

KLUITJESKRAAL COMMUNITY EMPOWERMENT TRUST

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PO Box 247, Wolseley 6830



3 March 2023

The Chairperson

Select Committee on Transport, Public Service and Administration, Public Works and Infrastructure

National Council of Provinces

Parliament

Cape Town 8000

Attention: Mr MK Mmoiemang

Dear Honourable Mmoiemang

The Kluitjeskraal Community Empowerment Trust representing a total of 300 members herewith submits for your consideration our comments on the Expropriation Bill of 2023

COMMENTS BY THE KLUITJESKRAAL COMMUNITY EMPOWERMENT TRUST TO THE NATIONAL COUNCIL OF PROVINCES ON THE EXPROPRIATION BILL 2023

1. INTRODUCTION

- 1.1 The Select Committee on Transport, Public Service and Administration, Public Works and Infrastructure (“the Committee”), invited interested

parties to submit written comments on the Expropriation Bill 2023, (“the Bill”).

- 1.2 The primary object of the Bill is amongst others, to repeal the Expropriation Act of 1975 (“the Act”) and come up with the expropriation regime that is uniform and aligned to the Constitution of the Republic of South Africa (“the Constitution”), by expanding the purpose for which expropriation may take place, which is in the public interest.
- 1.3 The repeal of the 1975 Act is long overdue, as this Act is inconsistent with the Constitution, by reason of the fact that it allows expropriation to take place for a narrow consideration of public purpose instead of a broader consideration of public interest, as required by section 25 (2) (a) of the Constitution.
- 1.4 We however, observe, with great concern that the history of land dispossession in South Africa, does not seem to have been adequately taken into consideration, in the Bill, particularly in the manner in which the determination of compensation is proposed. (We shall return this observation later).
- 1.5 We wish to point out, from the outset, that South Africa emerges from a very odious history where the majority of our people, to be precise, the African majority, were dispossessed of their land through unjust and irrational discriminatory laws, which existed at that time. The loss of land by African people has not only assaulted their dignity but also left them extremely impoverished and impecunious.
- 1.6 We note that the purpose of the Bill is to provide for expropriation of property for public purpose or in the public interest and to identify instances where property may be expropriated with nil compensation. This purpose is welcomed.

2. DISCUSSION

- 2.1 On the 27th of April 1994, the interim Constitution was adopted. Three (3) years later, in 1997, the final Constitution was adopted by the Constitutional Assembly. The Constitution, clearly a product of many years of struggle, came against the backdrop of a history of apartheid, a central feature of which was inequality based on race.
- 2.2 The Apartheid Government enacted various legislations to dispossess African people of their land. Some of these racially discriminatory laws are the Land Act of 1913, the Urban Areas Act of 1923 and the subsequent amendments to it and the Native Trust and Land Act, 1936, and many other laws. These laws are some of the primary laws directed against the African population. The effects of these Acts were that only approximately 8% of South Africa's total land area was set aside as a native reserve. The dispossession of land of the African Majority was not an accident, but a carefully orchestrated phenomenon aimed at impoverishing the African people, impairing, and assaulting their human dignity.
- 2.3 It is extremely disturbing that almost 29 years into democracy, the effects and consequences of the above-mentioned Acts have not been reversed in their totality and moreover, there are no imminent signs that the deleterious effects caused by these apartheid legislation would be removed soon. These laws have left very deep racist patterns of land and property ownership our country, which need to be addressed urgently.
- 2.4 Section 3(1) of the Bill provides that the Minister may expropriate property for a public purpose or in the public interest. We submit that the Minister should also have the power to decide compensation, as she/he has the power to expropriate. (we address the point later in the submission).

- 2.5 The Constitution provides that expropriation must be subject to compensation which must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected having regard to a variety of non-exhaustive factors in section 25(3) of the Constitution.
- 2.6 The factors in section 25(3) of the Constitution are meant to assist expropriating authorities and courts in the determination of compensation that is just and equitable. However, it appears that market value is indirectly given preponderance over other factors listed in section 25(3), despite the Constitution not giving preponderance to any one factor over others. We say this because in *Uys N.O v Msiza and others* (2017 ZSCA par 11-13), the SCA adopted a 2-stage approach in the determination of compensation. The first step was to determine market value and the second one was to adjust the market value so determined upward or downward, depending on the relevance or applicability of the factors in section 25(3) of the Constitution. This approach is inappropriate in that it indirectly gives market value preponderance over other factors. We propose that the legislature passes legislation which would guide the executive authorities and the courts in the determination of just and equitable compensation.
- 2.7 Section 19(1) of the Bill states that: *"if the expropriating authority and expropriated owner or expropriated holder do not agree on the amount of compensation, they must attempt to settle the dispute by mediation, which must be initiated and finalized without delay by either party"*. Furthermore, Section 19(2) of the Bill states that: *"if the expropriating authority and the disputing party do not settle the dispute by consensus or mediation, either party may, within 180 days of the date of the notice of expropriation, institute proceedings in a competent court for the court to decide or approve the amount of just and equitable compensation"*.

