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SOUTH AFRICAN RESEARCH CHAIR IN PROPERTY LAW

About the South African Research Chair in Property Law

The South African Research Chair in Property Law was awarded to Stellenbosch University in 2007 and started functioning in January 2008. The Research Chair, which is a Tier 1 Chair as part of the South African Research Chairs Initiative, is sponsored by the National Department of Science and Technology, administered by the National Research Foundation and hosted by Stellenbosch University, where it is accommodated in the Law Faculty. The Chair is currently awarded to Prof Zsa-Zsa Boggenpoel. The main purposes of the Research Chair are: to help develop the theoretical foundations for the development of Property Law in the new constitutional era; to develop a comprehensive academic text in which the implications of these foundations are worked out; and to help develop a corps of highly skilled young scholars who can take the development of Property Law forward.

The Chair hosted a workshop on the Constitutional amendment and invited various scholars working on expropriation law to participate. This submission is the outcome of the workshop. The views expressed here are the views of the academics that contributed to the discussion:

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Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa, 1996

1 Background

Despite a clear mandate for land reform in the Constitution of the Republic of South Africa, 1996 ("Constitution"), a large number of South Africans still have no access to land or have no security of tenure. In an attempt to address this, the National Assembly adopted a motion to review section 25 of the Constitution to authorise the state to expropriate land in the public interest without paying compensation. To give effect to this, the Ad Hoc Committee to Initiate and Introduce Legislation amending Section 25 of the Constitution was appointed with a mandate to make explicit what is implicit in the Constitution in relation to the possibility of providing nil compensation when expropriating property.

Consequently, the Draft Constitution Eighteenth Amendment Bill ("Draft Bill")[i] was published on 13 December 2019 for comment. The Bill aims to amend the Constitution to, among other things, provide that where land and any improvements thereon are expropriated for the purposes of land reform, nil compensation may be payable.

The Constitution must provide a framework of higher values and principles that are agreed upon, to last for a long time. Legislation should be promulgated within the framework of the Constitution, to give effect to these values and principles. The focus is therefore on this framework. The particularities of

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expropriation must be dealt with in the Expropriation Bill, and we will likewise comment on the Bill, once it is published for comments.

The current wording of section 25(2)(b) of the Constitution states that expropriation is "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." There have been debates on the meaning of the current formulation – some analysts argue that this provision allows for the possibility of nil compensation being paid, while others argue that this interpretation is not clear and needs to be made explicit. In light of this confusion, the Draft Bill proposes the insertion of the following words in this paragraph: "Provided that in accordance with subsection (3A) a court may, where land and improvements thereto are expropriated for the purposes of land reform, determine that the amount of compensation is nil." The Draft Bill further proposes the inclusion of a new subsection 3A, which tasks national legislation with delineating the circumstances in which a court may determine the amount of compensation payable as nil.

We hereby submit our comments on the Draft Constitution Eighteenth Amendment Bill. We are also prepared to make oral representations should the need arise.

2 Comments

2.1 Point of departure

As mentioned above, it is important to note that the mandate of the Ad Hoc Committee is to "make explicit what is implicit" in section 25 of the Constitution. Its purpose and mandate was, in other words, to clarify the existing legal position, as opposed to changing it or adding to it. Accordingly, anything that changes or adds to the current legal position is arguably beyond the committee's mandate.

That said, there seems to be little consensus on what is currently "implicit" in section 25, concerning compensation for expropriation. We propose that what is implicit, is that in any expropriation an amount of compensation that is just and equitable under the circumstances is payable. However, in some cases, the circumstances may indicate that the just and equitable amount of compensation is R0 (or nil), just as, in other cases, it may be market value, below market value, or even above market value. This position – in other words that compensation is always payable for expropriation, but may under appropriate circumstances be nil – is in our view the point of departure for the current interpretation of section 25 as

well as any amendment thereto. This position – as a point of departure – is importantly different from "expropriation without compensation", which in principle means that there is no obligation at all to compensate when property is expropriated. With "expropriation without compensation", the expropriatee can in other words not question the payment of no compensation, because there is no *per se* duty to compensate. In our view, this is not implicit in section 25.

Any amendment, in order to make explicit what is implicit, must then be clear that in any expropriation (also expropriation for land reform purposes), there is always a duty to compensate, but that the amount of compensation must be determined on a case by case basis, on the standard of justice and equity, and may sometimes be an amount of nil.

