The threat to property and investor rights

[From the South African Monitor Year-End 2016 Report: Political turbulence and business risks in the ANC's hybrid regime]

Increased political intervention and selective patronage

In August 2012, the Zuma government adopted the National Development Plan (NDP) as South Africa's policy blueprint until 2030. The ANC's national conference in Mangaung (Bloemfontein) in December 2012 endorsed the plan, which aims at boosting the economic growth rate to 5.4% of GDP and generating eleven million jobs.

However, the ANC has also proceeded with several statutes and bills that greatly increase the government's interventionist powers. They clearly prioritize the redistribution of the existing economic pie, rather than its expansion.[1] In a report on all business-related legislation since 2013, the SAIRR concluded that a common thread through all the bills is that "they weaken property rights, reduce private-sector autonomy, threaten business with draconian penalties, and undermine investor confidence".[2]

Recent examples include new regulations, policy initiatives and legislation regarding investment, expropriation, mining and energy, the security industry, affirmative action, black empowerment and land. During their implementation, these laws are especially likely to enhance the opportunities for political and bureaucratic decision-makers to gain access to lucrative positions, or to engage in selective patronage.

Ann Bernstein, director of the Centre for Development and Enterprise, stated:

1. Anthea Jeffery, "The ANC govt's war on economic rationality", 27 March 2014 at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=579465&sn=Detail&pid=71616; http://www.economist.com/blogs/baobab/2014/03/property-rights-south-africa.
2. http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=579465&sn=Detail&pid=71616.

> *South Africa's weak growth performance can also be attributed to a lack of coherent economic policy: at present we have three different government growth plans and since the mid-1990s, we have adopted and abandoned three more. Policy uncertainty over such investment fundamentals as property rights is another factor. A third is a state apparatus that has been put at the centre of growth plans, but fails to fulfil some of its most basic functions. Even those it does well, such as management of public finances, are under strain and threat of takeover by special interests.*[3]

The International Monetary Fund (IMF)'s annual country report released in June 2016 stated that South Africa's economic outlook is sobering, with considerable downside risks:

> *Downside risks dominate and stem mainly from linkages with China, heightened global financial volatility, and domestic politics and policies that are perceived to harm confidence.*[4]

Several drivers will reinforce economic interventionism by ANC policy-makers in the next few years. These include economic stagnation and shrinking resources, the loss of access to sources of patronage after the ANC's local election losses, the uncertainty about Zuma's political survival, related risks and opportunities for current systems of patronage, and factional struggles over fewer spoils.

Bad business perceptions of the ANC government

During ANC rule, extensive de-industrialization has occurred. In 1994, manufacturing accounted for 23% of GDP, which is now at about 11%. High wage rates, high strike rates, a steep decline in labour productivity and policies discouraging foreign and domestic investment all played a role. R.W. Johnson, liberal analyst, now contends that South Africa can choose to have an ANC government or a modern industrial economy, but not both.[5]

The World Economic Forum's Global Competitiveness Index (GCI) for 2016-2017 reflects the perceptions of domestic and international business.[6] In terms of the overall GCI, South Africa ranks quite well, namely in position 56 out of 144 countries

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3. Ann Bernstein, "Harsh choices await if we continue down the low road", *Business Day*, 7 April 2016.
4. IMF, *South Africa 2016 Article IV Consultation Staff Report*, p 2.
5. R.W. Johnson, *How long will South Africa survive? The looming crisis* (Jonathan Ball Publishers, Cape Town, 2015), p 158.
6. Klaus Schwab and Xavier Sala-i-Martin (eds), "The Global Competitiveness Report, 2016-2017", *World Economic Forum*, pp 324-325 at http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf. Compare Klaus Schwab (ed), "The Global Competitiveness Report, 2009-2010", *World Economic Forum 2010*, p 283 at http://www.weforum.org/reports/global-competitiveness-report-2009-2010.

measured. However, the GCI measure of South Africa's competitiveness is distorted favourably by its spectacular performance in a number of the GCI's sub-components. These include aspects strongly shaped by the private sector, like auditing standards, efficacy of corporate boards and the availability of financial services.

In GCI sub-indices that measure business perceptions of the government, South Africa fares very poorly. For three years in a row, South Africa has had low scores for the diversion of public funds (96th) and the perceived wastefulness of government spending (89th). In terms of organised crime, it is again in the 99th position. For "business costs for crime and violence" it is in the 133rd position out of 144. In terms of the reliability of the police, it is in the 115th place, a further drop from being 102nd in 2015. South Africa ranks 109th in terms of "public trust in politicians", a further drop after already being 65th in 2009. It also is 108th in terms of "the burden of government regulation". South Africa ranks 115th in terms of "favouritism in the decisions of government officials", a further drop from being 104th in 2015 and a huge drop from being 69th in 2009.[7]

International media reports revealing self-enrichment and selective patronage by President Zuma and his entourage have reinforced these perceptions. However, given the hybrid regime dynamics, foreign business and local business not aligned to the ruling ANC are reluctant to publicly oppose harmful policies and practices. They are unwilling to jeopardize the government licenses they require to operate.[8] Nevertheless, both local and international business have adapted the forms and extent of their investment in South Africa accordingly.

