

REPUBLIC OF SOUTH AFRICA

CONSTITUTION EIGHTEENTH AMENDMENT BILL

(As introduced in the National Assembly (proposed section 74(2); initiated by the Ad Hoc Committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996; Particulars of the proposed amendments and prior notice of introduction published in Government Gazette No. 42902 of 13 December 2019)

(The English text is the official text of the Bill)

*(AD HOC COMMITTEE ON THE AMENDMENT OF SECTION 25 OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996)*

[B 20...]

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from the existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

Drafting note: we only need the explanatory note on deletions being in [bold] if parts of the existing section 25 is being deleted. The Bill as advertised did not propose any deletions and thus did not contain this note. Some of the proposals do – if these proposals are NOT accepted, the explanatory note about deletions must be removed

BILL

To amend the Constitution of the Republic of South Africa, 1996, so as to provide that where land and any improvements thereon are expropriated for the purposes of land reform, the amount of compensation payable may be nil; and to provide for matters connected therewith.

Drafting note: The long title must be amended to include any additions to the Bill – this will be done once the final Bill has been agreed to

PREAMBLE

WHEREAS there is a need for urgent and accelerated land reform in order to address the injustices of the past that were inflicted on the majority of South Africans and especially as the hunger for land amongst the dispossessed is palpable and the dispossessed are of the view that very little is being done to redress the skewed land ownership pattern;

AND WHEREAS section 25 of the Constitution of the Republic of South Africa, 1996, must be amended to make explicit that which is implicit therein, so that an amount of nil compensation is explicitly stated as a legitimate option for land reform;

AND WHEREAS such an amendment will contribute to address the historic wrongs caused by the arbitrary dispossession of land;

AND WHEREAS such an amendment will further ensure equitable access to land and will further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 25 of Constitution

1. Section 25 of the Constitution of the Republic of South Africa, 1996, is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

FF+ proposal:

“(1) [No] Everyone has the right to own property and no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”;

Drafting note: This new insertion will have to be published for public inputs i.t.o. S74(5)(a) and NAR 275(a), sent to the provincial legislatures i.t.o. S74(5)(b) and to the National House of Traditional and Khoi-San Leaders (i.t.o. classification of the Bill) and seek inputs from the Departments i.t.o. NAR 275(b)

Drafting note: The Committee will also have to approach the Assembly for permission to extend the scope of the Bill i.t.o. NAR 286(4)(b) (which can be done in the report of 31 May 2021)

Bill as advertised:

(b) by the substitution in subsection (2) for paragraph (b) of the following paragraph:

“(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 nil.’’;

ANC proposal:

“(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 where land and any improvements thereon are expropriated for the purposes of land reform as contemplated in subsection (8), the amount of compensation may be nil.’’;

Drafting note: The Constitutional and Legal Services Office is of the view that the deletion of the word “court” will have to be published for public inputs i.t.o. S74(5)(a) and NAR 275(a), sent to the provincial legislatures i.t.o. S74(5)(b) and to the National House of Traditional and Khoi-San Leaders (i.t.o. classification of the Bill) and seek inputs from the Departments i.t.o. NAR 275(b) – due to the importance and nature of the Bill and as the Bill as advertised was open to more than one interpretation. Committee Support is of the view that it does not have to be advertised as it is a technical amendment, it was in the Bill as advertised and the amendment is as a result of public input. Motivation will be provided during the Committee meeting

Drafting note: The Constitutional and Legal Services Office is of the view that the proposed explanation of what land reform means (“as contemplated in subsection (8), will have to be published for public inputs i.t.o. S74(5)(a) and NAR 275(a), sent to the provincial legislatures i.t.o. S74(5)(b) and to the National House of Traditional and Khoi-San Leaders (i.t.o. classification of the Bill) and seek inputs from the Departments i.t.o. NAR 275(b) - due to the importance and nature of the Bill. Committee Support is of the view that it does not have to be advertised as it is a technical amendment, it was in the Bill as advertised and the amendment is as a result of public input. Motivation will be provided during the Committee meeting

EFF proposal:

(b) by the substitution for subsection (2) of the following subsection:

“(2) Property may be expropriated [**only in terms of law of general application**] without compensation—

(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]

(c) only in terms of law of general application.”;

Drafting note: Drafting conventions do not allow for the shifting of subsections or paragraphs in existing Acts. We thus have to draft around existing paragraphs – hence the change in numbering from what the EFF proposed – the content is however still the same

Drafting note: Please note that the portions in bold will be deleted from the existing text – we must however include a reference to it in the Bill

