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THE FUTURE OF PROPERTY RIGHTS

I would like to speak to you on the important topic of property rights - and the threat to property rights that is posed by current legislation - and particularly by the new Expropriation Bill that is awaiting President Zuma's signature before it becomes law.

The success of South Africa's historic constitutional negotiations depended on a continuous search for balance between the often diametrically opposed demands of the main parties. In particular, the parties had to try to find a balance:

- between those who had much to lose and those who had much to gain;
- between the need for national unity and the need to preserve our rich and varied cultural and linguistic heritage;
- between the concerns of minorities, and the demands of the majority; and
- between the need for stability and the need for change.

All reasonable participants in the negotiations accepted that the new constitution would need to have a strong transformational character. Any attempt to cast in stone the then prevailing social, economic and political relations would be neither acceptable nor tenable.

The new Constitution had to offer hope of a better and more just dispensation for the disadvantaged majority - but it had to do so in an equitable and sustainable manner that would not unfairly threaten the core interests of minorities.

The search for an equitable balance was also at the heart of the negotiations on the key question of property rights. Once again, all reasonable parties accepted that it would be untenable and unacceptable to freeze land ownership patterns on the demographically skewed basis of the past.

Land reform was essential - but it would have to take place in an equitable manner - preferably on the basis of willing seller, willing buyer. The main parties accordingly agreed to the inclusion of a property clause in the new Bill of Rights (Section 25) that would achieve a balance between these interests.

Whereas the property clause in the interim constitution made provision for expropriation only for a 'public purpose' (such as the building of a road or a dam), section 25 of the 1996 constitution also allowed expropriation in the 'public interest'. The public interest was specifically defined to include 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.'

However, Section 25 also sought to protect the reasonable interests of property holders by prohibiting arbitrary deprivation of property and by providing that expropriation would be 'subject to compensation, the amount of which and the time and manner of which have either been agreed to by those affected or decided or approved by a court."

It was furthermore stipulated that “the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all the relevant circumstances” - including market value.

However, it also soon became clear that whatever Section 25 may or may not have said, there were still fundamental differences in the approaches of the main parties on property rights

The roots of the ANC's approach to property rights lie in its 1956 'Freedom Charter' - which made the following pronouncements on property:

- The national wealth of our country, the heritage of South Africans, will be restored to the people;
- The mineral wealth beneath the soil, the banks and monopoly industries, will be transferred to the ownership of the people as a whole;
- All should have the right to occupy land wherever they choose;
- All the land shall be redivided among those who work it.

For obvious reasons, the ANC did not vociferously articulate its long-term ideological goals during the constitutional negotiations. However, it has subsequently become evident from its Strategy & Tactics documents that the organization had little intention of maintaining the reasonable balance with regard to property rights that was set out in section 25 of the Constitution.

The ANC’s real intentions became clearer at its National General Council meeting in June 2005 when the organization decided to review the question of property relations before the Polokwane National Conference in 2007. It complained that property rights were proving to be an obstacle to wealth redistribution and asked, in particular, whether the property clause "adopted by us and endorsed in the 1996 national constitution is still relevant now. "

The ANC subsequently decided that, rather than amending the Constitution, it would be sufficient to draft new legislation that would bring existing expropriation legislation into line with Section 25 - particularly by making provision for expropriation in the public interest. In December 2007 the ANC’s National Conference at Polokwane called on the state to “expropriate property in the public interest” and to award compensation “in accordance with the constitution, with special emphasis on equity, redress and social justice”.

The resolution called for the abandonment of “market-driven land reform”; immediate review of “the principle of willing-seller, willing-buyer” and the alignment of all legislation relating to expropriation with the Constitution.

In the same year the government introduced an Expropriation Bill that sought to broaden the definition of property that would be subject to expropriation in the public interest and to circumvent the role of the courts in determining fair compensation. After a national and international outcry the Bill was quietly withdrawn the following year.

Since then it has become clear that the Government has adopted the broad approach to property rights that was set out in its Green Paper on Land Reform in 2011.

The Green Paper asserted that “all anti-colonial struggles” were “at the core, about two things: repossession of land lost through force or deceit; and, restoring the centrality of indigenous

culture." The authors were actually saying that seventeen years after 1994 the "anti-colonialist struggle" was not over and that only the indigenous culture should be central.

