



FW de Klerk
FOUNDATION

THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

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21 February 2019

Dear Sir,

RE: SUBMISSION ON THE *EXPROPRIATION BILL*

1. The FW de Klerk Foundation is a non-profit organisation whose mission it is to promote and preserve FW de Klerk's presidential heritage by supporting the causes for which he worked during his Presidency. The Foundation promotes unity in diversity by working for cordial inter-community relations and national unity through the activities of the Centre for Unity in Diversity. The Foundation also supports and promotes the Constitution, the Bill of Rights and the Rule of Law through the activities of the Centre for Constitutional Rights.
2. Accordingly, the Foundation endeavours to contribute positively to the promotion and protection of our constitutional democracy. This includes the achievement of real and substantive equality and equitable access to land and other resources, with due regard for those rights concerning property and administrative action that is lawful, reasonable and procedurally fair, as provided for in the Constitution.
3. The Foundation accordingly welcomes the opportunity to make a concise submission on the *Expropriation Bill* and notes that the relevant constitutional imperatives that inform this submission are contained in section 25 of the Constitution.
4. The content of the submission is informed by the draft *Expropriation Bill, 2019*, (published in the *Government Gazette* no. 42127, 21 December 2018), which seeks to repeal the *Expropriation Act* of 1975. However, the political context within which the discussion of the Draft Bill ensues - including the work of the multi-party *ad hoc* committee on the amendment to section 25 of the Constitution - is of great significance to our assessment herein.

5. The Foundation strongly asserts the principle that property rights, including the right to own land and other assets, remain a cornerstone of our constitutional democracy and any attempt to effect expropriation without compensation is counter to the letter and spirit of the Constitution. This principled position informs our submission.
6. We trust that our submission will be of assistance to the Department of Public Works in its deliberations on the Bill.
7. The Foundation is available to make oral submissions as necessary.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Theuns Eloff', with a long horizontal stroke extending to the right.

Dr Theuns Eloff
Executive Director
FW de Klerk Foundation

A handwritten signature in black ink, appearing to read 'Zohra Dawood', with a large loop at the beginning and a long horizontal stroke extending to the right.

Ms Zohra Dawood
Director
Centre for Unity in Diversity

A. INTRODUCTION

South Africa is founded on the values of a constitutional democracy, constitutional supremacy and the Rule of Law. Accordingly, Chapter 2 of the Constitution, the Bill of Rights, makes explicit reference to property rights as follows:

“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)."

While subsections 1 to 4 specifically reference the arbitrary deprivation of property, sub-sections 5 to 9 reference the obligations of the State regarding equitable access to land. These two parts of section 25 are key to striking the necessary balance between the rights of existing property owners, and the imperative to redress the past through a process of land reform effected through the restitution, redistribution and tenure upgrade programme that came into effect post-1994.

In the light of the above, the Foundation supports the letter and spirit of section 25 of the Constitution and is strongly of the view that section 25 is an empowering provision in the Constitution, providing the State with extensive powers to effect land reform, without resorting to an amendment to section 25 of the Constitution.

The Foundation strongly asserts the principle that property rights, including the right to own land and other assets, remain a cornerstone of our constitutional democracy and any attempt to undermine this right, including through expropriation without compensation, must be fiercely resisted.

Additionally, Section 33 of the Constitution undergirds a key value that the Foundation makes throughout the submission in respect of just administrative action wherein it states that:

" 33 Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

- a. provide for review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
- b. Impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
- c. promote an efficient administration."*

The process and context of our submission on the draft *Expropriation Bill* is important. While the explicit purpose of the Draft Bill is to repeal the *Expropriation Act* of 1975, the current politically-charged environment around expropriation without compensation and the 31 March 2019 deadline for the Committee to amend section 25 of the Constitution, together with national elections on 8 May 2019, loom large over this process and the call for public submissions on the Draft Bill.

