

## Part 1: Expropriation without compensation (EWC)

15 June 2021

This is pursued through two distinct processes: an amendment to Section 25 of the Constitution, and the new Expropriation Bill to replace the Act of 1975, which has been in the making for a couple of years.

### Amendment of the Constitution

The Section 25 process is deadlocked because the ANC and the EFF cannot agree on the wording for the amendment. The EFF wants all land in the country to be owned by the state (“custodianship”). The state can then rent it out, lease it out, grant 99-year leasehold or otherwise dispose of it. The ANC supports the status quo of a range of private titles from freehold to communal land.

EFF leader Julius Malema made it clear in parliament on 3 June that it will “never vote” for an amendment that does not provide for state ownership. The next day ANC president Ramaphosa made it equally clear that the party supports the right of citizens to own land directly under a range of titles like freehold, POTs – permission to occupy – and other informal rights. The two parties are unlikely to bridge this gap.

A High Court judgement on 11 June gave strong backing to the ANC’s viewpoint of a range of titles as opposed to custodianship; and also illustrate how difficult it will be to convert traditional rights to “custodianship”. In a case brought against the Ingonyama Trust, the High Court ruled that the conversion of PTOs to leases was unlawful and ordered the Ingonyama Trust to pay back all the monies collected as rent.

If the EFF sticks to its word and not vote for what they see as a watered-down clause the whole process will come to nought, because without the EFF’s support the ANC cannot muster the two-thirds majority needed to change Section 25.

A short detour: Section 25 is ensconced in Chapter 2 of the Constitution, the Bill of Rights, which requires a two-thirds majority to change. The founding values of the Constitution are ensconced in Chapter 1 and require a 75% majority to change. Expropriation without compensation may clash with these founding values. Should the courts agree with this view, the required majority will be 75%, which certainly does not exist in this parliament. The Expropriation Bill discussed below, could also face these legal challenges once Parliament has approved it.

### New Expropriation Bill

The Constitution allows for expropriation in the public interest, provided that both the process and the price are “just and equitable”. Where the parties cannot agree on what is just and equitable, the courts must decide. The Expropriation Bill, now winding its way through parliament, follows these prescripts.

Clause 12(3) of the Bill lists circumstances under which the “just and equitable” price could be nil rand. It reads as follows:

*(3) It may be **just and equitable** for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to*

- *When expropriated land is **not being used** and the owner's main purpose is **not to develop** the land or **use it to generate income** but to benefit from appreciation of its market value;*
- *Where an organ of State holds land that it is **not using for its core function** and is not reasonably likely to need the land for its future activities in that regard and the organ of State acquired the land for no consideration;*
- *Where an owner has **abandoned land** by failing to exercise control over it;*
- *Where the **market value** of the land is **equivalent to, or less than**, the present value of direct **state investment or subsidy** in the acquisition and beneficial capital improvement of the land; and*
- *When the nature or condition of the property poses a **health, safety or physical risk** to persons or other property.*

Shortly after the Bill was published in October 2020 Ace Magashule said in KZN that it fulfills the ANC’s resolution on

the matter. Mr Magashule may change his tune now that he is on his way out of the ANC (the court permitting), but he is unambiguously on the record and his remark clears an important political hurdle.

### So what?

- Clause 12(3) as quoted above does not pose a threat to ordinary private ownership of property which is actively being used or developed and properly cared for. Even normally conservative commentators have accepted this point.
- The overall test of “just and equitable” still applies and any expropriating authority will be bound by it. Over the last 25 years a huge jurisprudence has developed on what is just and equitable which clarifies the concept and its application. It is not virgin territory.
- By taking the strong stance he has, EFF leader Julius Malema may unwittingly have played right into Pres Ramaphosa’s hand. Given the difference between the EFF and the ANC, it looks highly unlikely that the required 2/3 majority will be mustered to change the Constitution.

The Expropriation Bill only requires a normal majority of 50% + 1 but may be challenged for contravening section 25 and/or the founding values of the Constitution. SA has a very active civil society and a challenge by some sections of society is very possible.