
COMMENTS ON THE DRAFT CONSTITUTION 18TH AMENDMENT BILL

1.

THE PROPOSED AMENDMENT TO THE CONSTITUTION

1.1 The preamble of the Amendment Bill states the need for urgent and accelerated land reform in order to address the injustice of the past and especially the hunger for land amongst the dispossessed, who are of the view that very little is being done to redress the skewed land ownership pattern.

In the second preamble it is stated that section 25 of the Constitution must be amended to make explicit that which is implicit therein, so that an amount of nil compensation is explicitly stated as a legitimate option for land reform.

1.2 The proposed amendment to section 25 of the Constitution is better understood if read within the context of what remains of the relevant part of section 25 after amendment:

“(2) Property may be expropriated only in terms of law 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; *provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform determine that the amount of compensation is nil.*
- (3) The amount of compensation *as contemplated in subsection 2(b),* and the time and manner of *any* payment, must be just and equitable, reflecting an equitable balance between the public interest and the interests of those effected, 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.

(3A) *National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil.*

2.

DISCUSSION OF THE PRINCIPLE EMBODIED IN THE AMENDMENT

2.1 In a submission dated 14 June 2018 SAPOA pointed out that International Law does not countenance expropriation without compensation. In International Law, this concept is not regarded as expropriation but of confiscation of property. Indeed, confiscation of property is regarded in International Law in such a serious light that:

2.1.1 by International Private Law the confiscating authority's ownership of the confiscated property, is not recognised

and the original ownership still vests in the owner from whom the property was confiscated.¹

- 2.1.2 If the property so confiscated belongs to a foreign national, the confiscation is an International Law delict which opens the state up to diplomatic protection by the state of nationality of the owner, or international arbitration if covered by a Bilateral Investment Treaty.
- 2.2 It was also pointed out that there is a small window afforded by Article 16, Paragraph 1 of the Charter of Economic Rights and Duties of States whereby all States have the right and duty to eliminate colonialism, apartheid, racial discrimination and economic and social consequences thereof as a pre-requisite for development. Section 25(3) of the Constitution, we submitted, may thus be unpacked to provide for specific relevant circumstances when minimal or no compensation will be payable, but then the circumstances have to be closely and very clearly circumscribed and be subject to the provision that the equivalence principle discussed below, remain applicable. This will afford the

¹ Except in the case of Acts of State and War.

expropriated owner the defence that nil or minimum compensation is not just and equitable under the circumstances.

- 2.3 The basic principle underlying payment of full compensation is that of equivalence or equality in the bearing of public burdens. It is on the basis that where one or more individuals has to bear a sacrifice in the form of the loss of property for the common good, their individual and excessive burdens should be compensated by the community. That burden should not partially or wholly be imposed on expropriated landowners. The equivalence principle does not allow nominal compensation nor as a rule does it justify less than market value.
- 2.4 However, the provision in section 25(3) that the amount of compensation must be just and equitable encompasses the equivalence principle which must not be transgressed in instances where no compensation is paid.
- 2.5 The difficulty, however, is that these instances may amount to confiscation if wrongly crystalized in national legislation. It is very difficult, if not impossible, to correctly circumscribe the circumstances where it would be just and equitable to pay nil compensation, because the practical circumstances of each owner whose property is expropriated cannot be foreseen by a legislature.

The best one can do would be to make such instances strictly subject to the qualification of justice and equity and to put the burden of proof in each instance on the expropriating authority. Very few individuals will be able to withstand the anxiety and the costs of litigation with the State. All nil compensation cases should therefore be put before a court by the State, where the onus of proof will be on the State to prove that it is just and equitable that nil compensation be paid.

- 2.6 If nil compensation is implicit in the existing section 25, as is stated in the preamble to the Amendment Bill, why is it necessary to embark upon the amendment thereof to make explicit that which is already provided for in section 25(3)? Must a Constitution be amended simply because of the whims of politicians, whilst the amendments will have no practical effect, being already in existence?
- 2.7 The proposed section (3A) has the inherent danger that amendments to the Constitution which cannot be attained through a two-thirds or a 75% majority², will now sought to be introduced by

² Note that the equivalence principle is part of the Rule of Law which is a foundational value set out in Chapter 1 of the Constitution. The Constitution may thus only be amended as far as the equivalence principle is concerned, by a 75% majority of the

way of national legislation, unless the equivalence principle is strictly adhered to.