Business concern about ANC policies

Since 2013, several ANC-directed business bills and acts have increased distrust and concern in foreign and domestic business circles. A headline in *The Economist* of 27 March 2014 was clear: "Bashing business for votes: New legislation may save the ANC votes but will chase away foreign investment". The *Wall Street Journal* of 9 May 2014 stated that the ANC envisaged a greater role in the economy, prompting the headline "South African Policies Worry Big Business". Foreign diplomats, usually reserved, have also started to voice their concerns in private and in public.[9]

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7. Klaus Schwab and Xavier Sala-i-Martin (eds), "The Global Competitiveness Report, 2016-2017", *World Economic Forum*, pp 324-325. Compare Klaus Schwab (ed), "The Global Competitiveness Report, 2009-2010", *World Economic Forum*, p 283 at http://www.weforum.org/reports/global-competitiveness-report-2009-2010.
8. http://www.biznews.com/thought-leaders/2014/11/07/nomuras-peter-montalto-was-concerned-ahead-of-sa-research-visit-left-gloomier.
9. http://www.economist.com/blogs/baobab/2014/03/property-rights-south-africa; http://online.wsj.com/news/articles/SB10001424052702303948104579537802749237362; http://www.polity.org.za/article/businesses-brace-for-transformation-pressures-as-elections-loom-2014-04-08; http://www.bloomberg.com/news/2014-04-14/anc-adopts-laws-before-vote-that-

American Chamber of Commerce SA Executive Director Carol O'Brien stated in February 2015 that the plethora of legislation coming out of South Africa is causing "jitters" in US businesses with operations based in the country.[10] The chamber represents almost 40% of the six hundred US companies with operations in South Africa. She said that the stream of legislation did not send a message that foreign investment was welcome in South Africa. SAFRI, one of the main German business associations looking at the interests of about six hundred German businesses in South Africa, has expressed dismay over the direction of economic policy.[11]

The economist Mike Schüssler also commented:

> *The reality is that South Africa's economic cupboard of ideas is empty. One top firm after another is chasing opportunity elsewhere. Our top 60 companies now earn 70% of their turnover outside of South African borders. In effect, they have left and South Africa is just another market.*[12]

Higher political and economic risks

According to investors' perceptions, and those of international credit rating agencies, political and economic risks in South Africa have increased.[13] The former ANC Treasurer General and Mpumalanga Premier Mathews Phosa stated on 19 May 2015 to the Austrian Business Chamber in Johannesburg that a lack of policy stability was making investors wary.[14] In November 2015, ANC Treasurer General Zweli Mkhize confirmed that policy uncertainty and a lack of policy cohesion were among the reasons for a slow growth in private sector investment.[15]

Moody's Investors Service warned in late November 2016 that political infighting, low growth and unemployment pose the greatest risks to the South African economy. Moody's is the only one of the three main international rating agencies to rate South Africa two notches above junk, with a negative outlook. It has historically remained optimistic about the country. Peter Montalto of Nomura said he thought that Moody's

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may-hurt-south-african-business.html; http://www.bdlive.co.za/business/2014/03/09/diplomats-break-silence-on-investment-bill.

10. http://www.bdlive.co.za/economy/2015/02/20/barrage-of-new-laws-alarms-us-firms-in-sa.
11. http://www.dw.de/german-corporate-unease-in-south-africa/a-18078269; http://www.badische-zeitung.de/ausland-1/steinmeiers-vergebliche-visite-am-kap--95122906.html.
12. http://www.moneyweb.co.za/moneyweb-opinion/welcome-to-the-decline-south-africa/#.VkLfDu9ILUc.facebook.
13. http://www.bloomberg.com/news/articles/2015-05-07/riots-signal-what-is-going-wrong-with-south-africa-s-economy.
14. http://mg.co.za/article/2015-05-20-south-africas-instability-scares-away-investors-anc-stalwart.
15. http://www.bdlive.co.za/economy/2015/11/04/ministers-create-policy-uncertainty-says-anc-treasurer-general.

note is a way of negatively doing nothing. "They did not want to affirm. This, I think, was an active decision to send a signal."[16]

In November 2016, Fitch kept South Africa's rating at BBB-, one notch above sub-investment. However, it dropped the outlook from stable to negative. It also stated that political risks to standards of governance and policy-making had increased, and would remain high at least until the conference of the ANC to select a leader in December 2017, negatively affecting macroeconomic performance.

The in-fighting within the ANC and the government is likely to continue over the next year. In Fitch's view, this will distract policymakers and lead to mixed messages that will continue to undermine the investment climate, thereby constraining GDP growth. ANC factional battles may undermine government efforts to improve the governance of SOEs, which could affect the plan to stream-line the SOE portfolio.[17]

There have been several large deals since 1994, mainly in banking, retail and telecommunications, but South Africa has not attracted the amount of foreign investments most macroeconomic measures suggest it should. Instead, South Africa's foreign direct investment (FDI) is volatile, limited and on average lower than comparable developing countries.

