Comments on input at the colloquium on land reform

Having listened to the various views presented at the colloquium and during the parallel sessions, herewith some comments with regards to issues that were raised. The comments will be made from a legal perspective, within the current legal framework (and taking into account the Expropriation Bill that is not law yet, but that can benefit from the inputs from the panel).

1 Categories of land and compensation models

1.1 Introduction

There were various references to "categories" of compensation, presumably in an effort to draft a compensation policy, ranging from nil to more than market value compensation. Conceptually I have to note my reservation with such a classification process on two grounds.

Firstly, purely from a formulation perspective, it implies that our compensation standard is "market value" and not "just and equitable" compensation. The term "partial" is likewise problematic, as it ties compensation to market value only. I would suggest framing it rather as factors that can help the decision maker to exercise his or her discretion to arrive at "just and equitable" compensation. This will fit in with my framework as suggested in my original opinion sent (and attached again) that one separates the valuation inquiry from the compensation inquiry. If that suggestion is accepted, the factors will then help the decision-maker to move away from value (that is often tied to the market) to just and equitable compensation.

Secondly, these categories must be flexible if they are going to be proposed. The reason for this is that what is "just and equitable" is and remains a contextual question, and categorising various parcels to fall in various categories may lead to outcomes that is neither just not equitable. At the same time, I do understand the need to provide some level of certainty about what is envisioned so that people can decide how and if they want to invest in land.

Framing this issue therefore requires a careful balance between equity and efficiency.

Various categories have been identified, and I will comment on them separately below.

1.2 Categories for expropriation at Nil Compensation

1.2.1 Introduction: some notes on terminology (from a semantic)

Care should be taken not to use the terminology "without compensation". There is a possibility that "without compensation" will be unconstitutional, and there are people that argue that the very character of expropriation is the fact that compensation is a consequence of it. In that sense, expropriation without compensation is an oxymoron. Expropriation that is just and equitable may, however, in limited instances, be nil rand.

In the one presentation section 25(8) was further referred to as an "over-ride" clause. This is not true.

In the opinion that I submitted I took great care to set out that section 25 must be seen as a creative tension where the various interests must be balanced to attain one Constitutional goal (as set out in our preamble and founding provisions). This is a carefully balanced process, which is also why it makes reference to section 36(1) of the Constitution, that deals with when the limitation of rights will be constitutionally permissible in an open and democratic society. It might mean that in some instances the balance tip in favour of nil rand compensation, but that remains a contextual inquiry.

It should be remembered that section 25 includes both the protection of property rights from certain forms of state interference, AND the rights to land reform. Expropriation being an administrative act will require additional proportionality.

The impact of section 39 and the requirement that it must be in line with international law (that does not allow for "no compensation") will also have an impact on the interpretation of this section.

1.2.2 Land parcels not farmed in 10 years

Possible legal obstacle will be to decide what land will fall under this category, and how it will be determined. It obviously excludes urban land (I hope), but there might be grey areas that need clarification. Must the land have high production value?

Another problem area here can be land held in terms of customary law that might not be farmed, but that plays a different social role. Or, since customary law rights over resources are held and used differently, it might be perceived as being "unused", while in fact it is not.

"Farmed" will also need clarification.

1.2.3 Land owned by absentee owners and unused land

As with the definition above, definitions of what is "absentee" or "unused" are crucial. A beach house might be unused, a holiday farm might be unused for a great deal of the year. Do you also want to include this?

In this context it is important to know that in terms of law, especially in the area of immovable property (land), absenteeism does not automatically translate into abandoned. For property to be abandoned the owner must have relinquished physical control over the property, with the intention of no longer being owner of the property. With immovable property the legal rules become murky, as ownership passes on registration, and mere intention to no longer being owner might not be enough to lose ownership. Some commentators are of the opinion that abandoned land falls back to the state, in which case no expropriation is needed.

It might be that "abandoned land" and "absentee owners" are not the same, and this will need clarification.

1.2.4 Unused land under foreign ownership

Definitions will be crucial. How does this, for instance, differ from the category above? Of importance is also that international law will play a greater role (where compensation is often interpreted more generous than in South Africa). Section 39 of

the Constitution states that international law *must* be taken into account, when interpreting the bill of rights. It is therefore not something that can be ignored.

I refer you to my opinion here – while many of our BITs have been cancelled, some of them might have sunset clauses that allow for generous compensation and arbitration in the arbitration tribunals, and not in domestic courts that might make it impossible to expropriate foreign owned land without compensation.