The current submission on the *Expropriation Bill* builds on the Foundation's written and oral submission to the Constitutional Review Committee in mid-2018, where it repeated its longstanding position in support of land reform and property rights for all South Africans, within the existing provisions of section 25 of the Constitution. The Foundation reiterated its position, succinctly summed up in the report of the High Level Panel (HLP), chaired by former President Kgalema Motlanthe, that the failure of land reform over the past 25 years is best ascribed to State incapacity of relevant government departments, in addition to widespread corruption. The Foundation furthermore supports the recommendation of the HLP that it is paramount that there be greater institutional arrangements to guarantee transparency, reporting and accountability, and that Parliament exercise oversight over the Executive to ensure an efficient and effective land reform programme, as set out in section 25 of the Constitution.

B. DRAFT EXPROPRIATION BILL, 2019

Secure property rights are a core requirement for all successful societies. There is a direct correlation between respect for property rights and economic growth and social development. Property rights are also essential for the maintenance of human rights and freedoms. Any attempt to dilute property rights could have catastrophic consequences for investment, economic growth, social progress and societal stability.

South Africa is bound by international conventions and economic realities to protect property rights and to prohibit arbitrary deprivation of property.

Property rights are accordingly protected in section 25 of the Constitution which states that “*no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*”

Section 25 makes provision for expropriation in the “public interest” - which includes land reform - but on a basis where compensation is paid in a manner that is just and equitable, reflecting an equitable balance between the public interest and the interests of those affected having regard to all relevant circumstances - including market value. Since the general criterion for compensation

internationally and under the 1975 Act is 'market value', it must be accepted that the more that compensation falls short of market value, the more the process will be regarded nationally and internationally as inequitable and as a deprivation of property.

This does not derogate from the clear requirement for land reform in section 25. However, section 25 already makes adequate provision for an effective and fair process of land reform including, where necessary, expropriation under equitable circumstances. As the High Level Panel under the chairmanship of former President Motlanthe found last year, it will not be necessary to amend section 25 to achieve an effective process of land reform.

It is, at the same time, necessary to note that the core concepts in section 25 of the "public interest", "property" and "land reform" require much finer definition if they are to comply with the clarity requirement in the Rule of Law. As is argued below, the *Expropriation Bill* fails to provide any closer definitions of these concepts and accordingly fails the test of constitutionality.

The definition of "public interest" in the Bill and in section 25 is so wide as to be meaningless. As such, it is fundamentally at variance with the Rule of Law (and therefore with the foundational values in section 1 of the Constitution), which requires laws that are "clear, publicised and fair."¹ The definition of public interest - which is taken from section 25(4) - simply states that "*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*". It may, therefore, presumably also include any other objective, with no indication of which authority - the Executive, the Legislature or the Judiciary - should identify such an objective - and in what manner such an objective would be construed as constituting "the public interest". This opens the possibility of arbitrariness in the deprivation of property that is prohibited in section 25(1).

Similarly, there is no clear definition of property - except that it "is not limited to land." This, again, is so vague that any property might be at risk - including private possessions, shares in companies; private homes; intellectual property; etc. This broad threat to property rights is irreconcilable with South Africa's international treaty obligations - and specifically with Article 17 of the *International Declaration of Human Rights*, which states that:

- (1) *Everyone has the right to own property alone as well as in association with others; and*
- (2) *No one shall be arbitrarily deprived of his property.*

¹ Definition of the Rule of Law by the World Justice Project.

There is likewise, no definition of the key concept of “land reform”, whose meaning could vary from a process that would greatly empower new farmers by transferring land ownership to them - to a system in terms of which ownership of all land - including the homes and agricultural holdings of more than 8.5 million black South Africans - might be vested in “the people” - and under the custodianship of the State.

The proposed *Expropriation Bill* is a national law primarily intended to repeal the *Expropriation Act* of 1975, which is in contradiction of the requirements of section 25 of the Constitution. Its purpose as outlined in the Draft Bill is “to provide for the expropriation of property for a public purpose or in the public interest and to provide for matters connected therein”.

