

03 February 2020

Chairperson and Honorable Members
Ad Hoc Committee on the Amendment of
Section 25 of the Constitution of the Republic
of South Africa, 1996
National Parliament
c/o
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Introduction

The Land and Accountability Research Centre (LARC) is based in the University of Cape Town's Faculty of Law. LARC forms part of a collaborative network, constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights in the former homeland areas of South Africa. An explicit concern of LARC is power relations, and the impact of national laws and policy in framing the balance of power within which rural women and men struggle for change at the local level.

This submission is intended to comment on the Constitutional Amendment Bill aimed at providing that where land and any improvements thereon are expropriated for the purposes of land reform, the amount of compensation payable may be nil. The context identified for the necessity of this amendment is the need for urgent and accelerated land reform to address the injustices of the past. The Preamble rightly states that the majority of South Africans who bore the injustice and indignity of arbitrary land dispossession during colonialism and apartheid continue to be palpably hungry for land – 26 years into our democratic dispensation.

The Amendment aims to make “explicit that which is implicit” in the Constitution – so that an amount of nil compensation is explicitly stated as a legitimate option for land reform.

For the sake of brevity, this submission will deal with a single broad issue, that can be summarised as follows:

1. Requiring, in section 25(3A) of the Constitution, that legislation set out the “specific circumstances” in which a court may determine that the compensation payable be nil, is likely to be an unconstitutional limitation of the power the state has in terms of section 25, as it now stands, to constitutionally expropriate land for the purposes of land reform.

Section 25 (3A)

The Amendment makes an addition to the current section 25(2)(b) of the Constitution. Section 25(2)(b) provides that expropriation in terms of a law of general application¹ for a public use or in the public interest² should be subject to compensation that is agreed to by the affected parties or approved by a court.

The addition made by the Amendment provides that in accordance with the newly inserted section 25(3A) a court may, where the expropriation is for the purposes of land reform, determine that the amount is nil. The most important provision in relation to expropriation of land and improvements without compensation is section 3A, as it sets the parameters for expropriation without compensation for the purposes of land reform.

Section 25(3A) in setting the constitutional parameters of expropriation without compensation requires that national legislation set out the “*specific circumstance*” in which a court may determine that the amount of compensation is nil, subject to subsection (2) and (3) of section 25. So, the ambit of the state’s power to expropriate land with nil compensation will be determined by Parliament following the directive in section 25(3A) of listing “specific circumstances”.

Before the Joint Constitutional Review Committee, it was our submission that a proper reading of section 25 of the Constitution already allows for expropriation with nil compensation for the purposes of land reform, in a manner that is set out in legislation. A central component of our constitutional project is the achievement of land reform. One of the most important functions of section 25 is empowering the state to take action to promote land and related reforms that are aimed at reversing the injustices of our past.

The Bill of Rights as a whole, various provisions of the Constitution, as well as its founding values emphasise our constitutional democracy’s project of remedying the

¹ Section 25(2).

² Section 25(2)(a).



injustices of the past, and creating a society based on social justice and fundamental human rights. Through these provisions, the Constitution makes it clear that it aims to adequately empower the state to legitimately make significant interventions in the existing distribution of wealth and property in South Africa.

Section 25 does not exist or operate in isolation of the other rights in the Bill of Rights. The reason for the interconnection between rights is to ensure the achievement of the aim of creating a society where everyone can live a dignified and full life. The brutal dispossession of land was at the centre of the injustices and indignities visited upon the majority of South Africans aimed at dispossessing them of their rights to land as well as their political and citizenship rights in their homeland. Achieving land reform is a fundamental aspect of recognising those injustices and indignities and beginning to remedy them.

In this context, ensuring that the state has full access to powers necessary to achieve this is of utmost importance. However, this attempt at “making explicit that which is implicit in the Constitution” could severely curtail an important tool that the Constitution already makes available to the state to achieve land reform.

It is our contention that section 25(3A) would be an unconstitutional limitation of the power of the state to take the steps necessary to achieve land reform, a central tenant of the Constitution’s aim of redress. Of particular concern is the effect of the phrase “specific circumstances” when referring to when compensation can amount to nil. This phrase constitutes an internal limitation of the rights in section 25 as they relate to land reform. This phrase, which seems to require an exhaustive list of circumstances in which the state can use its power to expropriate with nil compensation, unreasonably limits the mechanisms available to the state to effectively achieve land reform.

As we stated in our previous submission, outside of section 25(1) – which provides for a negative procedural right not to be deprived of property arbitrarily – the rest of section 25 is an articulation of procedures and positive rights that allow for constitutionally compliant deprivation of property. The Constitution only requires that the manner in which these extensive powers are to be exercised be articulated in laws of general application. The extent of the state’s post-apartheid expropriation powers has not been adequately articulated in legislation. The power of the state to expropriate land with nil compensation has never been used or tested in a court of law. The legitimate ambit of this power has never been proactively placed before a court to be thoroughly considered. To limit this power as the proposed Amendment does thus takes away opportunities to explore and develop what is possible and Constitutionally permissible.



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Ample jurisprudence of the Constitutional Court has stated that in giving content to constitutional rights – and by extension understanding the power of the state to give effect to those rights – a purposive and generous approach must be used to ensure that the aims of our constitutional project are achieved.³ Legislation giving expression to how that right will be given effect to, is able to reasonably limit that right in terms of section 36 of the Constitution. Like all other rights in the Bill of Rights, section 25 is subject to the limitations clause in section 36 of the Constitution. Further limitations to such an integral provision are not necessary.

It is our submission that any limitation of the powers of the state to expropriate is better suited to being articulated in legislation, the reasonableness of which can be tested against section 25 and section 36 of the Constitution. Placing the limitation in the text of the Constitution will prevent the testing of the ambit of this power and the development of a rich jurisprudence relating to what “just and equitable” compensation looks like in varying contexts – including when nil compensation would be “just and equitable”.

Starting from a narrow position in giving content to constitutional rights and powers when the objective is to give effect to those rights, is not a good idea. It eliminates the opportunity for any enabling legislation to use the full extent of state power currently available in terms of the Constitution. Put differently, a narrow empowering provision results in limited and restricted enabling legislation, less likely to serve the objects, spirit and purport of the Constitution.

A better approach would be to expressly require legislation that appropriately gives expression to the power of the state to expropriate in terms of section 25(2) and (3); the other provisions in section 25; and the rest of the Constitution. The directive that section 25(3A) purports to give to Parliament in requiring it to set out “specific circumstances” creates an unreasonable internal limitation.

All the Constitution needs to do is require that national legislation be passed that would not legalise arbitrary deprivation of property and that does not violate section 36 of the Constitution. What that will look like needs to be left to Parliament to decide. If it decides that legislating a closed list of instances where expropriation with nil compensation is allowed, then it can do that. However, in such an instance the legitimacy of this limitation would be capable of being tested against the standard of “just and equitable” (including the non-exhaustive factors listed in the section 25(3)) and reasonableness in terms of section 36 of the Constitution.

³*Khosa and others v Minister of Social Development and Others, Mahlaule and another v The Minister of Social Development and others* 2004 (6) SA 505 (CC)



Section 25(3A) as it stands, with this internal limitation, would prevent any substantive enquiry into the reasonableness of nil compensation in circumstances that are not part of the closed list

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