Expropriation without compensation has only been allowed in terms of international law if it followed in the nationalisation of resources.

1.2.5 State land suitable for urban settlements

Land owned by the state do not need to be expropriated, because it is already in the ownership of the state. If the property is registered in the name of the state, but is merely under the management of a certain department, either the Government Immovable Asset Management Act 19 of 2007 or the Public Finance Management Act 1 of 1999 will be applicable. The land need not be expropriated then, since the state is already the owner. Land should therefore be identified and transferred to beneficiaries.

1.2.6 Proven restitution cases

At what stage will the claim be regarded as "proven"? Would this include the cases where it is not necessarily proven, but acknowledged by the owner for purposes of section 42D agreements? This might make owners reluctant to enter into these agreements with the risk of nil compensation and be counter-productive. This might also mean that claims that does not necessary comply with the Restitution of Land Rights Act are nevertheless (unfairly) acknowledged and settled, allowing room for false claims to succeed.

1.2.7 Expired mining land

Mining companies often declare themselves insolvent at the end of the mining operations in order to evade their rehabilitation responsibilities. Expired mining land might therefore be dangerous. There should be reference to the mining laws, and who

will be responsible for the rehabilitation (costs) of the land. A solution might be to work in mechanisms where the state expropriate property at nil compensation in exchange of taking over the rehabilitation duties.

1.2.8 Financially distressed landholdings held by DFI's

Definition of "distressed" and "development finance institution" important, as well as explaining who will be responsible for the debt.

1.2.9 Unviable and donated game farms

"Unviable" needs to be defined clearly. When farms are offered as a donation, this will not be an expropriation, as expropriation is a unilateral, compulsory action by the state. It is unclear how this will differ from the "unused" category above, or why it is only the unviable game farms, as opposed to other farms, that are identified.

1.2.10 Land of historical and national significance

The National Heritage Resources Act 25 of 1999 s 46(1) together with the Expropriation Act will apply in such expropriations. It is not clear why an owner should bear the brunt of such an expropriation.

In the case of the graves, section 6(2)(dA) of the Extension of Security of Tenure Act of 1997 provides clarity here. It allows for burial if the occupier was an occupier on the farm where the deceased will be buried on, the deceased as a family member, it is done in accordance with religious or cultural beliefs, the deceased was residing on the land at the time of death and it is an established practice. The new amendment also deals with the visits and upkeep of the graves. This seems to be more an issue of access rights, than of ownership rights, which makes the expropriation question mute.

The right to burial on the farm is a fairly onerous test and as such prevents malicious claims. In *Nhlabathi v Fick* [2003] ZALCC 9, the Land Claims Court already indicated (without ruling on the matter) that such a small intrusion on land will probably amount to an expropriation that does not need compensation.

1.2.11 Corrupt or failed farm equity scheme

This might fall under the DFI's above to some extent. The question here would who will identify a "corrupt" scheme, and when will it be regarded as having "failed"?

1.3 Categories for expropriation at partial compensation

1.3.1 Private land suitable for housing settlements

Care needs to be taken that the court has made it clear in numerous cases that, while a landowner might be expected to bear some intrusion in their property rights when it comes to housing rights of others, private owners cannot be expected to bear the brunt of a responsibility that is that of the state. Normally, where an eviction is stayed due to the fact that the occupiers do not have alternative accommodation, constitutional damages are paid for exactly that reason. It is not clear why such a owner would not also be liable for just and equitable compensation.

Where there are already occupiers on the land, a contextual inquiry will help determine what is just and equitable in the specific circumstances. For instance, was the owner prudent in trying to protect his or her rights, or to find suitable solutions? Is the owner a developer or a private owner? What is the nature of the property? These might be useful guidelines. It might be useful to keep a close eye on the recent Ekurhuleni Metropolitan Municipality council decision to expropriate such properties, and to ensure that these expropriations go to court to help determine just and equitable compensation.

The other problem with land already occupied is that it might legitimize unlawful occupation, thereby turning the processes of providing housing upside down: instead of the state expropriating, making sure that there are services, and then settling people, people settle, services are provided and then the state expropriate. Many people have argued that there should be an "activation clause" in the Expropriation Bill where a community of a landowner can require of the state to make a decision whether they will expropriate the property or not, which decision will then be an administrative action that can be taken on review. Since expropriation is a unilateral act, and a power that only the state can exercise, owners and communities are often

frustrated when the state does *not* exercise the power. This might be a good idea, although the wording of such a provision will need to be carefully considered.

Such a category will also have to refer to the planning laws and procedures – what land is envisioned for housing settlement.

