Ex parte

DEPARTMENT OF PUBLIC WORKS

In re:

DRAFT EXPROPRIATION BILL, 2015

OPINION

Furnished to:

DEPARTMENT OF PUBLIC WORKS
c/o State Attorney, Pretoria
Ref: N Modiselle

G M BUDLENDER SC
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Chambers, Cape Town
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INTRODUCTION

1. The consultant is the Department of Public Works.

2. We have been requested to provide our opinion on the response by the South African Institute of Race Relations ("the SAIRR") to the draft Expropriation Bill, 2015[1] ("the Draft Bill").

3. We have been briefed with copies of the following documents:

   3.1. The Draft Bill;

   3.2. The SAIRR's framework document, containing an alternative formulation of the Draft Bill ("the SAIRR's draft"), dated 22 April 2015;

   3.3. The SAIRR's synopsis of its alternative formulation, dated 22 April 2015; and

   3.4. The SAIRR's press release, dated 22 April 2015.

4. The SAIRR raises three core objections to the Draft Bill, which are reflected in its alternative draft Bill:

4.1. It contends that the Bill should require the State to obtain an High Court order confirming the constitutional validity of a proposed expropriation, and the

[1] Published in *GG* 38418 of 26 January 2015.

adequacy of the compensation proposed, before it issues a notice of expropriation;

4.2. It contends that the compensation payable must include damages for consequential loss resulting from the expropriation, from moving costs to any loss of future income;

4.3. It contends that the compensation must be paid before the State takes ownership of the property, failing which the notice of expropriation automatically becomes invalid.

5. Before we address the SAIRR objections and proposals, we set out the approach to property in South African constitutional law.

PROPERTY IN SOUTH AFRICAN CONSTITUTIONAL LAW

6. Section 25 of the Constitution endeavours to protect both traditional property rights and the public interest by striking a proportionate balance between these two functions.[2] In emphasising that property should also serve the public good, the Constitutional Court has endorsed the approach of Prof Andre van der Walt, the leading scholar on constitutional property law in South Africa. The Court quoted with approval his view that when interpreting the property clause, one must—

> "*move away from a static, typically private-law conceptualist view of the Constitution as a guarantee of the status quo to a dynamic, typically public-law view of the Constitution as an instrument for*

[2] *First National Bank of SA t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) ("*FNB")* para 50.

> *social change and transformation under the auspices [and I would add 'and control'] of entrenched constitutional values.*"[3]

7. The Court has thus recognised that there exists in section 25 of the Constitution a tension between the individual property rights, on the one hand, and social responsibilities, on the other.[4]

8. That tension is not unintended. It flows from the constitutional injunction to promote 'social justice',[5] which includes the positive obligations of the State with regard to social and economic rights. The Constitution and section 25 require that regard be had to the historical context of systematised dispossession and disenfranchisement along racial and other unfairly discriminatory lines when construing the property clause.[6] The Court thus held that —

> "*under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations.*"

9. Emphasising the non-absolute nature of private property rights, in *PE Municipality*[7] the Court noted that the Constitution envisages an "*orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.*"[8]

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[3] Id at para 52, citing with approval AJ Van der Walt *The Constitutional Property Clause* (Juta, Kenwyn, 1997) at 11.

[4] *FNB* above n 2 at para 50.

[5] See the Preamble to the Constitution.

[6] *FNB* above n 2 at para 49.

[7] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ("*PE Municipality*").

[8] Id at para 15.

10. In our opinion, the decisions of the Constitutional Court demonstrate that the constitutional protection of property differs from the classic liberal conception of the nature of property: it requires that property be addressed as a social construct.

11. This does not permit State interference in private property rights by fiat. To the contrary, both the text of section 25(1), as well as other provisions,[9] require that any interference with property rights be non-arbitrary (rational), justifiable, and consistent with the limitations placed upon the power of the state.[10] If interference crosses the threshold set by the internal limitations of the right, that must be justified and demonstrated by the State as proportional in accordance with section 36, which limits all of the rights in the Constitution.

