



Centre for
**CONSTITUTIONAL
RIGHTS**

CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

Patron: The Hon Mr Justice Ian G Farlam

Mr Manyane Chidi
Chief Director: Property Policy Development
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Attention: Mr Manyane Chidi

Per email: manyane.chidi@dpw.gov.za

30 April 2013

Dear Mr Chidi

CONCISE SUBMISSIONS ON THE DRAFT EXPROPRIATION BILL [2013]

Introduction

1. The Centre for Constitutional Rights (CFCR) is a unit of the FW de Klerk Foundation – a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 (the Constitution). To this end, the Centre seeks to promote the values, rights and principles provided for in the Constitution, to monitor developments including policy and draft legislation that might affect the Constitution and the values, rights or principles provided therein, to inform people and organisations of their constitutional rights and to assist them in claiming their rights.

A UNIT OF THE FW DE KLERK FOUNDATION

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2. The CFCR welcomes the opportunity to make concise submissions to the Department of Public Works (the Department) on the draft Expropriation Bill [2013] (the draft Bill) in response to your call for submission as published on http://www.publicworks.gov.za/Expropriation_Bill.html.
3. It is not the purpose or intention of this submission to provide comprehensive legal analysis or technical assessment of the draft Bill, but rather to draw attention to key concerns in relation to the draft Bill, particularly in so far as it relates to constitutional values, rights and requirements.
4. Nevertheless, the CFCR will again address the aforementioned matters more comprehensively, if so required, once the draft Bill has been tabled in Parliament.

Background

5. The right not to be arbitrarily deprived of property, whether by means of expropriation, or otherwise is enshrined in section 25 of the Constitution:

"25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application-

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) 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 relevant circumstances, including-

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section-

(a) 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; and

(b) property is not limited to land.

(5) *The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*

(6) *A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*

(7) *A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*

(8) *No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).*

(9) *Parliament must enact the legislation referred to in subsection (6)."*

6. Section 25 and the question of property rights was one of the most closely contested questions during the constitutional negotiations. It was carefully formulated to take into account the core right to own property, on the one hand, and the need for the state to be able to expropriate property on the other hand for a public purpose or in the public interest. It also carefully included the provision that any expropriation process must be "*just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances*". Moreover, it required compensation to i) be agreed to by those affected; or ii) to be decided or approved by a court.
7. Section 25 differed from the previous expropriation process by permitting expropriation not only for a public purpose – but also in the public interest. The public interest specifically includes "*the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources*" and states that "*property is not limited to land*". A much more exact definition of "*public interest*" is thus essential to ensure that the nature of any deprivation of property does not conflict with the foundational and peremptory requirement that "*no law may permit arbitrary deprivation of property*" – neither directly, nor by implication or unintended consequences.
8. In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), the Constitutional Court formulated some guidelines for the interpretation of section 25 in context of historical discriminatory land legislation and the new constitutional dispensation within which conflicting rights have to be balanced. According to the court, the starting and ending point of the analysis of section 25 "*must be to affirm the values of human dignity, equality and freedom*". In context of being both "*protecting existing private property rights as well as serving the public interest...striking a proportionate balance between these two functions*", any legislation implementing section 25 or parts thereof, has to carefully balance the right to

private property ownership with the right to infringe upon that right for purposes as provided for in section 25.

Draft Expropriation Bill [2013]

9. Although it is well understood that the purpose of the draft Bill is to give effect to section 25 of the Constitution and hence to provide for expropriation in terms of the provisions of that section, the draft Bill raises a number of concerns. In general and although in line with section 25 of the Constitution, the inclusion of "*public interest*" as a ground for expropriation without properly and accurately defining its meaning, may result in unintended and negative consequences for property owners and holders. Furthermore, the way in which compensation is determined, when it is paid and when property can be expropriated prior to full compensation being paid, raise further concerns.
10. Key concerns regarding the draft Bill include the following:

Application

Ad clause 1 Definitions

11. The definition of "*property*" is a broad definition that includes fixed property, movable property and "*a right in or to such property*". The latter includes mining rights, patents and other intellectual property rights and shares in listed and private companies.
12. Although in line with section 25(4)(b) of the Constitution, that fact that this definition is formulated to include property in the widest sense of the word, requires from the draft Bill to provide proper and adequate protection to property owners, especially from arbitrary application of the powers provided for in the draft Bill.

Ad clause 2 Application of the Act

13. Clause 2, read with clause 29, provides for the draft Bill to be applied in conjunction with other legislation which also provides for expropriation. The Mineral and Petroleum Resources Development Act, 2002 is one example. It is accordingly important to align the provisions of relevant legislation with this Bill, and *vice versa*, so as to ensure that, as the case with the aforementioned Act, this Bill does not result in unintended means of arbitrary deprivation and expropriation.