Meanwhile, the degree of capital flight among short-term portfolio investors has resulted in Central Bank warnings.[18] Foreign investors sold a net R43 billion of stocks and bonds in the final five months of 2015; there is no sign that they are returning, with net outflows in 2016 estimated at R20 billion as of mid-February.[19] Andrew Rissik, the managing director of foreign currency trading at Sable Group, a London-based money manager, has linked the trend to increasing political risk: "Poor decisions by (Mr) Zuma and the ruling party triggered a widespread urge to move assets abroad."[20]

According to the UN Conference on Trade and Development's *Global Investment Trend Monitor*, FDI into South Africa plunged with 74% to $1.5 billion in 2015. This was a far steeper decline than the 31.4% decline on year in 2015 experienced

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16. http://www.businesslive.co.za/bd/economy/2016-11-26-moodys-to-sa-watch-your-politics/; http://www.businesslive.co.za/bd/economy/2016-11-26-infighting-in-anc-distracting-policymakers--read-full-fitch-statement/.
17. http://www.businesslive.co.za/bd/economy/2016-11-26-moodys-to-sa-watch-your-politics/; http://www.businesslive.co.za/bd/economy/2016-11-26-infighting-in-anc-distracting-policymakers--read-full-fitch-statement/.
18. "South Africa's Central Bank Warns of Capital Flight Risk" at http://online.wsj.com/news/articles/SB10001424052702304518704579520901590608912.
19. https://www.bloomberg.com/news/articles/2016-02-21/tipping-point-looms-for-south-africa-as-economy-s-despair-grows.
20. "Politics pushes more money out of SA", *Business Day*, 13 April 2016.

elsewhere in Africa.[21] South Africa's external liabilities, 68% of GDP, are the largest of other emerging markets. According to the IMF, South Africa's capital inflows may become scarcer, costlier and more volatile in future. This situation would pose risks to South Africa's external financing. "A potential pull out of foreign investors, divesting their existing holdings of local assets, also poses risks."[22]

Domestic business: Increased distrust and divestment

As leader of the Consultative Business Movement in the early 1990s, Theuns Eloff organised the first partnerships between business and the ANC government through the National Business Initiative. According to Eloff, that trust is now all but dead and buried:

> *All that these laws will do is chase business away … What the government is proposing is exactly the way Zimbabwe went over the past 10 years.*[23]

Peter Montalto, a respected foreign investment advisor, already stated after visiting South Africa in November 2014:

> *We got the impression that the government and ANC are increasingly leaving out the private sector from its political discourse with voters, focusing on what the government has, is and will achieve for individuals. The private sector is ignored politically as the only real source of wealth creation and sustainable employment growth.*[24]

Tony Leon, former South African ambassador to Argentina and previously leader of the pro-business opposition Democratic Party (DP), described government expectations of business in April 2014:

> *It is the enemy, or at least that section of it that has not submitted to the government's itch to control it*.[25]

In April 2016, two years later, Ann Bernstein confirmed that

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21. "Foreign direct investment into SA nosedives 74%", *Business Day*, 21 January 2016.
22. IMF, South Africa: Selected Issues, 16 June 2016, pp 14-16 at https://www.imf.org/external/pubs/ft/scr/2016/cr16218.pdf; *Balance of Payments Manual: Fifth Edition (BPM5)*, (International Monetary Fund, Washington, D.C., 1993).
23. http://www.bdlive.co.za/national/2014/03/30/why-business-and-the-anc-fell-out-of-love.
24. See http://www.biznews.com/thought-leaders/2014/11/07/nomuras-peter-montalto-was-concerned-ahead-of-sa-research-visit-left-gloomier/. Peter Attard Montalto is a London-based executive director and emerging markets economist at Japanese investment bank Nomura, responsible for South Africa and Emerging Europe.
25. http://www.bdlive.co.za/opinion/columnists/2014/04/15/anc-fights-on-against-its-worst-enemy-business?crmid=crm2.

> *… a dysfunctional relationship between business and government that manifests failings on both sides, but has its roots in deep suspicion about business and markets, flourishes in and around the governing party. South Africa cannot hope to achieve growth while simultaneously being anti-business. The slide into crony capitalism makes matters considerably worse.*[26]

The ANC has underestimated the degree to which companies have opportunities to go elsewhere than South Africa, or it does not care too much.[27] Arnold Goldstone, the CEO of Invicta, a major engineering industrial company, has stated that South Africa has been "on the journey of a gradual decline of industrialization". For many companies, the best opportunities in mining and manufacturing are no longer in South Africa.[28] Major companies like BHP Billiton, AngloGold Ashanti and Gold Fields Limited have already considered hiving off their South African assets, or have actually done so.[29]

In 2016, for the first time in many decades, the value of South African-owned assets outside of the country exceeded the annual inflow of funds into it. As discussed earlier, many of its own citizens preferred to send their money out of the country rather than to invest locally, and foreigners often preferred other locations.[30]

ANC government weakened European investor protection

Following costly arbitration claims brought against South Africa by European investors, the Zuma administration decided in 2010 to stop signing bilateral investment treaties (BITs). The Department of Trade and Industry has, since 2012, undertaken a targeted termination of all 13 treaties with European states, replacing them with the Promotion and Protection of Investment Bill (PPIB), signed into law by