12. We now turn to consider the SAIRR's draft Bill and the contentions which underlie it.

FEATURES OF THE SAIRR'S ALTERNATIVE EXPROPRIATION BILL

13. Before analysing the legal issues in point, we summarise the salient features of the approach of the SAIRR. The following emerge as the main themes raised by the SAIRR's draft:

[9] Including the supremacy of the rule of law in section 2 and general limitations clause in section 36 of the Constitution.

[10] Any limitation of a right in the Bill of Rights, in terms of a law of general application, must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

13.1. The act of expropriation may be effected by any organ of state;[11]

13.2. Compensation for expropriation must principally be based on the market value of the property with other countervailing factors weighing in the balance;[12]

13.3. Compensation must include 'consequential damages' for any loss arising from the expropriation;[13]

13.4. Steps preparatory to expropriation must be overseen and authorised by the judiciary;[14]

13.5. In order to obtain court authorisation to expropriate property, the expropriating authority bears the onus of proving on a balance of probabilities that the proposed expropriation meets the requirements for a valid expropriation under the Constitution;[15]

13.6. The expropriating authority must bear the owner's legal costs on an attorney-and-client scale in all circumstances;[16]

13.7. The substantive validity of an act of expropriation derives directly from an order of court,[17] and only indirectly from the expropriation legislation;

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[11] Definition of "*expropriating authority*" in clause 1 of the SAIRR's draft.

[12] Clause 4 of the SAIRR's draft.

[13] Causes 4(f) of the SAIRR's draft.

[14] Clauses 8, 9, 10, 11(1) and the definition of "*serve*" in clause 1 of the SAIRR's draft.

[15] Clause 9(1) of the SAIRR's draft.

[16] Clause 9(6) of the SAIRR's draft.

13.8. The payment of compensation is a condition precedent for a valid expropriation;[18]

13.9. When the property to be expropriated is a person's home, the court must authorise the eviction of the owner(s)[19] from the property expressly in its order,[20] and determine whether the expropriating authority must provide suitable alternative accommodation to the affected persons;[21]

13.10. The provision of suitable alternative accommodation is a condition precedent for a valid expropriation;[22]

13.11. The prescribed steps preceding expropriation, and the expropriation itself, are regulated by strict time periods, including a minimum period, only after which may expropriation be effected;[23]

13.12. In order to implement an expropriation, the expropriating authority must prove that it has complied with all the provisions of the court order, failing which the expropriation will be set aside automatically;[24]

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[17] Clause 11(1) of the SAIRR's draft.

[18] Clauses 11(4)(d), 12(2) and 12(3) of the SAIRR's draft.

[19] And, presumably, other affected persons.

[20] Clause 13(1) of the SAIRR's draft.

[21] Clauses 11(4) and 13(2) of the SAIRR's draft.

[22] Clause 13(2) of the SAIRR's draft.

[23] See subsection entitled 'Proposed process for expropriation' below.

[24] Clause 12(3) of the SAIRR's draft.

13.13. No provision is made for urgent expropriations or for condonation by a court for failure to adhere to the prescribed time periods;

13.14. No provision is made for temporary expropriations;[25]

13.15. The possibility of the expropriated owner's holding over the property following expropriation is apparently excluded;[26]

13.16. The definition of expropriation includes 'indirect expropriation';[27]

13.17. The SAIRR's draft provides that the Act will enjoy prospective supremacy over future Acts of Parliament, with the exception of an amendment to the Constitution or the Act itself.[28]

14. We do not attempt to deal with every one of these propositions. We confine ourselves to the major themes, and the proposed clauses which reflect them. We assess the consistency of these clauses with the approach to property which is reflected in the Constitution, and in section 25 in particular.[29]

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[25] It appears from SAIRR's draft that acquisition of ownership by the State only is contemplated. Compare clause 5(1) concerning purchase of the property and clause 14 on acquisition of ownership and registered real rights in the property.