Drafting note: This deletion will have to be published for public inputs i.t.o. S74(5)(a) and NAR 275(a), sent to the provincial legislatures i.t.o. S74(5)(b) and to the National House of Traditional and Khoi-San Leaders (i.t.o. classification of the Bill) and seek inputs from the Departments i.t.o. NAR 275(b)

Bill as advertised:

(c) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

“The amount of the compensation as contemplated in subsection (2)(b), and the time and manner of any 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—”;

EFF proposal

(c) by the deletion of subsection (3);

Drafting note: The deletion of subsection (3) will have to be published for public inputs i.t.o. S74(5)(a) and NAR 275(a), sent to the provincial legislatures i.t.o. S74(5)(b) and to the National

House of Traditional and Khoi-San Leaders (i.t.o. classification of the Bill) and seek inputs from the Departments i.t.o. NAR 275(b)

(d) by the insertion after subsection (3) of the following subsection:

Bill as advertised:

“(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.”;

ANC proposal:

“(3A) National legislation must, subject to subsections (2) and (3), set out circumstances where the amount of compensation may be nil.”;

Drafting note: The Constitutional and Legal Services Office is of the view that the deletion of the word “court” will have to be published for public inputs i.t.o. S74(5)(a) and NAR 275(a), sent to the provincial legislatures i.t.o. S74(5)(b) and to the National House of Traditional and Khoi-San Leaders (i.t.o. classification of the Bill) and seek inputs from the Departments i.t.o. NAR 275(b). Committee Support is of the view that it does not have to be advertised. Motivation will be provided during the Committee meeting

EFF proposal:

(e) by the insertion after subsection (4) of the following subsection:

“(4A) Land is a natural resource and the common heritage, which belongs to the people as a whole, under the custodianship of the democratic state.”;

Drafting note: This new insertion was proposed to be part of subsection (4) – a new paragraph (c). However, when we interpret statutes, we need to read paragraphs in conjunction with the introduction sentence. If we do so, this insertion does not make sense when read with subsection (4)’s introduction sentence – the statement reads as if it is only intended for purposes of reading section 25, while it seems to be intended for a broader purpose. Subsection (4) also deals with

definitions and drafting conventions require that when we amend, we keep the content of each subsection aligned to what it already contains. Our proposal is thus to rather insert this as a new subsection – hence the change in numbering from what the EFF proposed – the content is however still the same

Drafting note: I.r.o. interpretation, it is not clear if this is affecting registered ownership of land. There might be concerns i.r.o. compliance with the basic structure doctrine if this is the intention – we will require time to consider this question, alternatively the Committee may wish to seek an external legal opinion on this matter

Drafting note: This new insertion will have to be published for public inputs i.t.o. S74(5)(a) and NAR 275(a), sent to the provincial legislatures i.t.o. S74(5)(b) and to the National House of Traditional and Khoi-San Leaders (i.t.o. classification of the Bill) and seek inputs from the Departments i.t.o. NAR 275(b)

Drafting note: The Committee will also have to approach the Assembly for permission to extend the scope of the Bill i.t.o. NAR 286(4)(b) (which can be done in the report of 31 May 2021)

EFF proposal:

(f) by the substitution for subsection (5) of the following subsection:

“(5) The state must take reasonable legislative and other measures, **[within its available resources, to foster conditions which enable]** which enable state custodianship and for citizens to gain access to land on an equitable basis.”;

Drafting note: Drafting conventions do not allow for the shifting of subsections or paragraphs in existing Acts. We thus have to draft around existing subsections – hence the change in numbering from what the EFF proposed – the content is however still the same

Drafting note: Please note that the portions in bold will be deleted from the existing text – we must however include a reference to it in the Bill

Drafting note: We propose the inclusion of the words “of land” or “of all land in the Republic” after “state custodianship” as it is currently not clear in respect of what state custodianship is envisaged

Drafting note: This new insertion will have to be published for public inputs i.t.o. S74(5)(a) and NAR 275(a), sent to the provincial legislatures i.t.o. S74(5)(b) and to the National House of Traditional and Khoi-San Leaders (i.t.o. classification of the Bill) and seek inputs from the Departments i.t.o. NAR 275(b)

Drafting note: The Committee will also have to approach the Assembly for permission to extend the scope of the Bill i.t.o. NAR 286(4)(b) (which can be done in the report of 31 May 2021)

Proposal by EFF:

(g) by the substitution for subsection (7) of the following subsection:

“(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.”; and

Drafting note: Drafting conventions do not allow for the shifting of subsections or paragraphs in existing Acts. We thus have to draft around existing subsections – hence the change in numbering from what the EFF proposed – the content is however still the same

Drafting note: Please note that the portions in bold will be deleted from the existing text – we must however include a reference to it in the Bill

Drafting note: This deletion will have to be published for public inputs i.t.o. S74(5)(a) and NAR 275(a), sent to the provincial legislatures i.t.o. S74(5)(b) and to the National House of Traditional and Khoi-San Leaders (i.t.o. classification of the Bill) and seek inputs from the Departments i.t.o. NAR 275(b)

Drafting note: The Committee will also have to approach the Assembly for permission to extend the scope of the Bill i.t.o. NAR 286(4)(b) (which can be done in the report of 31 May 2021)

Proposal by EFF:

(h) by the substitution for subsection (9) of the following subsection:

“(9) Parliament must enact the legislation referred to in [subsection (6)] this section.”.