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26. Ann Bernstein, "Harsh choices await if we continue down the low road", *Business Day*, 7 April 2016.
27. Also see http://www.bdlive.co.za/business/trade/2015/05/07/bee-code-change-shocks-industry; http://www.bdlive.co.za/opinion/2015/04/20/why-new-bee-codes-will-pull-the-rug-from-under-business.
28. http://www.biznews.com/video/2014/07/29/must-watch-invicta-holdings-arnold-goldstone-true-impact-numsas-strike/.
29. http://www.biznews.com/video/2014/09/11/what-crisis-rob-davies-shrugs-off-sa-corporate-flight-says-foreigners-investing/. On the issue of company actions to reduce their risk, also see http://www.miningweekly.com/article/major-south-african-assets-fail-to-make-the-cut-in-bhp-billiton-portfolio-remake-2014-08-15; http://www.reuters.com/article/2013/02/08/safrica-goldfields-idUSL5N0B86R420130208; http://www.miningmx.com/page/opinion/columnists/1474694-Selling-SA-gold-mines-is-strategy-of-last-resort.
30. http://www.biznews.com/sa-investing/2016/01/06/capital-flight-plunging-rand-more-sa-owned-assets-abroad-than-flowing-in/; http://derstandard.at/2000027849282/Praesident-Zuma-als-Belastungsprobe-fuer-Suedafrikas-Wirtschaft.

Zuma in December 2015. The department has not terminated the equally restrictive treaties that protect Chinese and Russian investors in South Africa.[31]

Where treaties are terminated, the foreign investors currently protected by them may have no remedy against damaging policy changes. They are also likely to receive less than the "prompt, adequate and effective" compensation promised by the treaties.[32]

The new Investment Bill or PPIB was approved by Parliament and signed into law by President Zuma at the end of 2015. In terms of the law, the rights of foreign and domestic property owners have been much reduced. The PPIB is supposed to apply equally to foreign and domestic investors. "This bill is part of a worrying trend that South Africa's protection of private property is weakening," according to Carol O'Brien, executive director for the American Chamber of Commerce in South Africa, in 2015.[33]

South Africa is Germany's most important trading partner on the African continent. The response of the Southern Africa Initiative of German Business to the cancellation encapsulates the key objections of European business to the policy:

1. *Compared to the terminated BIT the Promotion and Protection of Investment Bill (PPIB) does not provide a guarantee for the fair and equitable treatment of foreign investment. Changes in the legal framework conditions to the disadvantage of investors are possible at any time and might have the effect that both the investment protection and possible claims for compensation are cancelled.*
2. *According to the wording of the bill the legal protection of investments only comprises such cases in which there is a direct expropriation. Measures having an equivalent effect to expropriation are, however, not comprised so that in such cases – contrary to the BIT – a claim for compensation is not provided for.*
3. *In contrast to the BIT compensation payments in cases of expropriations can be below market value, as the basis for any decision is the general provision of fair and equitable compensation, which reflects the consideration of both public interests and the interests of the parties concerned, and not the market value.*
4. *The PPIB envisages the recourse to national arbitral jurisdiction and arbitral tribunals, whereas the access to international arbitral tribunals is neither explicitly mentioned nor allowed. However, for international*

31. Ben Winks, "Investors pawns in political power play", *Business Day*, 19 April 2016.
32. http://mg.co.za/article/2013-11-01-swiss-govt-reacts-to-termination-of-bilateral-investment-treaty-with-sa; http://www.bdlive.co.za/business/2014/03/09/diplomats-break-silence-on-investment-bill.
33. https://www.bloomberg.com/news/articles/2015-11-17/south-african-lawmakers-approve-foreign-investment-bill.

investors, the objective and neutral settlement of disputes according to international law is an important element in investment decisions.[34]

Foreign companies may in fact receive zero compensation if a taking of property by the state is not recognised as an "act of expropriation" under the PPIB. According to Matthias Boddenberg, CEO of the South African-German Chamber of Commerce and Industry, the PPIB would raise the investment risk of German companies, as well as the risk insurance premiums they would need to pay.[35]

Stefan Sakoschek, the executive director of the EU Chamber of Commerce in South Africa, told parliamentarians during public hearings in September 2015:

> *We are aware of a number of projects that are pending due to the degree of uncertainty related to the investment framework ... The withdrawal of SA's (bilateral treaties) with EU member states has sent an alarming message to the EU business community regarding the standard of protection of investments. The new bill does not sufficiently allay those concerns.*[36]

In May 2016, Sakoschek stated that the conditions for investing and doing business in South Africa were "very different" compared to the period when bilateral treaties still protected businesses. According to Sakoschek, political instability and regulatory uncertainty was forcing European firms to reconsider investing in the country. The rules for investing in South Africa appear to be changing too quickly and too drastically.[37]

ANC government weakened property rights[38]

Under the PPIB, signed by President Zuma into law in December 2016, expropriated owners will receive less than market value and will have no right to damages for consequential loss. One danger in the law is that domestic property owners will be confined to "just and equitable" compensation falling somewhat short of market value.