- 2.8 The Expropriation Bill has been revisited after comments for introduction to the National Assembly. Section 12(3) thereof has been extensively reworked but remains problematic, particularly in view of the equivalence principle, because in each instance circumstances can be postulated where it will not be just and equitable to refuse compensation.
- 2.9 The perception which is bound to arise with international investors, is that what South Africa is after, is to legitimise confiscation on the basis of it being just and equitable to do so.

3.

COMMENT ON THE CONTENTS OF THE AMENDMENT BILL

- 3.1 As stated above the proposed subsection (3A) requires that specific circumstances where a court may determine that the amount of compensation is nil, must be set out in national legislation.

National Assembly and a supporting vote of at least six provinces in the National Council of Provinces (see section 74(1) of the Constitution) as read with section 1(c).

These circumstances will be applicable only where expropriation takes place for purposes of land reform. Is it not explicit in the existing section 25(3) that such circumstances may also exist in respect of other expropriations?

Be that as it may, the Expropriation Bill set out the circumstances where land is expropriated “in the public interest”. The “public interest” expropriations are not confined to expropriations for land reform, whereas expropriations for public purposes is a further category of expropriations for which compensation is to be paid.

- 3.2 Either the Expropriation Bill has to be amended to make section 12(3) applicable only where expropriation is taking place for land reform purposes, or the requirement in the proposed section 2(b) of the Amendment Bill that the amount of compensation may be determined as nil in the case of land reform expropriations only, must be deleted.

Otherwise section 12(3) of the Expropriation Bill will be unconstitutional.

- 3.3 As presently formulated, only the national legislation is subjected in subsection (3A) to subsections (2) and (3), i.e. to the equivalence principle. The proviso in subsection 2(b) subjects the

powers of the court to subsection (3A) i.e. the national legislation. However, the power of the courts should not only be circumscribed by the national legislation, but by the Constitution itself. Therefore, the proviso to subsection 2(b) should be amended by adding before (3A) a reference to subsection (3). It will then read:

"2(b).....Provided that in accordance with subsections (3) and (3A) the court may...."

3.4 Lastly a proviso should be added to subsection (3A) as follows:

".....Provided that in every case where the State expropriates at nil compensation, the State has to obtain an order of court that it is just and equitable to pay nil compensation in the specific case....."

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Pretoria

21 January 2020

1.

ADDENDUM

1.1 In a statement released on 22 January 2020 of the ANC NEC meeting of 17 - 18 January 2020 and the NEC Lekgotla of 19 -

20 January 2020 the following court statement is made with respect to the amendment of section 25 of the Constitution:

“The Lekgotla endorsed the recommendations that the power to determine issues related to expropriation of land without compensation should reside in the executive.”

- 1.2 Last week the ANC MP and committee chairperson Mathole Motshekga stated that “[t]he minister can make decision, determine the price - that does not exclude the jurisdiction of the courts. Aggrieved parties may go to courts afterwards and say I am not satisfied with this. The court will be the arbiter.”
- 1.3 The two statements read together is indeed consonant with what is contained in the published recommended amendment of section 25(2), if what is intended thereby is that -
 - 1.3.1 the expropriating authority may serve a notice of expropriation on an owner in which nil compensation is offered;
 - 1.3.2 the expropriated owner may claim compensation as set out in the Expropriation Act on the basis that a nil compensation offer is not just and equitable;

- 1.3.3 proceedings may then be instituted in court deciding the dispute on compensation and determining the amount of compensation to be nil, or more.
- 1.4 However, if the idea is that the amount of compensation can be finally determined by the executive, and not by the court³ and that section 25(2) of the Constitution must be amended to reflect that position, such an amendment will be contrary to the rule of law. In that regard I fully agree with Ngcukaitobi SC that the amendment turns into the spotlight, the rule of law.
- 1.5 In terms of the rule of law the executive is controlled *inter alia* by the courts. In order to amend the existing section 25(2) of the Constitution and delete the role of the courts with respect to the determination of compensation, one of the foundational values of the Constitution, namely the rule of law, will be amended.
- Such an amendment will indeed require a 75% majority of the National Assembly and a supporting vote of at least six provinces in the National Council of Provinces in terms of section 74 as read with section 1(c) of the Constitution.

³ or with the court only able to review the administrative decision

It will also have to be evaluated against the provisions of section 34 of the Constitution which guarantees the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. Section 34 is narrowly interlinked with section 1(c) of the Constitution which sets out the foundational value of supremacy of the rule of law.

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30 January 2020

Pretoria