Proposal

We are of the view that the proposed amendments in their current form clearly and explicitly give effect to this point of departure. However, the explanatory memorandum to the amendments still states the purpose of the amendments to be to make provision for "expropriation without compensation"[ii] and is in this sense at odds with the proposed amendments themselves. Accordingly, we propose that the first sentence of the introduction to the explanatory memorandum be adapted as follows (words in bold and inside square brackets should be omitted from the current proposed wording, and words in bold and underlined, we argue should be inserted):

This Bill aims to amend the Constitution of the Republic of South Africa, 1996, by [**providing for the expropriation of land without the payment of**] **making explicit that under some circumstances, land may for land reform purposes be expropriated against payment of nil** compensation.

While the current wording makes explicit what is implicit, we propose the following formulation:

(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 certain instances, with consideration of all relevant factors and circumstances, it would be just and equitable for the amount of compensation to be nil.

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2.2 Expediting the process

One of the main arguments behind the proposed amendment is to allow for the process of expropriation for land reform purposes to be expedited.[iii] Although we agree that to make it clear that under some circumstances land may be expropriated for land reform purposes against payment of nil compensation *may* expedite the process of acquiring land for reform purposes if the correct process are actually followed through by government, we are of the view that the proposed amendments in their current formulation militate against expediency in two ways.

The proposed formulation of subsection 2(b) ("Provided that in accordance with subsection (3A) a court may, where land and improvements thereto are expropriated for the purposes of land reform, determine that the amount of compensation is nil") and subsection 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") can be read to confer the exclusive authority to decide when payment of nil compensation would be appropriate to the courts. In practice, this would require that, whenever a state authority contemplates expropriating for nil compensation, the process would have to be halted in order to refer the question whether nil compensation is appropriate to a court for decision. This process, in our view, would be unduly cumbersome and time-consuming. There is no need for the courts to be the only institutions clothed with the authority to make this decision. It should be remembered that the state has the authority to determine that in a particular case the just and equitable amount of compensation is nil, and if dissatisfied, the expropriatee can then challenge that conclusion in the appropriate forum. The expropriator should have the authority to decide administratively that nil compensation is appropriate in a particular case. Should the expropriatee disagree with this, the dispute may always then be taken to court. The courts will, in other words, retain the ultimate authority in case of a dispute to determine whether nil compensation is just and equitable and would not be the initial decision-maker in this respect.

It is crucial that the enabling legislation, the Expropriation Act, have sufficient internal and affordable mechanisms to hold the decision-makers accountable and to ensure that only the disputes that could not be resolved between the parties end up in court. It would be unfair on an expropriatee to have to fork out the costs of litigation where the decision-makers make irrational and unreasonable determinations.

Proposal

We accordingly recommend that the proposed amended subsection 2(b) be changed in the following way (words in bold and inside square brackets should be omitted from the current proposed wording, and words in bold and underlined, we argue should be inserted):

(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**] **<u>may be</u>** nil.

We accordingly further recommend that the proposed amended subsection 3A be changed in the following way:

(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**] **<u>may be</u>** nil.

2.3 Listing the grounds

A fair amount of time has been spent in the Ad Hoc Committee surrounding the question whether the Constitution should list the circumstances where property can be expropriated at nil compensation, or whether this should be left to the legislature to legislate on. Concerns were raised that the amendment to the Constitution requires a 2/3 majority, while the promulgation of legislation only requires 51%.
At this point, it should be reiterated that the Constitution is a framework, and any legislation promulgated by the legislature must comply with the principles and values laid down in the Constitution. The constitutional standard of "just and equitable" will always be applicable in the calculation of compensation, and while a list might serve the function of signalling which property may be subjected to nil compensation, the principle remains flexible and contextual.

2.4 Preamble

Preambles generally provide the background to, and contextualisation and reasons for the legislation and can help in the interpretation of the text. The purpose of this legislation is to amend the Constitution, clarifying the values that we, as a nation, adhere to in the case of compensation for expropriation. The Preamble should, for this purpose, be brief and to the point, and speak to general principles rather than specifics.

The first paragraph of the proposed Preamble ends by saying, "the dispossessed are of the view that very little is being done to redress [the land issue]". This creates the impression that the slow pace of land reform is only viewed as problematic by the dispossessed. However, this is not mere opinion; it is a fact.[iv] There have been several judgments recently where courts have explicitly pointed out the frustration with the slow pace of land reform.[v] Furthermore, there are questions relating to who the dispossessed are and where this view is articulated. The Preamble should speak for all people in South Africa, not just a specific group. Thus this statement needs to be reconsidered in light of the reality and the urgent need to speed up effective land reform in South Africa.

In the second paragraph of the Preamble, the word "expropriation" is missing. It can also be formulated more concisely. We propose that it should read: "Whereas there is a lack of clarity about whether section 25 allows for nil compensation in the case of expropriation for land reform."

The fourth paragraph seems to restrict land reform only to agricultural land, which should not be the case. It is assumed that "land" will include land other than agricultural land, for instance, urban and peri-urban land, but this needs to be made explicit. Defining concepts like "land reform" in the Bill would assist significantly in this regard.