The proposed Bill seeks to replace the current *Expropriation Act* of 1975, which remains on the statute books and empowers the Minister of Public Works to expropriate property for public purposes. The Act binds the Minister to the payment of market value and compensating for additional losses occurred as a result of expropriation, on a willing-buyer, willing-seller basis.

The provisions of the Act conflict with section 25 of the Constitution as it relates to the following key issues:

- The *Expropriation Act* makes reference only to public purpose, while the Constitution refers also to the public interest and public purpose
- The *Expropriation Act* refers to market value, while the Constitution makes reference to just and equitable compensation. Market value is but one consideration within the ambit of just and equitable compensation.

The core provisions of the *Expropriation Bill* 2019, in the view of the Foundation, revolve around but are not limited to the following key considerations:

- Section 2(1): Despite the provision of any law to the contrary, the expropriating authority may not expropriate property arbitrarily, or for a purpose other than a public purpose or in the public interest.

The Bill defines “public interest included the nation’s commitment to land reform and to reforms to bring about equitable access to all South Africa’s natural resources in order to redress the results of past racially discriminatory laws and practices”.

The Bill defines “*public purpose includes any purpose connected to administration of the provision of any law by an organ of state*”.

The Foundation asserts that notions of “public interest” are broad and undefined and are potentially subject to the whims and policies of political parties seeking radical economic change. The Draft Bill must define “public interest” to ensure certainty and parameters, as opposed to the current loose definition that may contradict the stated objective of the Draft Bill to act arbitrarily or exercise loose discretion. The Bill will be much strengthened by a more precise definition of public interest to ensure that the nature of any proposed deprivation of property does not conflict with the peremptory requirement that “*no law may permit arbitrary deprivation of property*” directly or otherwise.

- Section 3 of the application of the Bill states that subject to section 22, a power to expropriate property may not be exercised unless the expropriating authority has - without success - attempted to reach an agreement with the owner or the holder of an unregistered right in property for the acquisition thereof on reasonable terms.

The Foundation asserts that the Bill does not adequately define the nature or parameters of negotiations, nor define what reasonable terms entail. This may give rise to inconsistencies and the over-use of the exercise of discretionary powers.

- Sections 5 and 7 of the Bill place responsibility on the expropriating authority to investigate and gather information of the purpose for expropriation, in addition to serving notice of intention to expropriate.

Section 5 includes but is not limited to the following:

- (ii) survey and determine the area and levels of the land;*
- (iii) dig or bore on or into the land;*
- (iv) construct and maintain a measuring weir in any river or stream;*
- (v) insofar as it may be necessary to gain access to the property, enter upon and go across another property with the necessary workers, equipment and vehicles; and*
- (vi) demarcate the boundaries of the property required for the said purpose.*

Section 7 requires the following in respect of a notice of intention to expropriate must include—

- (a) a statement of the intention to expropriate the property;*
- (b) a full description of the property;*
- (c) a short description of the purpose for which the property is required and the address at which documents setting out the purpose may be inspected and particulars of the purpose may be obtained during business hours;*
- (d) the reason for the intended expropriation of that particular property;*
- (e) the intended date of expropriation or, as the case may be, the intended date from which the property will be used temporarily and the intended period of such temporary use;*
- (f) the intended date on which the expropriating authority will take possession of the property;*

The Foundation asserts that while both sections are detailed and reference processes to be undertaken, the key concern is that of the discretionary powers of the expropriating authority to determine the date of expropriation and date of possession, with no justification for these required. Additionally, the Draft Bill provides for the expropriating authority to take ownership and or possession before the payment of compensation, and crucially, before parties revert to the courts to mediate and arbitrate disputes. Furthermore, the Foundation raises the concern of whether skills are available to undertake the above tasks comprehensively and in a technically-proficient manner, without prejudice to the property rights of the affected parties. The absence of skill, transparency and disclosure will invariably result in long and costly litigation that will prejudice the interest of property owners, who will be liable for costs incurred, both legal and in relation to the continued running of land expropriated.