2.8 We do not agree with the formulation of section 19 (2) of the Bill for the following reasons. Our understanding is that section 25(2)(b) of the Constitution establishes three alternative means for the determination of the amount, time and manner of payment of compensation:

2.8.1 First, agreement by those affected;

2.8.2 Second, decision by a court; or

2.8.3 Third, approval by a court.

2.9 Our submission is that the word “decided” and “approved” are linked by a conjunction “or” and are, in our view, alternatives, either of which is sufficient to satisfy the requirements of section 25(2)(b) of the Constitution. Our submission in this regard is that, although both “decide” and “approve” involve determination of issues in dispute, the fundamental difference between the terms lies in the fact that “approve” entails a secondary or derivative act of sanctioning something that has gone before. Given their inclusion in the same phrase of section 25(2)(b) as alternative processes, our respective view is that “decide” in this context means that the court must determine the questions relating to compensation. By contrast, “approve” means that the court must consider a prior determination on those questions by another actor and consider whether to sanction that determination.

2.10 Accordingly, our view is that the ordinary meaning of the language in section 25(2)(b) leads to the interpretation that an initial decision by another actor may subsequently be “approved” by a court, and such a process will satisfy the requirements of section 25(2) (b) of the Constitution. Upon proper construction of section 25(2)(b) of the Constitution, it is clear that the court can either play an original role of deciding or a reviewing role of approving the compensation.

- 2.11 It would therefore be consistent with the Constitution to allow the executive to decide compensation and limit the role of the court to reviewing the decision already taken by the executive. We suggest that the power to decide compensation be vested in the expropriating authority, with a court exercising an approval function, when approached by a dissatisfied person.
- 2.12 There are views that by limiting the role of the court to reviewing the decision of the executive will be tantamount to impeding or denying access to court as required by section 34 of the Constitution. This contention is not true. One would appreciate that section 34 of the Constitution primarily deals with access to court, it does not address the question whether the power to set compensation may be vested in the executive or must be vested in the judiciary. Rather, it concerns the right to a judicial determination of disputes that can be resolved by the application of law decided in a fair public hearing before a court.
- 2.13 Therefore, section 34 of the Constitution will be satisfied in this case because the lawfulness of the executive decision-making process will be subject to judicial review and the decision of the executive in respect of the compensation formula will be subject to approval by the court.
- 2.14 We suggest that section 25 (2) (b) of the Constitution must be closely read with section 25(4) (a), which states that for the purposes of this section, (in other words of section 25 of the Constitution), the public interest includes the nation's commitments to land reform, and to reforms to bring about equitable access to all South Africa's natural resources. In this regard, our submission is that expropriation is an important tool which government may use for important purposes such as the public interest for amongst other things: provision of utilities, land settlement, land reform, redistribution and more importantly, to allow people who were previously disadvantaged to speedily access South Africa's natural resources. When

this happens, we would be comfortable that the society which the Constitution seeks to achieve is not far from being realized. We are therefore of the view that the expropriating authority is better placed to determine just and equitable compensation, as opposed to the courts.

2.15 Section 12(3) of the Bill provides that it may be just and equitable for nil compensation to be paid where land is expropriated in the public interest having regard to all relevant circumstances. We propose that the list of circumstances under which property may be expropriated with nil compensation be expanded to include the following properties:

2.15.1 Property acquired through illegal means;

2.15.2 Property utilized for commission of crime;

2.15.3 Bona vacantia properties that have not been claimed for an unreasonable period of time (the Bill should specify the unreasonable period of time and the appropriate time frames); and

2.15.4 Heavily indebted properties (which cannot become a successful concern).

2.16 The State has an obligation to fulfill its constitutional promise of bringing about land reform and thereby creating an egalitarian society inspired by the foundational values of our Constitution (values such as human dignity; achievement of equality and the advancement of human rights and freedoms).

