

COMMENTARY ON THE DRAFT EXPROPRIATION BILL, 2019

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1 About the SARChI Chair for Mineral Law in Africa

The SARChI Chair for Mineral Law in Africa (MLiA) was launched in 2016 as part of the South African Research Chairs Initiative (SARChI) established by the Department of Science and Technology (DST) and the National Research Foundation (NRF). The DST and NRF are jointly our main funders. We are hosted by the University of Cape Town within the Faculty of Law, Department of Private Law. Further information about MLiA, its objectives, projects and activities can be accessed from its official website.¹ Our research focus is generally on mineral law and policy development in South Africa and the rest of the African continent. Among the projects currently undertaken by MLiA is several doctoral and masters research studies that features various aspects relating to mining and land use. These include abandonment of land ownership, intersections of land and mineral resource reforms and other integrated topics of concern on land governance. It is in this context that we would like to make a submission on the Draft Expropriation Bill, 2019 (Draft Bill). This submission is in the service of our intention to promote and protect the integrity and quality of South African law and policy on land governance and administration.

2 Background and Context

On 27 February 2018, the National Assembly (NA) passed a motion to amend the 'Property Clause', section 25 of the Constitution of the Republic of South Africa, 1996 to provide explicitly for expropriation without compensation, in certain instances, as a legitimate means to acquire property.² This resulted in a series of public consultations across the country to solicit the views of ordinary people on the proposed amendment. On 6 December 2018, the NA then adopted the report of the Constitutional Review Committee to allow the property clause to be amended for it to provide for the expropriation of land without compensation.³

¹ This can be accessed at (accessed 24 February 2020).

² See Parliament of the Republic of the Republic of South Africa "National Assembly gives the Constitutional Review Committee Mandate to Review Section 25 of the Constitution" available online at <https://www.parliament.gov.za/press-releases/national-assembly-gives-constitution-review-committee-mandate-review-section-25-constitution> (accessed 24 February 2020).

³ Parliament of the Republic of the Republic of South Africa "National Assembly to Establish Ad Hoc Committee to Introduce Legislation Amending Section 25 of Constitution" Available online at <https://www.parliament.gov.za/press-releases/national-assembly-establish-ad-hoc-committee-introduce-legislation-amending-section-25-constitution> (accessed 24 February 2020).



All these developments culminated into the Draft Bills that are currently under intensive scrutiny from various ends and across sectors until **29 February 2020**. We respectfully accept your invitation for public comments and hope to have our views considered by your honourable department.

Our comments below are organised into two sections, one dealing with the Draft Eighteenth Amendment Bill to the Constitution (section 3 below); and the other dealing with the Draft Expropriation Bill, 2019 (section 4 below).

3 Comments on the Draft Eighteenth Amendment Bill to the Constitution of the Republic of South Africa, 1996

We commend the drafters of this Bill for acknowledging and putting in words the need for a mechanism that will support restitution and redistribution as key pillars of land reform. We further commend the drafters for placing the decision-making responsibility about expropriation at nil compensation firmly in the hands of the judiciary. The Bill in its current form is clear that the courts should remain the last arbiter when determining whether the state should pay for expropriated land.⁴ This provision is important in many respects. First, it would have entirely been a wrong and unconstitutional move to bypass and exclude the courts in the process of this nature that has far-reaching implications on various human rights, such as property rights and the right of access to courts. Also, this provision offers an important safeguard against corruption, lack of political will for law and policy implementation, ineptitude, excessive bureaucracy and just the risk of having politics overtaking the law.

4 Comments on the Draft Expropriation Bill, 2019

The Draft Expropriation Bill, 2019 (“the Bill”) purports to bring clarity on several issues in the current law. For one, the definition of “expropriation” as set out in the Bill now makes overt the requirement that expropriation must involve an acquisitive act by the expropriating authority. This means there can now be no expropriation if the state does not acquire

⁴ See Clause 1(c) of the Draft Eighteenth Amendment Bill to the Constitution.

ownership of (or at least the right to exploit) the property in question. This requirement was implied in the law up until now and found expression for the first time in *Agri South Africa v Minister for Minerals and Energy*.⁵ This position is then also entrenched in clause 3(5)(a) and clause 9(1)(a) of the Draft Bill.