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34. Southern Africa Initiative of German Business, *South Africa: New Legal Framework for Direct Investments*, 2014, pp 1-2 at www.safri.de.
35. http://www.marktundmittelstand.de/zukunftsmaerkte/ppib-deutsche-firmen-fuerchten-um-standort-suedafrika-1233191/.
36. http://www.bdlive.co.za/economy/2015/09/10/investment-bill-may-cause-investor-flight-eu-firms-warn.
37. "Rules for investing in SA changing too drastically and too quickly", *Moneyweb*, 31 May 2016.
38. The analysis of the PPIB's contents is heavily indebted to the analyses of Doctor Anthea Jeffery of the SAIRR and Advocate Martin Brassey, SC, as reflected in the sources quoted. Also see http://www.bdlive.co.za/opinion/2013/06/10/bills-threaten-the-property-rights-of-all-south-africans; http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639/page71619?oid=579465&sn=Detail&pid=71619.

An even greater danger is that such property owners will receive no compensation at all.

According to analyses of Senior Advocate Martin Brassey and policy analyst Doctor Anthea Jeffery,[39] this danger stems from a key clause in the legislation stating that various actions "do not amount to acts of expropriation". There will thus be no expropriation where the state's actions result "in the deprivation of property", but "the state does not acquire ownership" and "there is no permanent destruction of the economic value of the investment".[40]

This situation could arise, for example, where the state takes commercial farmland under claim as "custodian" for land claimants, and then invites them to apply to it for licences to use portions of this land for specified periods. In these circumstances, commercial farmers would be deprived of their property, but the state would acquire it as custodian rather than as owner – and there would be "no permanent destruction of the economic value" of the land, which would continue to be farmed by others. This means there would be no "act of expropriation" under the principles established by the PPIB. As a result, no compensation would be payable.

Constitutional Court neutralized property rights clause in Constitution

The wording of this provision can be traced back to a majority judgment of the Constitutional Court in April 2013. This ruling was made by Chief Justice Mogoeng Mogoeng, an appointee of President Jacob Zuma.[41] The ruling was concerned with whether expropriation had occurred when an unused and unconverted private mining right "ceased to exist" under the Mineral and Petroleum Resources Development Act (MPRDA) of 2002.

Judge Mogoeng found that Sebenza Property Limited, which used to own the coal mining right in issue, had suffered a "compulsory deprivation" of its right under the MPRDA. In addition, "the custodianship" of this resource was now "vested in the state on behalf of the people of South Africa". However, the state had not acquired

39. http://www.bdlive.co.za/opinion/2013/06/10/bills-threaten-the-property-rights-of-all-south-africans; http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639/page71619?oid=579465&sn=Detail&pid=71619. Also see "Concourt ruling, new Investment Bill could give government sweeping powers to take property without compensation", *Polity*, 19 May 2014; Martin Brassey, "The ANC govt's property rights grab", *Politicsweb*, 22 July 2014.
40. http://www.sabinetlaw.co.za/economic-affairs/legislation/promotion-and-protection-investment; http://www.saiia.org.za/opinion-analysis/draft-investment-bill-requires-amendment; http://www.bdlive.co.za/opinion/2013/06/10/bills-threaten-the-property-rights-of-all-south-africans.
41. http://mg.co.za/article/2011-08-16-zuma-picks-mogoeng-as-chief-justice.

ownership of the mining right. Instead, it was simply a "custodian" or "conduit" through which "broader and equitable access to mineral resources could be realised".[42]

The chief justice ruled that since the deprivation of ownership from Sebenza had not been matched by the acquisition of ownership by the state, no expropriation had taken place. It followed that no compensation was payable. Echoing this judgment, a key provision in the PPIB states that various actions "do not amount to acts of expropriation". Among the actions it lists are "measures which result in the deprivation of property, but where the state does not acquire ownership of such property".

When Chief Justice Mogoeng handed down the ruling on Sebenza's rights, two judges of the Constitutional Court, Johan Froneman and Johann van der Westhuizen, disagreed with the majority's conclusion that no expropriation had taken place. They also cautioned against the implications of Judge Mogoeng's ruling. According to the judges, the ruling could lead to "the abolition of the private ownership of … all property" without the payment of any compensation. "Any legislative transfer of property from existing property holders" would no longer be "recognised as expropriation" if it was "done by the state as custodian of the country's resources", they said.[43]

Disempowered international and South African property owners

Government could use the PPIB's rules to take further measures to vest all mining land, mining equipment and other mining assets in the state as the custodian of the nation's mineral resources. Simultaneously, it could invite black-owned businesses in particular to apply to the Department of Mineral Resources for a licence to use a portion of these assets for a specified period. If past experience is any guide, the businesses that benefit would usually be tied to supporters of the ANC, and not to political opponents thereof.

Similar measures, intended to generate a similar outcome, could be taken as regards all other "investments" covered by the PPIB. These are broadly defined to include companies; equities; land; movables; and intellectual property; along with mining rights and similar "licences, authorisations, or permits … to carry out economic and commercial activities". Moreover, the PPIB applies equally to domestic and foreign investors, for the need to ensure equal treatment for both categories of investor is a key theme of the measure.[44]

42. Anthea Jeffery, "The ANC govt's plan for expropriation on the sly", *Politicsweb*, 25 February 2014; Martin Brassey, "The ANC govt's property rights grab", *Politicsweb*, 22 July 2014.
43. Anthea Jeffery, "The ANC govt's plan for expropriation on the sly", *Politicsweb*, 25 February 2014; Martin Brassey, "The ANC govt's property rights grab", *Politicsweb*, 22 July 2014.
44. Anthea Jeffery, "The ANC govt's plan for expropriation on the sly", *Politicsweb*, 25 February 2014; Martin Brassey, "The ANC govt's property rights grab", *Politicsweb*, 22 July 2014.

