

The FW de Klerk Foundation wishes to bring the attached article by Dr Anthea Jeffery of the IRR to your attention.

It is very significant for a number of reasons:

- It provides a clear indication of the actual objectives of the ANC with regard to its proclaimed policy of Radical Economic Transformation;
- It confirms the centrality of the National Democratic Revolution ideology in the determination of ANC policy - irrespective of catastrophic consequences for the economy;
- It illustrates the symbiotic relationship between ANC ideology and unrestrained corruption;
- It highlights, once again, the danger of amending the Constitution to make it possible to expropriate property without compensation; and
- It shows the continuing efficacy of approaching the courts in opposing the ANC's unconstitutional policies and actions.

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BEE AND THE EXPROPRIATION BILL TO 'COMPLETE THE REVOLUTION'

By Dr Anthea Jeffery, Institute of Race Relations

Last Friday both Fitch Ratings and Moody's Investor Services downgraded South Africa's sovereign risk rating by a further notch each, pushing the country yet further into junk status. South Africa is now at 'its lowest credit rating levels...since 1994', said the Treasury in its reaction.

Both Fitch and Moody's kept the country on negative watch. This means that additional downgrades could follow if tangible progress in implementing constructive reforms and limiting state spending is not soon evident.

The African National Congress (ANC) nevertheless remains determined to avoid reforms and to double down on, among other things, the BEE 'tenderpreneurship' that so contributes to inflated pricing, wasted revenue, and persistent corruption.

And this despite a recent judgment of the Supreme Court of Appeal (SCA) striking down some of the BEE procurement rules and so providing the ANC with an important opportunity to reconsider and reset.

Early in November, the SCA found that the Preferential Procurement Regulations of 2017 (the Regulations) were inconsistent with the Preferential Procurement Policy Framework Act of 2000 (the Act) and thus invalid. (It suspended the declaration of invalidity for 12 months, so as to give the Treasury time to adopt replacement rules.)

The Regulations were gazetted by Finance Minister Pravin Gordhan in January 2017 and brought into effect in April that year. They allow organs of state to set 'pre-qualifying criteria' under which a company wanting to tender for a contract must have 'a stipulated minimum BEE status level' if it is to be considered at all. In practice, this minimum is often set at 51% BEE ownership, even though the ownership target under the generic codes is 25%.

Pre-qualification criteria

Sakeliga, a business organisation, objected that this pre-qualification criterion was inconsistent with the Act and the Constitution. In practice, it also made for inflated pricing and poor delivery as many businesses with competitively priced and high-quality products were excluded from tendering.

The SCA effectively agreed. Under Section 217(1) of the Constitution, the court stated, ‘all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective’. As an exception to this general rule, Section 217(2) adds that national legislation must ‘prescribe a framework’ within which preferential procurement policies may be implemented to ‘protect or advance’ the disadvantaged.

The Act is the national legislation to which Section 217(2) refers. It sets out a framework for preferential procurement under which tenders must generally go to the bidder with the highest points, as calculated under a specified formula. This formula gives 80 points for price and 20 for BEE status for tenders below a specified threshold (currently set at R50m). It gives 90 points for price and 10 points for BEE status for tenders above that threshold.

As the SCA pointed out, ‘this framework does not allow for the preliminary disqualification of tenderers’ without their tenders being considered at all. And the minister cannot use his regulations to ‘create a framework which contradicts the mandated framework’ set out in the Act.

Exceeded the powers

The minister, the court went on, had thus exceeded the powers given to him by the Act, ‘exercised a power that was reserved for the legislature’, and acted in a manner ‘inconsistent with the Constitution’.

The SCA judgment provides the ANC with an important opportunity to withdraw all pre-qualification criteria – and particularly those demanding 51% BEE ownership rather than the 25% envisaged in the generic codes.