In our opinion, the Bill especially deserves to be commended for the meticulous and measured way in which it deals with the investigation phase preceding a decision to expropriate. For one, the to-be-expropriated landowner's rights now are given a better opportunity to be considered more consistently than in previous attempts at drafting a new expropriation law. Clause 5(3), for instance, affirms the owner or occupier's right to consent to an expropriating authority or its nominees entering the relevant property, and determines that a refusal of consent to enter can be overturned by a court order.

The 2019 Draft Bill provides elaborately (in clause 5) for the investigation of the property prior to a decision to expropriate is made, to ascertain its fitness for purpose. Furthermore, clause 5 affirms the duty to consult with the municipality in which the to-be-expropriated property is situated, as part of the investigation prior to the decision to expropriate.

The Bill is also robust in facilitating the expression of an expropriating authority's intention to expropriate through the provisions of clause 7. Subclause (4) of the same clause also provides the to-be-expropriated owner an opportunity to furnish motivations for an amount claimed as 'just and equitable' compensation; and provides a safeguard for the interests of unregistered right holders to be considered. It also pays particular attention to the process involved in the notice of expropriation.

While we appreciate the efforts taken to formulate the suggested amendments in the Draft Bill, and the commendable improvements noted above, we are of a view that a lot still needs to be done. The Draft Bill, in its current form, fails to articulate the provisions on the following points adequately:

⁵ *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).

4.1 The determination and/or calculation of ‘fair and equitable’ compensation

Clause 12 of the Draft Bill provides for the determination of compensation. Clause 12(1) reiterates the principle already embodied in section 25(3) of the Constitution and so leaves no doubt about the alignment of the constitutional principle and the legislative rules. The following, however, deserves special attention:

4.1.1 Special suitability as a consideration determining compensation

Clause 12(2) lists considerations irrelevant to the determination of compensation. Of these, subclause (b) raises some questions. It provides that the “special suitability or usefulness of the property for the purpose [of the expropriation]” is an irrelevant consideration in determining compensation. A proviso is added: the consideration is irrelevant, apparently only “if it is unlikely that the property would have been purchased for that purpose in the open market.” We agree that special suitability should not be a consideration in determining compensation. As indicated in Clause 5(1)(a) the suitability of the property for the purpose of the expropriation should be a consideration during the investigation phase. As such, suitability is a core consideration in the decision to expropriate. It is unclear why the drafters of the Bill mentioned the unavailability of the property in the open market as a consideration overriding the principle that suitability is a constitutive element of the decision to expropriate, rather than a means to determine compensation.

4.1.2 Justification grounds for an award of nil compensation

The considerations that have given rise to the inclusion of clause 12(3) may have been politically controversial, but the clause itself is commendable for its cautious approach to situations warranting an award of nil compensation. The circumstances under which nil compensation may be warranted, comprise three categories:

- (i) situations where the land in question are already outside of the ambit of private enterprise by its owner(s), in that the land is occupied by labour tenants, or has been abandoned by the owner;
- (ii) situations where land is not put to (otherwise) productive use, because its owner’s main intention is to speculate with it.
- (iii) situations where land is owned by a state-owned corporation or entity.

Clause 12(3) makes no specific reference to the nil compensation award being limited to circumstance involving land restitution or redistribution. As such, it does not align with the proposed amended provisions to the constitutional property clause, embodied in clause 1(a) of the proposed eighteenth Constitutional Amendment Bill amended provisions of section 25(3) of the Constitution. As the long-intended purpose of amending South Africa's expropriation law has been to align national legislation with the constitutional provisions, we advise that the drafters should include a reference to the limited context of land reform as justification for nil compensation in clause 12(3).