- Section 12 of the Draft Bill, in relation to determination of compensation, reinforces the constitutional imperative for just and equitable compensation and takes cognisance of the following:

The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, 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

The key concern is in relation to section 12(3):

(a) Where the land is occupied or used by a labour tenant, as defined in the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);
(b) where the land is held for purely speculative purposes;
(c) where the land is owned by a state-owned corporation or other state-owned entity;
(d) where the owner of the land has abandoned the land;
(e) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land.

The Foundation asserts that it is a concern that the Draft Bill goes beyond constitutional precepts by listing the above circumstances where nil compensation will be paid for expropriated land in the public interest. The question is that of whether the Draft Bill will pass constitutional muster where nil compensation is payable. The Draft Bill fails to define how land held for “purely speculative purposes” will be determined. This might impact on a critical investment category and is unduly punitive, as it curbs the freedom to choose where to invest resources. The lack of parameters and determinations in relation to the categories listed above, in the light of potential grave steps to pay nil compensation, will predictably result in long and costly court challenges.

The move toward nil compensation must be avoided at all costs to maintain the integrity of a market-based economy and continue to vest property relations in an inviolable transactional model of exchange. If based on all the above factors having been taken into account, and which results in expropriation, some form of compensation must be due, including a minimum sum of R1.

Other concerns:

- Definition of Property Rights

The definition of property rights is broad and includes land, housing, servitudes, mining and water rights. While the concept is understood within the constitutional context and is subject to the limitations of the Bill of Rights, the Foundation is concerned that within the current political debate, its definition and application is in question and will directly impact the application of the Bill into law.

- Definition of Public Interest and Public Purpose

While this submission references the definition outlined in the Draft Bill, these definitions, in the view of the Foundation, remain amorphous and potentially subject to broad interpretation by political forces driven by populist demands for radical change.

- Parameters of Negotiations

While the Draft Bill does not detail the parameters of negotiations between parties, it explicitly states in section 6(21) that a court must adjudicate disputes and shall remain the final arbiter. While judicial oversight is key and a source of comfort, it would be appropriate to adequately define the nature of negotiations. The threat of long and costly litigation might well be a deterrent to existing property owners to resist efforts for land expropriation.

- Inter-Departmental Negotiations

The Draft Bill does not sufficiently detail how negotiations between government departments and state-owned entities will take place per section 2(2). The section will be significantly strengthened if a deadlock-breaking mechanism is available to settle disputes that might arise if the Minister of Public Works identifies State-owned land for the purposes outlined in the Bill from other government departments or State-owned enterprises. State-owned land should be the first port of call in effecting land reform and therefore any obstacles to its expropriation for this purpose must occur through enabling and speedy mechanisms.

- Determination of Compensation

While Chapter 5 of the Draft Bill details procedures for determining compensation, it is incumbent, the Foundation argues, that the constitutional principle of “just and equitable” be the norm for such determination. In addition, we argue, it is incumbent on the Office of the Valuer-General (OVG) to effect its mandate which is derived from section 25 of the Constitution. Further, the *Property Valuation Act, 17 of 2014* clearly states that the OVG, “*must value all land to be acquired for land reform purposes in accordance with a prescribed set of criteria based on section 25(3) of the Constitution*”. The OVG must, in addition, provide fair land values, determine fair compensation and provide specialist valuation advice to government. As outlined above, the issue of nil compensation must be reconsidered for inclusion in the Draft Bill, as it will not pass constitutional muster.

- Political Climate

The Draft Bill is under consideration at a time of political turmoil and a significant economic downturn, fuelled by policy uncertainty. The combination of these factors does not bode well for an unsullied passage of the Draft Bill through public consultation and the legislative process.

The Draft Bill must be considered within the context of the parliamentary motion on 27 February 2018, to amend the Constitution to allow expropriation of land without compensation, as well as the ANC's Nasrec resolution that land reform and rural development must be seen as part of the programme of radical socio-economic transformation but guided by sound legal and economic principles and contribute to the country's overall job creation and investment objectives. The reality is that changes to a fundamental constitutional precept of property rights will lead to, amongst others, widescale socio-economic unrest, widespread land grabs and unlawful occupation of any land, which in turn could conceivably lead to political instability and have dire consequences for the country. Taking the ineffectiveness and lack of capacity of the SAPS into account, the possibility of land-owners taking the law into their own hands is a real concern. This could lead to a serious deterioration of race relations and even bloodshed and anarchy.