It also gives the ruling party the chance to limit the scope for preferential procurement. Such procurement is a major factor in the ‘inflated pricing and fraud’ which, according to a former chief procurement officer in the Treasury, taints ‘between 30% and 40%’ of all state procurement, currently worth some R800bn a year.

BEE procurement has greatly enriched – and often re-enriched – a small and politically connected elite of ANC ‘tenderpreneurs’. It has simultaneously jeopardised the efficient and cost-effective delivery of essential goods and services to millions of disadvantaged black South Africans heavily dependent on the state for many of their core needs.

Instead of drawing back from this patently defective system of supposed ‘redress’ for past injustices, the ANC is doubling down on it. According to ANC secretary-general Ace Magashule, the ruling party is ‘dismayed’ at the SCA judgment and determined to have it set aside by the Constitutional Court.

Charges of corruption

Mr Magashule currently faces charges of corruption and other crimes for his alleged role, as Free State provincial premier, in the 2014 granting of a R 255m contract to BEE entrepreneurs Edwin Sodi and Ignatius Mpambani. Of the R230m paid to Mr Sodi’s company for an audit of asbestos roofing in the province, only some R21m went towards project costs. Mr Sodi effectively pocketed the remaining R200m, from which he is said to have funnelled substantial ‘gratifications’ to the ruling party and smaller sums to Mr Magashule and other ANC luminaries.



It is not surprising that the ANC and its secretary-general want to preserve the current system. But the SCA has now put an unwelcome spanner in the works. It has made 'the process of implementing the 51% black ownership provision far more cumbersome', says Mr Magashule, even though the 51% provision is vital to give black South Africans 'control of our economy' and 'complete our revolution'.

In the past, the ANC has been less overt about its 51% BEE ownership goal. A requirement for 51% black ownership for all new mines within ten years was included in a leaked draft of the first mining charter in 2002, prompting a massive R99bn decline in the value of mining shares over two days. The 51% target was then withdrawn, amidst (false) ANC promises that the 26% goal thereafter agreed was immutable and would not be increased.

The generic codes under the BEE Act of 2003 have long set a 25% BEE ownership requirement, but this too is being steadily pushed up via pre-qualification criteria and other procurement rules. That this is happening is not surprising when the ANC's real aim is to demand 51% BEE ownership, as Mr Magashule has made clear.

A 51% BEE ownership requirement is qualitatively different from a 25% (or 26%) one. It signals the loss of majority ownership and control. It means a business no longer belongs to its current owners and must effectively be ceded, generally for significantly less than market value, to cadres of the ANC's choice.

Vital permits from the state

Moreover, if the 2013 Licensing of Businesses Bill were to be resuscitated and enacted, all businesses – not only those contracting with the government – might have to comply with BEE ownership rules to obtain their vital permits from the state.

Forced ownership deals at heavily discounted prices under a compulsory 51% BEE ownership requirement would amount to 'regulatory' or indirect expropriations, for which 'just and equitable' compensation should in principle be paid. International law – which is supposed to guide our courts in interpreting the property clause in the Bill of Rights – endorses this assessment, buttressing the case for compensation.

However, one of the key purposes of the Expropriation Bill of 2020 is to preclude this outcome by introducing an unusually narrow definition of 'expropriation'. Under this definition, expropriation means the 'compulsory *acquisition*' of property *by the state*. But forced equity transfers to BEE entrepreneurs such as Mr Sodi would not fulfil this definition. This in turn means that no compensation would be payable for any resulting losses.

That this risk remains largely unreported underscores the urgent need for many in the mainstream media and academia to reconsider their assumptions. Contrary to what many commentators seem willing to believe, the Expropriation Bill is not about land reform, while BEE is not about advancing the black majority.

Both the Expropriation Bill and BEE are intended to give the SACP/ANC alliance and their loyal cadres effective control over the economy. This, as Mr Magashule states, is what is needed to 'complete the revolution' and so achieve the socialist 'nirvana' to which the alliance has been advancing by incremental steps since 1994.