1.3.2 Land for public purposes

It is unclear what is meant by this. No expropriation will be valid if there is not a valid public purpose, which means that every expropriation will comply with this.

1.3.3 Donated land

As mentioned before, donation does not involve compulsion, and will therefore not fall under expropriation. It is probably better dealt with in redistribution legislation where the mechanisms and incentives for such a donation is set out.

1.3.4 Private land offered in joint ventures with black partners

As above: if offered, there is no compulsion and therefore no expropriation but rather a transfer. How does joint ventures differ from the BEE categories below?

1.3.5 Financially distressed farms held with financial institutions

Definitions will again be important here, as well as the question of who will be responsible for the outstanding debt if the compensation does not cover that amount.

1.3.6 Land donated by churches, NGO's and CBO's

As mentioned before, donation does not involve compulsion, and will therefore not fall under expropriation. It is probably better dealt with in redistribution legislation.

1.3.7 Game farms to be incorporated into national parks

I am unsure why this is singled out, or need specific attention.

1.3.8 Land for public infrastructure

How does this differ from "public purpose" above, and what would be the justification for this? If the just and equitable factors mostly focusses on the redress of past injustices (that therefore justifies less than market value compensation), what would be the justification for this? In cases of foreign law, a move away from strict market value was mostly only allowed in the cases that dealt with social reform. This is covered by the "public interest" requirement, while public infrastructure will be "public purpose".

1.4 Possible exemptions from EWC

1.4.1 Introduction

With all these categories, definitions and thresholds will be important. This should probably not be dealt with in expropriation legislation, but rather in other policy or legislation (Redistribution Bill? BEE legislation?). A framework as to what is aimed with this, can also be helpful. In other words, how this stands alongside the public / state process, in an effort to relieve the state of certain duties (especially with regard to bigger commercial farming) and to speed up land reform. I would make this purpose clear. The normal pitfalls and reservations regarding BEE will also be applicable here.

1.4.2 Job creators (>100 employees)

Definitions are again important. Who are employees? Will seasonal employees count too? Also, link with the Labour Relations Act and the requirements contained therein. Are there other rights in property or potential for acquiring property worked in, if we assume that the one aim of land reform is to alter landholding patterns?

1.4.3 New investments (>R10m)

Clarity as to what must be invested where? In land? In people? In training?

1.4.4 Significant forex earners

Definition of "significant". Presumably this has to do with trade and trade relations?

1.4.5 BEE contributors

The normal pitfalls and reservations regarding BEE will also be applicable here.

1.4.6 Level 4 firms

The normal pitfalls and reservations regarding BEE will also be applicable here.

1.4.7 Firms with active learnerships and apprenticeships

Will this include farmers who might not have "firms". The focus is mostly on corporate entities, but what about possible smaller farmers who might be doing something? I don't have enough knowledge to comments on this, but I presume that this might be a concern.

1.4.8 Firms acting as mentors and incubators

See above. Are there current examples that can be used to get to a definition?

1.4.9 Strategic partners

How does this differ from the land donation in joint ventures above?

1.4.10 Firms with BEE procurement contracts

This led to a fair amount of problems in the mining sector, where tools are bought at inflated and unsustainable prices to comply with this requirement. This might also be a problem in the farming sector, and one that one needs to either manage as part of the bigger BEE procurement system, or in terms of agriculture specifically.

1.4.11 Firms with credible CSI

When is something credible? What is the type of impact that is desirable? Upward mobilisation? Frameworks on what the aim of farming or land reform or CSI in rural areas require will be important.

1.4.12 Firms with black ownership

How will "black ownership" be determined?

2 Procedural mechanisms in expropriation legislation to streamline the process

The Expropriation Bill of 2018 is extremely administratively cumbersome that can frustrate the acquisition of land via expropriation. Every administrative action where a decision is made or where requirements for compliance is laid down, is an act that can be challenged by the owner on review. This means that an already cumbersome process can get stuck in courts for years. That is without even questioning the compensation amount.

There are certain procedural mechanisms that can be used to facilitate the process. For one, the 6 month process of the Valuer General *before* an expropriation (possibly, it is not clear), can be shortened. A well-researched and substantiated valuer report will also facilitate in effective negotiations in the investigation phase of the Bill, which might lead to agreement on the amount. This will reduce the risk of being caught up in court cases, and will mean that several steps within the Bill are already complied with.