[26] Compare clause 15 of the SAIRR's draft.

[27] Clause 1 of the SAIRR's draft.

[28] Clause 21(2) of the SAIRR's draft.

[29] A provision may be "inconsistent" in two senses. In the narrow sense, it is impermissible under the Constitution. In the broader sense, it is not in accord with the approach and mandatory requirements of the Constitution, but may nevertheless be permissible, because the Constitution provides a floor of rights, and does not prohibit the granting of more extensive rights. We use the term in the broader sense.

EVALUATION OF THE SAIRR'S DRAFT

Market value in the computation of compensation

15. Section 25 of the Constitution states that the amount, time and manner of payment of compensation must be *just and equitable*. To determine the terms of just and equitable compensation, a balance must be struck between the public interest, on the one hand, and the interests of those affected, on the other. To do so, the decision-maker must have regard to *all relevant circumstances*.

16. The issue is what the relevant circumstances are and how much weight ought to attach to each of them. According to section 25(3) of the Constitution, the relevant circumstances *include* (and are thus not limited to):

> "*(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.*"

17. In the SAIRR's view, the market value of the property is the key criterion against which the remaining factors must be weighed.[30] In other words, market value is to be separated out from the list in section 25(3) of the Constitution to occupy a place on one end of the scales, and is to be set against the remaining factors, which are said to 'discount' market value by virtue of their position on the opposite end of the scales.

[30] SAIRR's press release, dated 22 April 2015.

18. However, this separation of the factors has not been translated into the formulation of clause 4(2) of the SAIRR's draft. That clause merely replicates clause 25(3) of the Constitution, except in two respects:

18.1. First, it reorders the list so that market value no longer occupies the third position, but rather the first; and

18.2. Secondly, it appends the list by including "*an amount to make good all financial losses resulting from the expropriation*"[31] as the final factor.

19. It does not seem that the SAIRR's intention to prioritise market value has found adequate expression its draft. Changing the sequence of the criteria listed in section 25(3) of the Constitution does not achieve this object.

20. In any event, the SAIRR's proposal that special significance should be accorded to market value is not consistent with the Constitution. In *Du Toit v Minister of Transport*[32] the Constitutional Court held as follows:

> "*Section 25(3) indeed does not give market value a central role. Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces.*"[33]

21. There are strong textual indicators in the Constitution that market value was not intended to be pitted against other factors listed in section 25(3):

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[31] Clause 4(2)(f) of the SAIRR's draft.

[32] 2006 (1) SA 297 (CC) ("*Du Toit*").

[33] Id at para 36.

21.1. Market value falls into the set of relevant factors, just as the four other factors enumerated in section 25(3) do;

21.2. Market value is not textually distinct from the other four factors – to the extent that its location in the sequence has any significance, it is in the middle of the list; and

21.3. Market value is to be considered conjunctively with the other factors, where relevant, as evidenced by the use of the conjunction 'and' at the end of paragraph (d).

22. Further, it is conceivable that there will be situations in which "just and equitable" compensation will be greater than market value. For example if the state is responsible in some way for the unlawful occupation of land, and as a result of the occupation the market value of the land decreases, it is at least arguable that the state's conduct in affecting the market value should be taken into account in determining what is "just and equitable" compensation.

23. It seems to us that the SAIRR's contention that market value should be elevated above other factors stems from a strongly libertarian conception of property rights which is inapposite when dealing with section 25 of the Constitution.

24. In our view, if the Bill were to accord market value a position of primacy in calculating just and equitable compensation for expropriation, then it would not be constitutionally competent.

25. In many cases the market value will be a convenient starting-point in determining what is "just and equitable" compensation.[34] However, to say that is not to say either that market value enjoys primacy, or that it is to be pitted against the other factors.

26. There does not appear to be anything constitutionally objectionable, in and of itself, in including consequential loss as a result of the expropriation in determining the just and equitable compensation to be paid.