It is worth reiterating that the property clause was one of the most tightly-negotiated compromises in the final Constitution. Non-ANC parties conceded the principle of expropriation in the national interest - which included land reform. In return, the ANC accepted that just and equitable compensation would be paid for expropriated property.

The challenge in relation to the Draft Bill is the timing of its passage, given the deadline for a submission on the proposed amendment to section 25 of the Constitution by the multi-party *ad hoc* committee under the chair of Minister Thoko Didiza, with a deadline of 31 March 2019. If the proposed amendment to section 25 of the Constitution comes to pass, the circumstances and passage of the Draft Bill will be gravely impacted.

Additionally, Parliament rises on 6 May 2019, with national elections to be held on 8 May. These factors, individually and collectively, will influence discussion on this Bill if it (in the unlikely circumstances) passes through the current sitting of Parliament. If it is deferred to the new Parliament after the elections, the balance of forces present in the house will determine its future.

- **Economic Considerations**

Tampering with property rights and the prospect of expropriation without compensation will predictably see the flight of capital and investment from South Africa. Its impact on agricultural production and food security will be felt acutely and will be aggravated in a water-scarce country gripped by long periods of drought. Additionally, the ANC's Nasrec resolution is a gross contradiction: asserting the imperative for radical socio-economic change, while attempting a profound shift in policy to advance transformation, while not undermining of "future investment in the economy" or harming

“other sectors of the economy.” It is a truism that the net impact of tampering with property rights and nationalising land and assets destroy the collateral value of land. If banks do not lend and insurers insure, the inherent potential of the asset is stripped of value and use, and the impact on the economy is profound.

- **Legal Implications**

Proposed amendments to the existing property rights regime, including the payment of nil compensation as stated in the Draft Bill, risk the prospect of a possible inconsistency with section 36 of the Constitution. Additionally, any amendment to section 25 and in particular to section 25(2), i.e. removal of the term “law of general application” at section 25(2), will result in an amendment in contravention to the limitation clause at section 36(1)(a). The limitation clause states that in limiting any rights, such limitation has to take into context an open, democratic society that is based on human dignity, equality and freedom. In targeting a specific group of South Africa’s population on the flawed assumption that most land vests in the hands of white people, the law no longer becomes a law of general application and will run contrary to the values of section 36, which need laws not to run contrary to the notion of equality.

Conclusion

While the Draft Bill rightly seeks the repeal and replacement of the *Expropriation Act* of 1975 to bring it in line with the Constitution, the highly-charged political context within which it is being discussed, will potentially derail its discussion and crucially its passage through Parliament.

The Foundation has outlined its significant concerns in relation to the current draft of the *Expropriation Bill*. Some of these can be “fixed” by way of clarification and identification of procedures to be followed that are fair, non-prejudicial and non-discriminatory, while others require a steady political hand that will ensure that the foundation of the Constitution, especially section 25, remain intact. The Foundation reiterates its position that the current formulation of section 25 is a permissive and not a prescriptive formulation and is a sufficient basis on which to effect land reform.

The Draft Bill may well be held hostage to electoral politics with some parties vying for extreme positions on property rights and means to change the property regime in South Africa, including through expropriation without compensation on a scale beyond that which the Draft Bill makes provision for. As stated above, much will hinge on the outcome of the current parliamentary process to amend section 25, as well as the 8 May national elections. The Foundation strongly asserts that a country in limbo, held hostage by radical elements averse to constitutional democracy, poses grave

risks to the political and economic future of the country and will invariably infect the social fabric of society.

At face value the Draft Bill passes constitutional muster, save for the matter of nil compensation and the Foundation supports its passage through the legislature.