2.17 Section 25(3)(e) of the Constitution defines public interest to include the nation's commitment to land reform, and to bring about equitable access to all South Africa's natural resources. The unavailability of land for sale and the exorbitant prices on which land is exchanged by a willing seller to a willing buyer, inhibits the realization of the constitutional promise to land reform, access to water and other constitutional promises.

- 2.18 Section 25(5) of the Constitution obliges the State to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on equitable basis. The State finds it difficult, with its constrained fiscus to access land for redistribution and other purposes, as the vast tracts of land are in the hands of a few minorities, mostly white and privileged. This Bill must be an instrument at the hands of the State to acquire land, at reasonable prices and place it at the disposal of the majority of our people, who needs it for a variety of purposes, including for agricultural purposes.
- 2.19 Section 25(7) of the Constitution provides that a person or a community disposed of property after 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 equitable redress. Much as the Parliament has enacted the Restitution of Land Rights Act of, 22 of 1994 to provide for restitution, the State is unable to fulfill this obligation for a variety of reasons, including but not limited to lack of resources to acquire land for restitution purposes. We have been following restitution cases at the Land Claims Court and the reality is that the amount paid to owners of claimed land is at market value, despite the Constitution not giving market value preponderance over other factors. In most cases, the Land Claims Court, seem not to find other factors in section 25(3) relevant, with the exception of market value (this approach needs to change).
- 2.20 In light of the challenges faced by the State to achieve its constitutional promises to land reform and other reforms, the slow pace of restitution and redistribution of land including agricultural land, we propose that this Bill permits the expropriation of land (particularly agricultural land) held by the municipalities, state organs and other government agencies to be expropriated and transferred to the Department of Agriculture, Land Reform and Rural Development (DALRRD), to be used in the public interest.

- 2.21 One of the mandates of DALRRD is to preserve food security in the country for the benefit of the nation. We have witnessed incidences across the country where agricultural land is not used for any purpose related to agriculture. ie in the district of Tulbagh agricultural land owned by ESKOM is being leased out for restaurants and guest house related activities, whilst a lot of black farmers does not have grazing land (this cannot be justifiable in an open society such as ours). Furthermore, this phenomenon threatens food security as a lot of agricultural land is used for other purposes unrelated to agriculture. It is therefore imperative for agricultural land held by certain state organs to be transferred to DALRRD to preserve food security and for land reform purposes.
- 2.22 By way of concluding remarks, the preamble of the Constitution states that:
*“We, the people of South Africa, Recognise the injustices of the past.. We, therefore through our freely elected representatives, adopt this Constitution as a supreme law of the Republic so as to-
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is bases on the will of the people and every citizen is equally protect before the law...;”*
- 2.23 As we have set out in our introductory remarks that South Africa emerges from a very odious history were the majority of our people, to be precise, the African majority, were dispossessed of their land through unjust and irrational laws, which existed at that time. We are aware that the loss of land by African people has not only assaulted their human dignity but also left them extremely impoverished. We submit that it is in the public interest for the expropriation Bill to exercise the dual purpose of expropriating property for public purpose or in the public interest in a manner that enables the executive authority to determine just and equitable compensation and limit the role of the court to that of reviewing the decision of the executive.

- 2.24 We appreciate that the determination of just and equitable compensation requires a careful balance of all the factors involved, it is therefore in this regard that we propose that the Bill includes the establishment of an advisory body with requisite skills and expertise to assist the expropriating authority in the determination of just and equitable compensation.
- 2.25 It is important as a country to move with speed in achieving the values of human dignity and equality through dealing with land inequities associated with the history of land dispossession in our country, which has affected millions of black people. One would recall that the provisions of the interim Constitution were as the result of a compromise. The approach, at the time, was that the white minority parties were broadly liberitarian and sought to entrench, perpetuate and protect individual rights whereas the African National Congress was more committed to creating an egalitarian society which was under pinned by the values of equality, equity, redress and social justice.
- 2.26 It is therefore necessary and constitutionally permissible to come up with an expropriation regime which seeks to bring back the dignity of our people, by achieving land reform, restitution and redistribution of land in order to create an egalitarian society anchored by the founding values of our Constitution.

Yours faithfully

Nico Williams

Chairperson

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