27. This perhaps aptly illustrated in circumstances where considerable capital investment has gone into land with little commercial value, for the purposes of a project in which future economic inflows would have been considerable. In those instances, it may well be just and equitable to compensate the owner for his capital and other expenditure incurred in anticipation of the project, to the extent that it is not accurately reflected in the *assessed* market value of the land. However, the formulation in the SAIRR's draft does more than compensate the owner for expenses in accordance with what is just and equitable, which in terms of section 25(3) is the guiding factor. Instead, the expropriating authority is obliged to compensate the owner "*to make good all financial losses resulting from the expropriation*", regardless of the remoteness of the loss to the expropriation, or whether payment of that amount would be just and equitable.

[34] Id at para 37.

28. For these reasons, we consider the SAIRR's position on the correct method for computing compensation to be inconsistent with the constitutional formula and the jurisprudence in that regard.

Proposed process for expropriation

29. The SAIRR proposes an elaborate process for expropriating property. There are to be three distinct phases: the first is the preparatory phase; the second is the expropriation itself; and the third relates to the period following the expropriation. In the last phase, certain conditions have to be met: if they are not met, the expropriation is deemed to be invalid *ab initio* (from the outset).

30. In sum, the effect of the proposed process is to make expropriation very difficult, and to prolong the procedure in a manner that can hamper expropriation in circumstances where doing so may frustrate the public interest.

31. We summarise below the essential elements of the process proposed in the SAIRR's draft, as we understand it:

    31.1. An authority which is interested in acquiring property must give written notice to the owner, and negotiate mutually acceptable terms of purchase.[35]

[35] Clause 5(1) of the SAIRR's draft.

31.2. If no agreement is reached, the expropriating authority may serve a notice of *possible* expropriation on the owner and holders of registered rights.[36]

31.3. The expropriating authority may do this only after *90 days* have passed since delivering its initial notice.[37]

31.4. The notice of possible expropriation must indicate that a High Court order confirming the constitutionality of the expropriation will be sought and obtained before the expropriation proceeds.[38]

31.5. The owner and holders of registered rights may within *90 days* object in writing to the notice of possible expropriation.[39]

31.6. The expropriating authority must respond in writing to the objections within *60 days*.[40]

31.7. The expropriating authority may elect to proceed with its request for expropriation or to abandon it, in the light of the owner's objections.[41]

31.8. The reasons for rejecting the owner's objections must be furnished in writing to the owner (presumably when the expropriating authority responds to the objections).[42]

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[36] Clause 6(1) of the SAIRR's draft.

[37] Id.

[38] Clause 6(2) of the SAIRR's draft.

[39] Clause 6(3) of the SAIRR's draft.

[40] Clause 6(4) of the SAIRR's draft.

[41] Clause 6(5) of the SAIRR's draft. No mention is made of the objections of any of the holders of registered real rights.

31.9. The expropriating authority must then seek further information concerning compensation that would be payable in the event of expropriation.[43] These may include requesting copies of approved plans, zoning documents and related information from municipalities.[44] It may also include inspections of the property with the written prior consent of the owner.[45]

31.10. If the expropriation will result in the eviction of the *owner* from his home, the expropriating authority must investigate and provide details of alternative accommodation that it proposes to provide.[46] This is required regardless of whether the expropriation will result in the owner being left homeless.

31.11. Thereafter the expropriating authority may make application to the High Court for an order confirming the constitutional validity of the proposed expropriation.[47]

31.12. The expropriating authority must give at least *180 days'* notice of the court proceedings to the owner and holders of registered real rights.[48]

31.13. The owner is entitled to provide "his" own evidence and to cross-examine any witness called by the expropriating authority.[49]

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[42] Clause 6(6) of the SAIRR's draft.

[43] Clause 6(7)(a) of the SAIRR's draft.

[44] Clause 7(2) of the SAIRR's draft.

[45] Clause 7(3) and (4) of the SAIRR's draft.