3 Unfair burden on farmers and the "wealth tax" debate

An argument against the argument that the public purpose can mean that just and equitable can be less than market value, is the fact that an individual should not bear the brunt alone, for something that the public benefits from or is in the interest of the public. This is because the rationale for the payment of compensation is that the cost of a public project, is distributed amongst society and should not be shouldered by an individual. The fiscus therefore pays with tax money, in order to ensure fairness.

In 1997 it was proposed to the TRC that a "wealth tax" be levied to set up a restitution fund in order to help alleviate the worst poverty in South Africa. This was met with much resistance, and the ANC rejected the suggestion when the TRC made it in their final report. In 2018, the Davis Tax Commission invited proposals to such a tax. The argument for this kind of tax as a separate tax (with some saying that other tax can even be lowered), lies in the symbolic value of the tax. The additional argument is that this kind of wealth tax means that the pressure on "affirmative action" policies are less.

It should be noted that every time this was introduced or put on the table as an option, it was met with heavy criticism and was very controversial. The reason for raising it here is because of the question that was raised as to why black people must also pay taxes that pays for the compensation for expropriation of land to rectify injustices, as well as the concern that farmers carry the burden on their own. This addresses that issue to an extent.

4 SPLUMA and traditional leaders

In one session there was a discussion on traditional leaders, and the possible land use planning impact they can have (that speaks to beneficiary selection and land use decisions). There should at least be reference or acknowledgement of this problem in the report.

In terms section 4(1) of the Traditional Leadership and Governance Framework Act, traditional councils have certain functions that impacts on planning, namely:

> (c) supporting municipalities in the identification of community needs;
>
> (d) facilitating the involvement of the traditional community in the development or amendment of the integrated development plan of a municipality in whose are the that community resides.

The Municipal Structures Act requires a partnership between the municipalities and the traditional leaders, that promotes a cordial relationship based on mutual respect and a sharing of responsibility.

The Spatial Land Use and Planning Act not only recognizes, but also allows for the participation of Traditional Councils in planning matters, where such planning will impact communities residing in areas where Traditional Councils exist.

In terms of section 23(3), "a municipality, in the performance of its duties in terms of this Chapter [on land use management] must allow the participation of a traditional council". This is subject to the Local Government: Municipal Structures Act 117 of 1998.

In terms of the Regulations, a service level agreement may be concluded with the municipality in whose area the traditional council is located, and the traditional council may perform functions as agreed to in the service level agreement. It may not, however, make a land development or land use decision. This means in the absence of such an agreement, the traditional council will be required to provide proof of land use allocation in terms of customary law.

This inclusion of traditional authorities was controversial for various reasons. On the one hand, traditional leaders claimed that it gives municipal councils power over the traditional institution, which according to the leaders, "is the rightful owner to the land". On the other hand, there are concerns about the wide-ranging powers these traditional councils have.

Chapter 6 of SPLUMA establishes Municipal Planning Tribunals that are responsible for the facilitation and enforcement of land use and development measures. They determine the land use and development application within a municipal area, and since all land now falls under a municipality, this includes land under traditional authorities. It is this that makes the traditional leaders unhappy, accusing government of undermining them. Government answered that municipalities will make land use decisions in consultation with the traditional leaders as "the de facto owners of the land", and that leaders will be represented in the proposed municipal planning tribunals.

But many of the councils don't comply with section 3 of the TLGFA and as such may not have legal capacity to accept and exercise the powers granted in terms of the regulations. Neither the Act nor the Regulations provide guidelines on how these decisions should be made. The focus falls on official customary law that is still rooted in the Apartheid concept of what customary law is, and not the living customary law that looks at the changing practices on the ground. Where, in terms of living customary law, decisions are made in layers and on different levels, we are now left with a situation where the traditional authority alone can decide, with no requirement of community consent or involvement. Recent pronouncements from the President and

the Traditional Courts Bill entrenches this view, to the determinant of communities living on land.

The fact that traditional councils can prove a customary law allocation to anyone living in the area, means that it is left to the traditional councils to define the content of customary law. Without clear guidelines on how decisions should be made, specifically with reference to community involvement, it is left to the traditional council to decide when an application will comply with customary law or not. This means that local land allocation can be left to the traditional councils, who will also be the only people entitled to decide what the content of customary law rights are. This often undermines the customary laws and practices of many rural communities, where land allocation and management take place on the various levels. Customary law is more often than not layered, and not centralized. The proposed powers of traditional councils to be involved in land allocation in the way that SPLUMA envisions, in this model of customary law, would therefore distort customary law.

5 Conclusion

Thank you for providing me with the opportunity to make comments on some of the issues raised at the colloquium.

Regards,

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