The Green Paper's solution to the land problem was 'Agrarian Transformation' – which was defined as 'a rapid and fundamental change in the relations (systems and patterns of ownership and control) of land, livestock, cropping and community.' In terms of its proposals there would be four categories of land tenure:

- state and public land that would be subject to leasehold;
- privately owned land - that would be freehold but with 'limited extent';
- foreign owned land that would be freehold with 'precarious tenure' and subject to conditions (It was later decided that foreigners would be able to own land only on a leasehold basis.); and
- communal land with communal tenure and institutionalised use rights.

The proposed land tenure system would be supported by a number of new agencies, including a Land Management Commission; a Land Valuer-General and a Land Rights Management Board, with local management committees. The new system would go hand in hand with the implementation of the Land Tenure Security Bill, 2010 – which created extensive new rights for farm workers and their dependents and onerous new obligations for land owners.

These proposals have since become the basis for the government's new approach to property rights and have given rise to a raft of property legislation that has recently been adopted - or is about to be adopted- by Parliament.

A disturbing aspect of this legislation is the introduction of the new concept of "custodianship" in terms of which, if property owners are deprived of their property in circumstances where ownership does not pass to the state - but where the state acts as the 'custodian' of the property on behalf of claimants, there has been no expropriation and compensation is not payable. In *AgriSA v the Minister of Mineral and Energy Affairs 2014,* the Constitutional Court upheld this principle - with strong dissenting judgments from two of the presiding judges who pointed to its potentially fatal implications for property rights. The Court made it clear that its judgment dealt with the specific case before it and might not apply to other similar cases.

The raft of recent legislation affecting property rights includes the following acts and bills:

<u>THE PROTECTION OF INVESTMENT ACT, 2015</u>

- THE PURPORTED OBJECTIVE OF THE ACT IS TO PROTECT FOREIGN (AND LOCAL) INVESTMENTS FOLLOWING THE DTI'S INEXPLICABLE DECISION TO CANCEL SOUTH AFRICA'S BILATERAL INVESTMENT TREATIES (BITs) WITH VARIOUS EUROPEAN COUNTRIES.
- THE CONSENSUS IS THAT IT WILL PROVIDE CONSIDERABLY LESS PROTECTION THAN THE BITs.
- THE ACT WILL ENSURE THAT FOREIGN INVESTORS ARE NOT TREATED LESS FAVOURABLY THAT LOCAL INVESTORS (I.E. THEY WILL BE EQUALLY SUBJECT TO BEE ETC)
- INTERNATIONAL ARBITRATORS WILL NOT LONGER AUTOMATICALLY BE ABLE TO DECIDE ON DISPUTES.

<u>THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL, 2013</u>

- THE BILL PLAYS A CENTRAL ROLE IN THE GOVERNMENT'S INDUTRIALISATION PLANS.
- IT GIVES THE MINISTER THE POWER TO DECIDE ON THE PERCENTAGE OF MINERAL RESOURCES THAT MUST BE SET ASIDE FOR LOCAL BENEFICIATION;
- MINERALS MUST BE SOLD EITHER AT "MINE GATE" PRICE OR AGREED PRICE;
- MINISTER WILL DECIDE WHAT PERCENTAGE OF MINERAL PRODUCTION CAN BE EXPORTED;

- STATE WILL HAVE 20% FREE CARRIED INTEREST IN ALL NEW GAS AND OIL EXPLORATION AND PRODUCTION AND WILL BE ENTITLED TO A FURTHER INTEREST UP TO 80% AT AN AGREED PRICE;
- PRESIDENT ZUMA REFERRED THE BILL BACK TO PARLIAMENT IN JANUARY 2015 BECAUSE OF POSSIBLE UNCONSTITUTIONALITY.