Power to expropriate

Ad clause 3 Power of Minister to expropriate property

14. Clause 3 provides for the Minister to expropriate property for a "*public purpose*" or in the "*public interest*". Although in line with section 25(2)(a) of the Constitution, clause 3 relies upon a very wide and

inadequate definition of "*public interest*" as defined in clause 1. The latter definition relies primarily on the wording of section 25(4)(a) of the Constitution (and an additional reference to non-descriptive "*other related reforms*") and provides no further test for determining "*public interest*".

15. The definition of "*public interest*" is wholly inadequate, lacks clarity and precision and opens the door for arbitrary expropriation based on the subjective interpretation of the meaning of "*public interest*" by the Minister or delegated official. In particular, any definition of the national interest must take cognisance of the overwhelming empirical evidence that secure property rights are essential – not only for economic growth and the material prosperity of society – but also as a central prerequisite for the enjoyment of other freedoms. Accordingly, national interest may not be equated with the subjective, transient and sectional policies of the government of the day, but must conform to the long-term and objective requirements for the economic wellbeing, stability and freedom of society and South Africa as a whole.
16. In addition, it is also advisable, with reference clause 3, to include a definition of "*Compensation*" under clause 1, which at minimum must reflect that compensation shall be "*just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or holder*". Alternatively, clause 3 must duly refer to clause 13(1) as being subject to the latter provision.

Ad clause 4 Expropriation of property on behalf of a juristic person

17. In terms of clause 4, the Minister may on the grounds of public purpose or public interest, expropriate property for the benefit of a "*juristic person*" established by law and which is required to account for the management of its finances under the Public Finance Management Act, 1999 (PFMA) or the Local Government Municipal Finance Management Act, 2003 – thus a state-owned enterprise. This provision could result in state-owned enterprises and statutory bodies benefitting from the expropriation of land, prospecting and mining rights as well as other unregistered rights, to the detriment of competing private juristic persons and business, and at potentially less than market value.

Ad clause 5 Delegation of duties by the Minister, read with clause 1 "expropriating authority"

18. Clause 5(1) determines that the Minister may delegate "*to an official of the Department any power or duty conferred or imposed to him or her in terms of this Act*", save for those powers or duties as excluded in terms of clause 5(2). Clause 1, however, defines an "*expropriating authority as being the Minister, the executive authority of a national or provincial department, the municipal council of a municipality, or an organ of state empowered by a general law of application*".
19. Although the Minister is hence limited by clause 5 to delegate certain powers and duties, the definition of "*expropriating authority*" clearly extends to all three tiers of government as well as other organs of state.
20. The current drafting is not only a cause for confusion and incorrect interpretation, but also allows for much too wide a power across all levels of government to effect expropriation. It is strongly advisable to limit this power to the Minister and only the Minister.

Ad clause 10 Vesting of expropriated property, read with clause 18 Payment of amount offered as compensation

21. The draft Bill currently provides for an "*expropriating authority*" to take ownership and possession of property before paying any compensation to the expropriated owner or holder at all with obvious negative impact on property owners and holders. This provision may also result in increased chances of the State resorting to expropriation without properly considering financial implications for the State as well as property owners or holders.

Ad clause 13 Determination of compensation

22. In terms of section 25(3) of the Constitution, compensation as a result of expropriation must be "*just and equitable*" and must reflect "*an equitable balance between the public interest and the interests of those affected*".

23. Considering the relevant circumstances as provided for in clause 13(1)(a)-(e), the compensation awarded for expropriated property may indeed, in line with the Constitution, be less than market value. In this regard it is once again evident why it is crucially important to clearly define the meaning of "*public interest*" in order to duly consider the interests of the expropriated owner or holder.

Ad clause 18 Payment of amount offered as compensation

24. Clause 18 determines that compensation only becomes payable "*on the date on which the amount of such compensation has been determined by agreement between the expropriating authority and the claimant, or approved or determined by court*". In the event where no agreement exists between the parties, a determination by a court could increase a delay in payment of compensation for increased periods of time. This in turn will put much pressure on the expropriated owner to accept any amount offered by the expropriation authority, rather than remain without the benefit of either the property or compensation.

Conclusion

25. CFCR would like to contribute positively to the promotion and protection of our constitutional democracy by ensuring that real and substantive equality is achieved in relation to land reform and reforms to bring about equitable access to all South Africa's natural resources whilst having due regard for the rights of property owners and holders. In this regard and if required, the CFCR will be available to engage in oral submissions to the Department in order to elaborate on this submission, whether during public hearings or at any such time as the Department may deem it appropriate.

26. We trust that our submission will be of assistance in guiding the Department in finalising the draft Expropriation Bill [2013].

Yours sincerely



Adv Johan Kruger
Director