Apart from the first two paragraphs, the rest of the Preamble does not add to the underlying principles and can be seen as redundant. More telling is what is *not* in the Preamble. For one, there is a lack of acknowledgement and accountability on the part of the government as to *why* land reform has failed and *why* this amendment is needed to address that failure, and why, despite all the indications to the contrary, a clarification of the possibility of expropriation at nil compensation is needed to address these issues.

The third paragraph of the Preamble mentions that the amendment seeks to rectify the "arbitrary dispossession" of land caused by historic wrongs. The apartheid government was deliberate and

planned racially-based land measures. Land reform (and any amendments to rectify the historic wrongs) should be equally clear and deliberate.

Furthermore, the purpose of this amendment needs to be made clear. We propose that the first 2 paragraphs of the Preamble be kept and elaborated on to reflect the history and context of this issue. Additionally, "…the dispossessed are of the view…" needs to be removed and the slow pace of land reform generally should be emphasised. The urgency and importance of land reform should also be stressed quite pertinently.

2.5 Policy considerations

The broad scope of the questions raised in this submission makes clear that any land reform policy that includes the prospect of nil compensation when expropriating property requires absolute policy clarity, extensive planning and sensible implementation. It also needs to be consistent with *inter alia* constitutional requirements relating to justice, equity, general legislation, access to the courts and administrative justice. Any limitation of rights will be subject to the limitations clause of the Constitution.

There is a need to ensure that the amendment is as clear as possible and does not leave room for uncertainty, lest we may require further amendments. In this regard, definitions are crucial. Nil compensation is only applicable when the expropriation is for "land reform", but it is unclear what constitutes "land reform". The fact that there is mention of agricultural reform programmes implies that the focus is specifically on agricultural land, which is by no means the complete picture. It follows that there also needs to be land reform initiatives for urban and peri-urban land as well.

Additionally, uncertainty is raised concerning the use of the word "improvements",[vi] which also needs to be clearly defined. As mentioned above, there is a need for a clear regulatory framework, which is still outstanding. The amendment cannot be implemented without this, and it is arguably within this regulatory framework where the definitions mentioned could be elaborated on.

It is important to note that in terms of section 74 of the Constitution, if the National Assembly adopts the Bill with a two-third majority, the new formulation forms part of the Constitution and cannot be tested for its constitutionality, except on procedural grounds.[vii] We therefore recommend that once the Bill is passed in terms of section 74, the President (in terms of section 79) should send the Bill to the Constitutional Court to decide on its constitutionality before assenting.

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2.6 Government accountability

Deep public participation has also been lacking in the comment process around the Bill, especially given that the proposed amendment was released shortly before the holiday period. The Constitutional Review Committee process was separate from the amendment process, and the focus of the former was not on the actual amendment of the Constitution, but on whether an amendment was necessary at all. Throughout that process, there was little engagement on the concerns raised. There also seems to be very little engagement with the concerns raised in this process.

Regard should be had to what public participation entails as highlighted in the *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* judgment.[viii] In this regard, the focus should fall on not only the eventual outcome but also on the actual process in terms of section 74 of the Constitution. While there is formal compliance in terms of the dates, the government will be wise to engage in thorough public participation to substantively comply with the "public purpose" requirement.

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[i] *GG* 42902 of 13 December 2019.

[ii] See the Introduction section of the Memorandum on the objects of the Constitution Eighteenth Amendment Bill, 2019.

[iii] Advisory Panel on Land Reform and Agriculture *Final report of the presidential advisory panel on land reform and agriculture* (2019) <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 30-01-2020) 42.

[iv] Listen for a discussion on the findings of the Special Investigation Unit on land reform https://bit.ly/373ovDO. See also the High Level Panel *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf>

[v] *Rakgase and Another v Minister of Rural Development and Others* [2019] 4 All SA 511 (GP); *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC); *District Six Committee and Others v Minister of Rural Development & Land Reform and Others* 4 All SA 89 (LCC); *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* 2019 (6) SA 568 (CC).

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[vi] The proposed amended subsection 2(b) states that nil compensation may be provided where "land *and any improvements* thereon are expropriated". What is meant with "improvements" here is unclear. In terms of the basic principles of property law, all permanent attachments form part of the land. See P Badenhorst, W Freedman, J Pienaar & J Van Wyk *The principles of the law of property in South Africa* (2010) 167-168; GM Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg & Schoeman's The Law of Property* 6 ed (2019) 164. It is submitted that where land has any improvements (in the sense of permanent attachments), such improvements automatically form part of the land in terms of the principle of attachment (or *inaedifiatio*, to be more specific).

[vii] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC).

[viii] 2016 (5) SA 635 (CC).

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