The PPIB's reference to "investors" is also misleading, for it suggests that the new law will apply solely to companies and other commercial enterprises. In fact, the law will apply to everyone, including "natural persons" and "regardless of nationality".[45] The law gives the state the power to take measures to acquire property of virtually any kind as "custodian" for the poor, and without the need to pay any compensation.

The Restitution of Land Rights Amendment Act came into force in July 2014, reopening the land claims window and causing uncertainty about investment in agriculture. In May 2016, Parliament approved the Land Expropriation Bill, which indicate the requirements for the State to lay claim to land for public purpose or in the public interest without the owner's consent. The term "property" in the Bill was not defined as referring to land only, meaning it was open to interpretation and could lead to movable property like shares and intellectual property be expropriated. The Bill will now be sent to the president to be signed into law.[46]

Agriculture contributes less than 3% of the national GDP and employs just 4.4% of workers. Land reform may serve political purposes, but it cannot serve as the mainstay of serious economic reform. However, serious disruption of the already challenged agricultural sector can have major negative implications for food security in South Africa.

Creeping state ownership in the mining and energy sectors

The amended Mineral and Petroleum Resources Development Amendment Bill of 2013 (the Mining Bill) was approved by the National Assembly on 1 November 2016.[47] The Mining Bill also applies to offshore oil and gas exploration and production. BNP Paribas economist Jeffrey Schultz expects that the law and the uncertainties it creates for producers will influence investment and production negatively in the medium term.[48]

The law gives the minister of Mineral Resources unprecedented discretionary powers in many spheres. It gives the state a 20% "free carried interest" (or free stake) in all new ventures of this kind. It "entitles the state to a further participation interest" of an unspecified percentage, to be attained either via "acquisition at an agreed price" or through a "production sharing agreement" obliging the petroleum company in question

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45. "A new Expropriation Bill by another name", *Liberty*, 25 February 2014, p 5; http://www.miningweekly.com/article/top-lawyers-warn-of-mining-bills-devastating-consequences-2013-09-13.
46. http://mg.co.za/article/2016-05-26-parliament-approves-land-expropriation-bill.
47. http://www.lexology.com/library/detail.aspx?g=e4cc1739-49a3-41e1-98e0-5d97cb86d704; http://allafrica.com/stories/201612050901.html.
48 http://www.miningweekly.com/article/local-mining-industry-still-in-doldrums-economists-2016-12-08/rep_id:3650.

to “share ... the extracted resource” with the state. An earlier version of the bill put this additional interest at 30% and expressly limited the state’s potential stake to a maximum of “50% per petroleum operation”. Now, the state can demand as much as an 80% additional share, over and above its 20% free share.

Oil and gas companies will find it difficult to negotiate an accurate price. They will be required to pay 100% of the costs of developing new projects, but will receive only 80% of the profits. This means that only projects that can fund the government’s 20% free ride will be developed.[49]

Business Day, the premier business publication in South Africa, previously commented:

> *(T)he Mineral and Petroleum Resources Development Amendment Bill allows government to “cherry-pick”, forcing producers to sell all of their most profitable projects to the government. They must do this at an “agreed price” rather than a market price. This means companies can never recoup the costs of exploration or of unprofitable projects. The consequences are obvious. Under such conditions companies will not explore in South Africa. Nor will they develop projects they know the government will nationalise.*[50]

In April 2016, the Department of Mineral Resources released a revised mining charter that demands a perpetual minimum of 26% black ownership per mining right. The charter was drawn up without consultation with the industry. Many companies have complied with this requirement, but BEE partners have exited, taking their profits, or the previous BEE partner has transferred shares to a non-BEE company. The charter now states that all BEE targets stipulated in the mining charter shall be applicable throughout the lifespan of mines. The charter increased the level of capital goods procurement from BEE-compliant companies to 60% from 40%.[51] The charter could have quite a negative impact on one of South Africa’s key industries,[52] especially since the industry’s long-term focus and challenging conditions require policy certainty.

Increased state ownership and control of the lucrative security industry

ANC attempts at other forms of creeping expropriation can be expected in the hybrid regime in the next decade. The Private Security Regulation Amendment Bill of 2013

49. http://mg.co.za/article/2013-09-13-experts-stakeholders-grill-proposed-changes-to-mining-laws.
50. http://www.bdlive.co.za/opinion/columnists/2014/03/31/a-hard-ask-for-business-to-criticise-government.
51. “Department blindsides miners with new charter”, *Business Day*, 15 April 2016.
52. http://www.politicsweb.co.za/news-and-analysis/digging-a-hole-for-mining--irr.

(alias the Security Bill) was adopted by Parliament in February 2014 and is to be signed into law. A provision reintroduced in the closing stages of the parliamentary process requires that “at least 51% of the ownership and control” of security companies must be “exercised by South African citizens”. Foreign-owned companies will be forced to sell 51% of their shares to South Africans.