[46] Clause 8(1) of the SAIRR's draft.

[47] Clauses 6(7)(b), 8(1) and 8(2) of the SAIRR's draft.

[48] Clauses 6(7)(c) and 8(2) of the SAIRR's draft.

31.14. The expropriating authority bears the onus of proving on a balance of probabilities that the expropriation meets all the requirements for a valid expropriation in terms of the Constitution.[50] This includes proving that the proposed compensation is just and equitable.[51]

31.15. If the expropriation would involve the eviction of the owner from "his" home, the expropriating authority must provide the court with all relevant information, show that the eviction is just and equitable, and give details of the suitable alternative accommodation it proposes to provide.[52]

31.16. The High Court must then determine whether the expropriation is constitutional, giving full written reasons.[53]

31.17. Only if the High Court approves the constitutionality of the proposed expropriation, may the expropriating authority proceed to issue a notice of expropriation.[54]

31.18. Either party may appeal the High Court's decision. The effect of this will be to suspend the operation of the High Court's order, pending

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[49] Clause 9(5) of the SAIRR's draft. The reference to cross-examination of witnesses called by the expropriating authority suggests that the form of the process is to be by way of a trial (with oral evidence), rather than by application (by affidavit). In this respect the draft appears to be confused.

[50] Clause 9(1) and (2) of the SAIRR's draft.

[51] Clause 9(3) of the SAIRR's draft.

[52] Clause 9(4) of the SAIRR's draft.

[53] Clause 10(1) of the SAIRR's draft.

[54] Clause 10(2) of the SAIRR's draft.

final resolution of the dispute on appeal. During this time, no notice of expropriation may be issued.[55]

31.19. The High Court's order must require payment of all compensation due at least *15 working days* before the date of expropriation.[56]

31.20. Only once a final order of court permitting the expropriation has been made, may the expropriating authority issue a notice of expropriation, to which the relevant court order must be annexed.[57]

31.21. The notice must be served on the owner and holders of registered rights.[58]

31.22. The date of expropriation may be a date not earlier than *90 days* from the date of service of the notice on the owner and holders of registered rights, unless the owner agrees otherwise.[59]

31.23. If the expropriating authority fails to satisfy the conditions of the court order, the owner may seek urgent relief from the court that granted the order.[60] The expropriating authority evidently bears the onus of proving in writing that it has paid the full amount of compensation due to the owner and provided suitable alternative accommodation, if

[55] Clause 10(5) of the SAIRR's draft.

[56] Clause 10(4) of the SAIRR's draft.

[57] Clause 11(1) and (3) of the SAIRR's draft.

[58] Clause 11 (2) of the SAIRR's draft.

[59] Clause 11(4)(b) of the SAIRR's draft. The date of passing of the right to possess the property seems to be the same as the date of expropriation – clause 15 of the SAIRR's draft.

[60] Clause 11(6) of the SAIRR's draft.

applicable. If the court is not satisfied that the expropriating authority has discharged its obligations in terms of the court order, the notice of expropriation will 'automatically' be set aside.[61]

32. The process for expropriation proposed in the SAIRR's draft is subject to the following main criticisms.

Separation of powers

33. Under the scheme in the SAIRR draft, the executive may not expropriate property unless the courts have sanctioned this in advance.

34. The constitutional doctrine of the separation of powers was described as follows in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*:[62]

> *"[91] It is now clear from a steady trickle of judgments that the doctrine of separation of powers is part of our constitutional architecture. Courts are carving out a distinctively South African design of separation of powers. It must be a design which in the first instance is authorised by our Constitution itself. In other words, it must sit comfortably with the democratic system of government we have chosen. It must find the careful equilibrium that is imposed on our constitutional arrangements by our peculiar history. For instance, it must ensure effective executive government to minister to the endemic deprivation of the poor and marginalised and yet all public power must be under constitutional control. Our system of separation of powers must give due recognition to the popular will as expressed legislatively, provided that the laws and policies in issue are consistent with constitutional dictates.*

[61] Clauses 12(3) and 13(3) of the SAIRR's draft.