Drafting note: Drafting conventions do not allow for the shifting of subsections or paragraphs in existing Acts. We thus have to draft around existing subsections – hence the change in numbering from what the EFF proposed – the content is however still the same

Drafting note: Please note that the portions in bold will be deleted from the existing text – we must however include a reference to it in the Bill

Drafting note: This amendment will have to be published for public inputs i.t.o. S74(5)(a) and NAR 275(a), sent to the provincial legislatures i.t.o. S74(5)(b) and to the National House of Traditional and Khoi-San Leaders (i.t.o. classification of the Bill) and seek inputs from the Departments i.t.o. NAR 275(b)

Drafting note: The Committee will also have to approach the Assembly for permission to extend the scope of the Bill i.t.o. NAR 286(4)(b) (which can be done in the report of 31 May 2021)

Short title and commencement

2. This Act is called the Constitution Eighteenth Amendment Act, 2021, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION EIGHTEENTH AMENDMENT BILL, 2021

1. INTRODUCTION

This Bill aims to amend the Constitution of the Republic of South Africa, 1996 (“the Constitution”), by providing for the expropriation of land without the payment of compensation. During the Fifth Parliament, the Constitutional Review Committee was mandated by the two Houses of Parliament to solicit the views of the public on the possible review of section 25 of the Constitution. The review focused on allowing the state to expropriate land in the public interest without compensation, as well as on mechanisms for expropriating land without compensation. After an extensive consultation process, the Constitutional Review Committee filed a report in the two Houses recommending that:

“Section 25 of the Constitution must be amended to make explicit that which is implicit in the Constitution, with regards to expropriation of land without compensation, as a legitimate option for land reform, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs.”

It further recommended that Parliament must urgently establish a mechanism to effect the necessary amendment to the relevant part of section 25 of the Constitution. That mechanism was established by a resolution of the National Assembly first during the Fifth Parliament, and then again in the Sixth Parliament, which resulted in the development of this Bill.

2. OBJECTS OF THE BILL

The purpose of the Constitution Eighteenth Amendment Bill, 2019 (“the Bill”), is to amend section 25 of the Constitution so as to provide that the right to property may be limited in such a

way that where land is expropriated for land reform, the amount of compensation payable may be nil. Further to clarify that such limitation is a legitimate option for land reform, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs.

3. CONTENTS OF THE BILL

3.1. Clause 1 proposes an amendment to section 25 of the Constitution to provide—

FF+ proposal:

3.1.1. that provision is made for a positive right to property;

Bill as advertised and ANC proposal:

3.1.2 that where land and any improvements thereon are expropriated for the purposes of land reform, the amount of compensation payable may be nil;

EFF proposal:

3.1.2. that property may be expropriated without compensation for a public purpose or in the public interest, and only in terms of law of general application;

EFF proposal

3.1.3. for the deletion of subsection (3), which provides for the amount, time and manner of payment of compensation;

Bill as advertised and ANC proposal:

3.1.4. for national legislation to provide circumstances where the amount of compensation may be nil;

EFF proposals

3.1.5. for the insertion after subsection (4) of a new subsection (4A) in order to allow for land which is a natural resource and common heritage to be under the custodianship of the state;

3.1.6. for the substitution of subsection (5) to delete the phrase “within the available resources”, and to add that the state must take reasonable legislative and other measures to enable State custodianship of land;

3.1.7. that the date 19 June 1913 is deleted as a cut-off date for restitution of property for persons disposed of property as a result of past racially discriminating laws and practices; and

3.1.8. that parliament enact legislation referred to in section 25 of the Constitution as a whole and not only that referred to in subsection 6; and

3.2. Clause 2 provides for the short title and commencement.

4. FINANCIAL IMPLICATIONS FOR THE STATE

None

5. PARLIAMENTARY PROCEDURE

5.1 The Committee proposes that the Bill must be dealt with in accordance with the procedure established by section 74(2) of the Constitution since its object is to amend a section within Chapter 2 of the Constitution of the Republic of South Africa, 1996.

5.2 The Committee is of the opinion that it is necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and

Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains provisions pertaining to customary law or customs of traditional communities.

DRAFT