will lead to the demise of South African pension funds, as a result of uncertain and dangerous government policies.

Although this seems like a slippery slope argument, considering the immense Constitutional hurdles the ANC would have to overcome to implement the prescribed redirection of pension funds, they are already nearing the finishing line with regards to amending section 25 of the Constitution – something legal students were taught, even until recently, was a completely impossible feat.

2.4 Conclusion

If legislation through EWC allows for government to expropriate people's houses or commercial properties for nil compensation, it will be enough to erode confidence with investors, both local and international and will lead to a weak property market going forward, which essentially means new development will be impossible.

South Africa is a country in dire need of increased, stimulated economic activity and capital investment. Creating hysteria and mass uncertainty regarding rights in the Constitution – in this case property rights – is the worst road to take.

The real estate sector contributes substantially to the country's GDP and it has a massive impact indirectly in terms of providing places of employment when considering shopping centres, offices and industrial property.

[20] ANC 2019 Election Manifesto, p. 34.

3. Overall Conclusion

If EWC were to be accepted and adopted, even if in diluted form, it would be the straw that breaks the fragile "economy camel's" back. South Africa has been cut at the knees due to Covid-19, transformation rules are closing the funding taps for private entities who do not adhere to BEE standards, and now the government is threatening the core of business owners' and their financial institutions' survival.

One of the issues this report aims to address is not the evident negative impacts of EWC, but the relative silence emanating from corporate top-brass at South Africa's financial and other private institutions.

Banks and other financial institutions are, in the majority of cases, the method with which South Africans finance expensive property such as houses, agricultural land, vehicles, factories, businesses and many other assets. The private sector has been the life blood of the South African economy for most of its democratic existence. Yet, there is no mass call from business for the scrapping of any EWC policies or plans.

Unfortunately, especially during Covid-19, it seems to have become a trend of business cosying up to government in the hope that they might get a seat at the negotiating table or, at least, remain out of the line of fire.[21] They believe that by "playing along" in the legislative process, may eventually save them from being in the first pickings for expropriation.

There comes a time when fence-sitting by the private sector voices, is irresponsible.

Participants in the business world and private sector are not obligated to have an opinion about every single political issue or policy reform, for such a world would be a dissonant society in which businesses are castigated for having an opinion on something which does not concern them. In this case, however, government has proposed a change so radical, which so significantly affects the business environment, that it becomes an economic crime to remain silent on the matter.

EWC will affect every single business, whether big or small; it will demolish what remains of our post-Covid economy; it will drive away any possible investors, local and/or international; it will break down what is left of the trust in government and flair up dormant racial tensions.

As Nicholas Babaya rightly explains:

> For ordinary South Africans going about their daily lives, consider what companies provide a service to you on a daily basis. Consider what companies help you own and/or finance your own property. Have you been sold out? Classical liberals often talk about the need for government accountability, but when business refuses to take a stand for its own self-interest in the face of hostile legislation, the customers and clients of these businesses must speak up.

[21] BizNews, Linda van Tilburg, "Clarification sought from banks on loans and expropriation without compensation – Daily Friend", 27 January 2020.

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