The clause on expropriation speaks of a minimum of 51% local ownership, but leaves it up to the minister of Police to decide on a higher figure. Both the South African Chamber of Commerce and Industry (SACCI) and the Security Industry Alliance (SIA) have requested President Zuma not to sign this bill.[53]

The National Water Act of 1998 has already made the ANC government the “public trustee of the nation’s water resources”.[54]

State-owned enterprises (SOEs)

SOEs with their billions in lucrative procurement budgets, are already at the heart of the ANC government’s economic policies and political patronage. In 2016, briefings on a cabinet meeting announced that President Jacob Zuma would chair a new presidential SOE co-ordinating committee. The suggestion was withdrawn after resistance, but Zuma has already used senior appointments to SOEs to extend his networks of patronage.

During the past years, there has been an increase in SOEs’ revaluation of fixed assets to current day replacement costs. This increase enabled a sizeable increase in their borrowing abilities. Spending on high-status capital projects surged, often at very inflated costs and with benefits to politically-connected tenderpreneurs.

Many SOEs, having squandered much resources, are now deeply troubled. In the 2014/2015 financial year, for example, they made a combined loss of R15.5 billion.[55] The SOEs are one of the chief obstacles to its aims of stabilising national debt and government finances. Total guarantees to SOEs stood at R469.6 billion at the end of the 2015/2016 financial year, compared to R190.4 billion in the 2012/2013 financial year. The government’s full exposure to these is R263 billion, because several entities

53. http://www.bdlive.co.za/national/2014/06/19/business-groups-urge-zuma-not-to-sign-disputed-bill-on-private-security; http://www.issafrica.org/iss-today/are-foreign-owned-private-security-companies-a-threat-to-south-africas-national-security; http://www.prweb.com/releases/2014/06/prweb11907317.htm.
54. https://www.dwa.gov.za/Documents/Publications/NWAguide/part1.pdf.
55. https://businesstech.co.za/news/general/136311/sa-parastatals-are-losing-billions-while-being-used-for-personal-ends/; http://www.dailymaverick.co.za/opinionista/2016-09-02-dear-moral-investor-would-you-invest-in-rotting-state-owned-entities/#.V84uKJUw_IV.

have not used the full amount available to them.[56] Questionable, dubious and very expensive deals are being done at many parastatals.[57]

Thembinkosi Bonakele, the nation's antitrust commissioner, stated in October 2015:

> *The African National Congress is paying very little attention to economic policy and implementation, despite the rhetoric to the contrary ... The negative global economic outlook notwithstanding, our mediocre economic performance is largely of our own making, by commission or omission*.[58]

Congested railways and ports controlled by SOEs have constrained exports. According to *The Economist*, this situation removed an estimated percentage point from South Africa's low annual growth. The ANC government did not invest enough in expanding its power generation capacity and neglected maintenance. It also did not respond after earlier crises. ESKOM, which supplies about 95% of the nation's electricity, has since 2015 been rationing its supply because its aging plants cannot keep up with the demand. ESKOM implements blackouts when it struggles to meet the demand. These measures have had a huge impact on productivity and also on business morale in South Africa.[59]

The sectors using the most electricity are also the foreign exchange earners, namely non-ferrous metals; basic iron and steel; non-metallic minerals; mining; paper and paper products; and chemicals. According to Peter Montalto:

> *The problem is not its technical ability but the external political and ideological pressure that has slowed the process ... As ever, the government seems to have too much time. The knowledge to solve the ESKOM problem is already within the government. Remove the politics, the tenderpreneurship and the cadre deployment.*[60]

Corruption has also worsened further, according to forensic lawyer Steven Powell: "The tone at the top is my biggest concern. Corruption is becoming more [common] and our clients are experiencing more bribery requests." For the third year Powell's team has published an anti-corruption and bribery survey. It names South Africa as one of eight African corruption hot spots.

56. http://mg.co.za/article/2016-10-28-00-fiscal-risk-beware-the-parastatals.
57. http://mg.co.za/tag/parastatals; http://mg.co.za/article/2016-09-02-00-treasurys-bids-to-end-corruption-are-peeling-back-a-curiously-connected-gravy-trail.
58. http://www.bloomberg.com/news/articles/2015-10-12/south-africa-s-anc-must-focus-on-economic-policy-bonakele-says.
59. http://www.bdlive.co.za/opinion/2015/04/14/eskom-lies-will-continue-over-ideology.
60. http://www.bdlive.co.za/opinion/2015/04/14/government-knows-eskom-solution-but-lacks-resolve.

According to the survey, the worsening of corruption is particularly evident in the issuing of permits by the Department of Home Affairs; the insertion by state departments of middlemen, who do nothing other than take a slice of the money as a condition of the awarding of government contracts; and the prevalence of government officials demanding a bribe simply to do their job.