THE PRIVATE SECURITY INDUSTRY REGULATION AMENDMENT BILL

- FOREIGN-OWNED PRIVATE SECURITY COMPANIES WOULD BE REQUIRED TO RELINQUISH CONTROL AND 51% SHARE-HOLDING TO SOUTH AFRICANS.
- THE DEFINITION OF SECURITY COMPANIES NOW INCLUDES COMPANIES THAT MANUFACTURE, IMPORT OR DISTRIBUTE SECURITY EQUIPMENT.
- THE ACT MAY CONTRAVENE STILL EXISTING BILATERAL INVESTMENT TREATIES AND SOUTH AFRICA'S COMMITMENTS IN TERMS OF GATT AND AGOA.
- THE BILL COULD PROVIDE A PRECEDENT FOR FOREIGN-OWNED COMPANIES IN OTHER SECTORS OF THE ECONOMY.
- THE BILL HAS STILL NOT BEEN SIGNED BECAUSE OF PRESSURE FROM THE USA AND OTHER COUNTRIES

THE RESTITUTION OF LAND RIGHTS AMENDMENT ACT, 2014

- THE ACT EXTENDS THE WINDOW FOR RESTITUTION CLAIMS UNTIL 30 JUNE, 2019;
- BY 15 APRIL 2015 55,893 NEW CLAIMS HAD ALREADY BEEN SUBMITTED, EQUAL TO 70% OF THE TOTAL NUMBER OF CLAIMS SUBMITTED DURING THE PREVIOUS 4-YEAR PERIOD.
- CLAIMS CREATE MORE UNCERTAINTY IN THE AGRICULTURE SECTOR AND MAKE IT DIFFICULT FOR TARGETED FARMS TO RAISE WORKING CAPITAL.
- THE GREAT MAJORITY OF CLAIMANTS HAVE IN THE PAST SETTLED FOR CASH PAYMENTS IN LIEU OF LAND.

THE PRESERVATION AND DEVELOPMENT OF AGRICULTURAL LAND FRAMEWORK BILL, 2015

- "AGRICULTURAL LAND IS THE COMMON HERITAGE OF ALL THE PEOPLE OF SOUTH AFRICA AND THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES IS THE CUSTODIAN THEREOF FOR THE BENEFIT OR ALL SOUTH AFRICANS".
- FARMERS MUST ACTIVELY USE AND DEVELOP THE LAND TO ITS FULL POTENTIAL AND PROTECT IT FROM NON-SUSTAINABLE AND NON-AGRICUTLURAL PRACTICES - OR FACE THE POSSIBILITY OF EXPROPRIATION AT A BELOW MARKET PRICE.
- MINISTERIAL APPROVAL IS REQUIRED FOR FARMERS TO
    - USE THEIR LAND FOR NON-AGRICULTURAL PURPOSES;
    - LEASE THEIR LAND FOR MORE THAN 10 YEARS;
    - SELL LAND FOR NON-AGRICULTURAL PURPOSES; AND TO
    - BEQUEATH THEIR LAND TO THEIR HEIRS

THE PROPERTY VALUATION ACT, 2015

- THE ACT ESTABLISHES THE OFFICE OF THE VALUER-GENERAL
- IN DETERMINING THE VALUE OF LAND THE VALUER-GENERAL WILL TAKE INTO ACCOUNT ALL THE FACTORS LISTED IN SECTION 25(3) OF THE CONSTITUTION RATHER THAN CONFINING THE PROCESS TO ONLY THE MARKET VALUE OF THE PROPERTY.
- IT IS NOT CLEAR HOW THE ROLE OF THE VALUER-GENERAL WILL BE RECONCILED WITH SECTION 25(2) OF THE CONSTITUTION WHICH STATES THAT THE AMOUNT OF COMPENSATION AND THE TIME AND MANNER OF PAYMENT MUST EITHER BE AGREED TO BY THOSE AFFECTED "OR DECIDED OR APPROVED BY A COURT."

THE REGULATION OF LAND HOLDINGS BILL

- THE BILL WILL BE PRESENTED TO PARLIAMENT LATER THIS YEAR

- IT WILL PROHIBIT FOREIGNERS FROM OWNING AGRICULTURAL LAND BUT WILL ALLOW THEM LEASEHOLD RIGHTS FOR A MINUMIM PERIOD OF 30 YEARS
- THE BILL WILL PLACE A CAP ON THE SIZE OF FARMS:
    - SMALL FARMS WILL BE LIMITED TO 1 000 ha;
    - MEDIUM SIZE FARMS WILL BE 2 500 ha; AND
    - LARGE FARMS WILL BE 5 000 ha;
    - LAND HOLDINGS ABOVE THESE LIMITS WILL BE EXPROPRIATED FOR REDISTRIBUTION;
    - GAME FARMS, FORESTRY PLANTATIONS AND WIND FARMS COMPRISE A SPECIAL CATEGORY WITH A CAP OF 12 000 ha.

