



## Terence Corrigan Insight

# Certainty of government's policy lacking once more

Ever since the ANC officially committed itself to expropriation of land without compensation in late 2017, it has struggled to square the impossible circle: how going down this investment-killing path could be justified in a country whose very future hinged on vastly accelerating growth.

It's never been able to do this convincingly. If anything, SA's growth slowdown — from an already indifferent 1.4% in 2017, to a concerning 0.8% in 2018, and to a baleful 0.2% in 2019, each before the Covid-19 pandemic struck — testifies in part to the damage the mere debate has inflicted.

The only argument with any shred of credibility on this front that the government and the ANC have been able to put forward has been that of certainty. Once this process has been completed, everything will be clear, investors will be aware of the circumstances under which the state will exercise its enhanced powers and they can plan accordingly. Indeed, a lack of "policy certainty" is one problem that the government will acknowledge as a deterrent to economic growth, and so the country is perpetually striving for it — though it seems always to be just beyond the next horizon.

This was central to the promotion of the Expropriation Bill. The horizon, it seems, had finally been reached. "The bill brings certainty to South Africans and investors because it clearly outlines how expropriation can be done and on what basis," said public works and infrastructure minister Patricia de Lille.

Not only would it introduce certainty, she contended, but it would be a positive certainty. This law, she has said, was in line with the constitution ("as it currently stands"). While making possible the rapid acceleration of land reform it provides protection to those subject to it through providing recourse to the courts.

Yet this message may well be obsolete after recent proceedings at the parliamentary committee tasked with Section 25 of the constitution.

Changing the constitution was the first formal move in the EWC agenda, harking back to a parliamentary motion in February 2018 which required an investigation into the necessity or otherwise of this (though in the event, the conclusion seems to have been fore-ordained). Doing so would always be of profound importance to SA's future, since it represented the first incursion

into the Bill of Rights.

The rejoinder here as well was that this process would also produce that elusive certainty. More than that, the official word implied, it would essentially be about tidying up language. The power to expropriate without compensation — on "proper reading", as President Cyril Ramaphosa put it — already existed; making explicit that which is implicit, as the pat formula put it.

The draft amendment was broadly in line with this thinking, even as it explicitly asserted the state's right to take property without paying compensation.

But in a recent twist, the parliamentary committee was presented with arguments for some extensive changes to the amendment. Three are particularly noteworthy.

First, the department of agriculture, land reform and rural development recommended limiting the role of the courts in determining "nil" compensation. To allow them to do so — as the constitution currently allows, and which the current amendment would retain — would amount to "judicial overreach".

This mirrors demands made by the ANC at the beginning of 2020. The courts were cumbersome and slow, the party

argued, and thus the process should be largely in the purview of the executive. The courts would be confined to reviewing these decisions.

Interestingly, the department of public works and infrastructure — which is responsible for administering the proposed Expropriation Bill — agrees with this.

Second public works wants to emphasise that EWC can be undertaken in respect of all property, and not only land. The entire EWC drive has been articulated largely in terms of land reform (not least by De Lille), and the Constitutional Amendment and Expropriation Bill limited specific mention of EWC to land. It appears now that explicit constitutional sanction of compensation-free takings of all manner of property is now in play.

These are to receive consideration. The fine irony here is that, having presented the Expropriation Bill as the pathway to certainty, De Lille's department is pushing to alter the constitutional framework with which it was supposed to align. Radically so.

It is worth noting the minister's assurances to foreign investors on the Expropriation Bill: "Foreign investors have nothing to fear — there is no

way we are going to invite foreign investors into our country and the summarily take away their land. Investors are guaranteed that their properties, as defined by Section 25 of our constitution, are not going to be grabbed and expropriated in an unconstitutional and hazardous manner."

Much of this is now rendered moot, if not false. A reformulated amendment would probably necessitate major changes to the Expropriation Bill, with an outcome offering even less protection to investors' assets.

Third, was a proposal by the EFF for the constitution to be amended to specify that the state would hold all land as custodian. In other words, private ownership of land would no longer be possible — and no compensation would be forthcoming to any landowner for the loss. Following interactions between the ANC and EFF, the ruling party has come around substantively to this position. Its proposed wording is as follows: "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable state custodianship of land and for citizens to gain access to land on an equitable basis."

If this is the path the ANC

chooses, the disruption to the economy, and the administrative burdens will be beyond comprehension. Indeed, a taking on this basis would not be confined to land.

Observers of developments related to the proposed National Health Insurance will be aware that the Health Professions Council of South Africa has recommended that the system should be capitalised by the reserves held by medical aid schemes — "all assets under the control of the medical schemes must be taken by over the NHI", said Prof Simon Nemutandani. It is difficult to see this as anything other than a massive act of expropriation, worth something in the region of R90bn. And given the ambitions of the ruling party, this is unlikely to be the only such demand.

So, we await these developments to work themselves out. "Certainty", the ersatz holy grail of South African policymaking, is put off once more. Indeed, all of this suggests that even this modest goal is of scant importance. And every suggestion is that, should "certainty" one day be achieved, it will codify much of what has already compromised SA's prospects.

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