In the opinion of Corruption Watch Executive Director David Lewis, the survey is consistent with the findings of organisations such as the Organisation for Economic Cooperation and Development, and Transparency International. "It has a lot to do with the fact that people at the top – in both public and corporate life – are seen to be getting away with corruption."[61]

Patronage pressures and emptying state coffers

The prominent economist Moeletsi Mbeki has stated that the only agenda of the ANC currently is "it is our turn to eat".[62] However, after twenty-two years of one-party-dominant rule, the state sources to satisfy important actors and constituencies have declined. The ANC's policies have included the overuse and abuse of civil service employment and SOEs, in conjunction with profligate spending, corruption and extreme consumption. Over the past decade the number of civil servants has increased by about 25%. One in five working people now works for the government.[63] The post-2000 period has generated a new labour elite in the labour market, namely the unionised public sector employee.[64] The wage bill for the first four months of the 2016 financial year, was R23 billion higher than for the same period last year.[65]

Under President Zuma's administration, the national debt has grown so much that it costs R128 billion a year in interest payments alone. Public sector wages, debt interest payments and welfare grants now account for 60% of the budget.[66] In addition, according to South African chief procurement officer, Kenneth Brown, as much as 40% of the country's R600 billion budget for goods and services is being eaten up by inflated prices from suppliers, and fraud.[67] Without sufficient new wealth-generating activities, investment, savings and productivity, a risk of insufficient state income is looming.

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61. http://www.timeslive.co.za/thetimes/2016/09/23/South-Africa-drowning-in-graft.
62. Andrew England, "Power failure", *Financial Times*, 13 May 2015, p 7.
63, "The hollow state", *The Economist*, 20 December 2015.
64. https://theconversation.com/south-africas-civil-servants-are-the-countrys-new-labour-elite-54269.
65. http://businesstech.co.za/news/government/139193/shocking-levels-of-fraud-and-inflated-prices-cost-south-africa-r233-billion/.
66. R.W. Johnson, *How long will South Africa survive? The looming crisis* (Jonathan Ball Publishers, Cape Town, 2015), p 124.
67. http://businesstech.co.za/news/government/139193/shocking-levels-of-fraud-and-inflated-prices-cost-south-africa-r233-billion/.

Professor Jannie Rossouw, currently head of the University of the Witwatersrand's School of Economics and Business Sciences, and co-researchers Adele Breytenbach and Fanie Joubert refer to an approaching fiscal cliff, "the danger that the South African government might run out of income to cover growing government expenditure".[68] Social grants and state jobs together would account for all government revenue by 2026 – assuming high average annual revenue growth of between 9.7% and 9.9%. It is currently at 1% per year. Even sharp increases in personal tax, company tax, fuel levies and excise duties would merely defer the fiscal cliff for two or three years.

The public commentator and former editor of the anti-apartheid weekly *Vrye Weekblad*, Max du Preez, summarized it in 2014:

> *Combined, welfare payments and public service salaries consume 56.4% of all state revenue, leaving just 43.6% for everything else that has to be done in this country. That is madness.*[69]

Professor Susan Booysen concludes that there is little evidence of Zuma's policy leadership on economic growth and job creation.[70] Political pressures to raise extra income for the ANC, its cadre networks in the state structures and key constituencies will also increase in the next three years.[71] The ANC Youth League, for example, again started calling for nationalisation policies in October 2016. Intense factional competition in the ANC and its allies, and between the ANC and breakaway political or politicized opponents like the EFF and NUMSA, will reinforce these dynamics.[72]

Under budget pressures, the ANC government will try to raise extra income in the form of taxes, including road tolls; regulations; licence fees; and other means. Unorthodox actions and rules of the game may emerge as a result. For example, the first transaction of the contested nuclear deal with Russia may already have occurred.[73] When most businesses had closed for the December break in 2015, acting CEO of the Strategic Fuel Fund (SFF) Sibusiso Gamede and Energy Minister Tina Joemat-Pettersson negotiated and sold South Africa's entire stock of strategic oil

68. Jannie Rossouw, "South Africa's fiscal cliff: A different meaning to a well-know concept", ERSA, 16-17 May 2013; "SA is headed for a financial cliff", *Financial Mail*, 14 October 2014.
69. http://today.moneyweb.co.za/article.php?id=790143&cid=2014-11-06#.VFs_D5UcTIU.
70. Susan Booysen, *Dominance and Decline: The ANC in the time of Zuma* (Wits University Press, Johannesburg, 2015), p 304.
71. See for example http://www.bdlive.co.za/business/mining/2015/05/18/chamber-of-mines-comes-to-members-defence.
72. http://today.moneyweb.co.za/article?id=466373&acid=Z254vWXulCUeZeuwhd4cWQ%3D%3D&adid=CxgRuNO6fqMeZeuwhd4cWQ%3D%3D&date=2015-04-22#.VXbCkssR673; http://sa-monitor.com/anc-youth-league-nationalisation-call-plunge-mining-deep-pit-bdlive-11-october-2016/.
73. http://allafrica.com/stories/201609161193.html.

reserves, 10 million barrels, to three invited buyers. The sale occurred at a discount on the spot price of between $3 and $14 a barrel, an average discount of $7 a barrel. The sale took place without the knowledge of the fund's board or its holding company, the Central Energy Fund. It also took place without the permission of the Finance minister, which is required by both the Central Energy Fund Act and the Public Finance Management Act.[74]

Business may be expected to take on new obligations usually fulfilled by the tax-funded state. Business will often have difficulty in establishing whether extra state revenue is actually spent on improving the infrastructure or conditions of all citizens, or on subsidizing the ANC's patronage and reinforcing its one-party dominance in a hybrid regime. ■

74. http://sa-monitor.com/awful-lot-official-silence-oil-heist-bdlive-4-october-2016/.