At the beginning of the 2014 parliamentary session President Zuma stated that the ANC would "intensify the implementation of affirmative action policies in order to deepen reconciliation and social cohesion in our country." He said that "after the elections, the country will enter a new radical phase in which we shall implement socio-economic transformation policies and programmes that will meaningfully address poverty, unemployment and inequality." He repeated the "second phase" theme that "we have achieved political freedom, now we must achieve economic freedom, and ensure that the ownership, management and control of the economy is deracialised further".

By 2015 the time was ripe to introduce a new Expropriation Bill. Once again, the ANC made no secret of its intentions: on 9 July, Deputy President Cyril Ramaphosa declared that "the economic transformation we are undertaking is aimed at fundamentally changing the structure of the economy and patterns of ownership." (What part of this statement do property owners not understand?)

At first sight the 2015 Bill appeared to be an improvement on its 2008 predecessor: it accepted that the courts would have to decide on the value of compensation for expropriated land and also made provision for negotiations between the expropriating authority and property owners before proceeding with expropriation.

However, the ANC's late introduction of a new definition that expropriation was "the acquisition" (and not the purchase) of property - raised fears that it was still intent on circumventing the balanced approach to expropriation required by the Constitution. After proclaiming the Minister of Agriculture the "custodian" of all agricultural land in the 2015 Protection of Agricultural Land Bill the ANC seemed to be opening the way to the acquisition of land (and other property) not for its own possession - but as "custodian" on behalf of South African citizens. The Constitutional Court had decided in *Agri-South Africa vs The Minister of Mining* in 2013 that in such circumstances compensation might not be payable - although the court made it clear that its judgement applied only to the special circumstances of the case before it.

The Bill provides for expropriation for a "public purpose" and in the "public interest". The concept of "public purpose" is well established in law and includes expropriation for public purposes, such as the building of roads or dams. However, the concept of the "public interest" is vague and simply quotes the Constitution that the "public interest" "includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources…".

If determination of the public interest is left in the hands of government, it might be defined as anything that suits the ANC's purposes and ideology, devoid of any objective test. This could open

the way to arbitrary deprivation of property - which is expressly prohibited in Section 25 (1) of the Constitution.

There is likewise a very broad definition of property in the Bill which simply quotes the Constitution that "property is not limited to land." "Property" could include private homes, possessions, shares in companies and intellectual property.

There is also no definition of "land reform". Land reform might range from expropriation of all land belonging to private persons - to a process that would make land accessible to all South Africans in cooperation with a continuing and thriving commercial agricultural sector. Depending on the definition, land reform might vastly expand the property rights of all South Africans - or it might culminate in all land being being placed under the custodianship.

It is important to note that the abovementioned legislation threatens the property rights of all South Africans regardless of their race. In general, the Government's land reform initiatives do not result in black South Africans acquiring ownership of land. Generally, the effect will be to transfer land to the custodianship of the state or to some other form of collective ownership. This could also have far-reaching implications for the more than seven million black South Africans who own their own homes - but who are seldom in possession of valid title deeds - or to the large number of black South Africans who farm communally owned land in the traditional areas. It has been estimated that the value of black-owned property may be in the region of R1,7 trillion.

South Africa requires a new expropriation process that is aligned with the Constitution and that reflects an equitable balance between the need for land reform and the rights of property owners. The new Expropriations Bill's vagueness creates almost unbounded possibilities for the arbitrary deprivation of property. We accordingly agree with the Institute for Race Relations that there should be no expropriation without a prior court order.

However, the origins, intentions and consequences of the Expropriation Bill are not at all vague:

- The origins are rooted deeply in the ANC's racial NDR ideology;
- The intention - in the words of Deputy President Ramaphosa - "is aimed at fundamentally changing the structure of the economy and patterns of ownership".
- The consequences would be catastrophic: the Bill would precipitate a downgrade by the ratings agencies; it would terminally discourage foreign and domestic investment; it would finally torpedo the National Development Plan; it would seriously undermine South Africa's ability to produce food; and it would lead to racial division and growing polarization.

President Zuma should use his power in terms of Section 84 of the Constitution to refer the Bill back to the National Assembly or to the Constitutional Court to decide on its constitutionality.