4.1.3 Compensation for expropriation of unregistered land rights

Although the Draft Bill recognizes, in clause 11(1) read with (4) that unregistered rights can be expropriated against payment of compensation, there are no provision for suitable mechanisms of property valuation for determining the proportional value of unregistered rights. We submit that it will be difficult to ensure payment of 'fair and equitable' compensation if guidelines to this extent are not included in the Draft Bill. We accordingly recommend a revision to this effect. This will require, either in the proposed new expropriation law, or in a further supporting statute, the setting of standardised indicators to gauge the suitability of property valuation methods used in determining true value of unregistered rights on land.

4.2 The payment of compensation for expropriated land

Section 25(2)(b) of the Constitution guarantees that property may be expropriated once key aspects of the compensation payable (amount, time and manner) *have been* determined, either by agreement between the parties or by the courts. The Constitutional Court emphasised this position in *Haffejee NO and Others v eThekweni Municipality and Others*,⁶ stating that the general rule is that this determination "must always be ... before expropriation under section 25(2)".⁷

⁶ *Haffejee NO and Others v eThekweni Municipality and Others* (CCT 110/10) [2011] ZACC 28.

⁷ *Haffejee NO* at 43(a).

By contrast, the Draft Bill allows expropriation to proceed without first having determined compensation. This is permissible only where compelling circumstances (such as natural disaster) exist, as was stated by the Constitutional Court in the *Haffejee* case. Therefore, all provisions of the Bill (such as clause 17(1)) that conflict with the *Haffejee* ruling are unconstitutional. We recommend a further revision of these provisions to be brought in harmony with the Constitution.

Clause 17(3) reads: “Any delay in payment of compensation to the expropriated owner or expropriated holder by virtue of subsection (2) or any other dispute arising will not prevent the passing of the right to possession to the expropriating authority in terms of sections 9(2) or (4), unless a court orders otherwise”. This provision is skewed against the owner/holder and in favour of the state. Its operation will place severe hardship on those to-be-expropriated owners who may be affected by it. The clause in its current form may well be unconstitutional.

4.3 Provision for a change in the purpose of expropriation

It has been a shortcoming of existing laws in South Africa dealing with expropriation, that do not foresee the eventuality that gave rise to the case of *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP). This is the possibility that an expropriating authority might discover, after the process of expropriation has been completed, that the purpose for which the expropriation was undertaken, is no longer viable or desired. Nothing in the current Draft Bill seem to recognize that the so-called “change of purpose” problem needs to be addressed.

Not dealing expressly with the “change of purpose” problem in legislation has several drawbacks. For one, the public purpose requirement serves as the justification for an expropriation. It also fosters public support of the expropriation process. If the public purpose is not realised and the expropriating authority wishes to change the purpose for which the already expropriated property is used, the democratic legitimacy of the expropriating act falls away. Social tension may also arise. Given these considerations, we recommend the insertion of a provision stipulating clearly that in the event of non-realisation of a purpose that motivated an expropriation, the expropriated property should

be transferred back to the original owner, or, if a new purpose is identified by the state, such a new purpose should be subjected to the same legislative scrutiny and processes as the original purpose for which the property was expropriated. We attach an earlier, comparative study by Hoops, Saville and Mostert, entitled “Expropriation and the Endurance of Public Purpose” to assist the drafting committee with suggestions from comparative examples as to how such a provision may be formulated.

4.4 Some stylistic/formatting revisions needed

The following needs attention:

Definition of “valuer”: There seems to have slipped in a formatting glitch, as the subsection (2) (a) and (b), dealing with calculation of time, does not seem to belong in this definition.

Notice of expropriation: There is a stray “15” which seems out of place in clause 8(2)(b) (Government Gazette of 21 December 2018, top of p 143).

5 Concluding Remarks

Whilst we have outlined several aspects which we believe requires further revision, we are of the view that this version of the Draft Bill reflects a substantive improvement on earlier versions.

We welcome any initiative aimed at improving aspects of South Africa’s land policy and legal framework. We do, however, caution that the envisaged expropriation interventions should not dilute the meaning of property rights or be applied injudiciously.

We remain committed to continue participating in this process. We do not serve any client, nor have any private interests or hidden agenda that we seek to advance through this submission. Our researchers are at the disposal of the Department of Public Works for consultation in all the remaining stages towards the final consolidation of the Draft Bill (2019).