[62] 2012 (4) SA 618 (CC).

> *[92] In our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. . . .*
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> *[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution."*

35. The usual core functions of the courts in relation to executive action are twofold: to correct unlawful action which has occurred, and to interdict unlawful action which is reasonably anticipated. The SAIRR draft places the courts in the situation in which they will in every case have to determine the validity of proposed executive conduct before it takes place.

36. Expropriation is a competence that falls within the remit of the executive and administrative branch of government. It is not by its nature a judicial function. Courts do not generally, under our Constitution, act as a gatekeeper for the exercise of executive or administrative functions.

37. In this context, it is necessary to understand the nature of the act of expropriation, in order to determine whether it is appropriate to require the judiciary to be the primary decision-maker in the expropriation process.

38. According to Van der Walt,[63] "*in South African law . . . expropriation traditionally almost always assumed the form of administrative expropriation, which results from an administrative decision authorised by legislation.*" *"Much more uncommonly"*, there is statutory expropriation which involves the promulgation of a law that brings about expropriation. *"Equally uncommonly"*, legislation can authorise a court to bring about judicial expropriation by making an appropriate order in terms of a statute. The SAIRR draft proposes that this should be fundamentally changed, by making judicial expropriation or authorisation of expropriation the norm.

39. We have not been able, in the time available to us, to undertake a comprehensive analysis of expropriation legislation in other countries.[64] There can however be no doubt that the general practice in constitutional democracies is for expropriation to be carried out by administrative decision, without any requirement of prior judicial approval or permission. In the country which is regarded by many as having the strongest constitutional

[63] Van der Walt *Constitutional Property Law* (Juta, Cape Town, 2011) at 433-4.

[64] A useful but now somewhat outdated two-volume survey is contained in Erasmus (ed) *Compensation for Expropriation: A Comparative Study* (Jason Reese, Oxford, 1990). A more recent comparative study in the context of the constitutional protection of property rights is Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta, Cape Town, 1999).

protection of property rights, the United States of America, prior judicial approval or permission for expropriation is not required.[65]

40. While it is not altogether impermissible for judicial officers to carry out administrative tasks, there are circumstances in which performance of administrative functions by judicial officers will infringe the doctrine of separation of powers.[66] The test is whether the performance of a particular task is compatible with judicial office.[67]

41. There is room for debate as to whether it would be permissible for the legislature to confer upon the judiciary the tasks envisaged in the SAIRR draft. What can however be said with certainty is that the judicial function proposed by the SAIRR draft is

41.1. not required by the Constitution;

41.2. inconsistent with the general function of the courts in South African law;

41.3. inconsistent with the general practice in constitutional democracies.

42. In our view, it is salutary in this regard to the Constitutional Court's cautionary advice in *De Lange v Smuts NO and Others:*[68] that the system of

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[65] See the discussion in Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta, Cape Town, 1999) pp 423-440.

[66] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 141 fn 107.

[67] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) at para 27.

[68] 1998 (3) SA 785 (CC).

checks and balances in the South African model of separation of powers should "*avoid diffusing power so completely that the government is unable to take timely measures in the public interest.*"[69]

Compensation to be determined and paid before expropriation

43. A distinguishing feature of the SAIRR's draft is that payment of compensation for expropriation is made a necessary pre-condition for a valid expropriation.

44. Under the existing law, the transfer of ownership takes place on the date of the act of expropriation, and is not dependent on the prior payment of compensation. This is consistent with the common law.[70]

45. In *Haffejee NO and Others v eThekwini Municipality and Others*[71] the Constitutional Court had to decide whether the <u>determination</u> of the amount, time and manner and payment of compensation was a condition precedent for a valid expropriation. The Court held that it was not. Section 25(2)(b) of the Constitution does not require that the amount of compensation and the time and manner of payment must always be determined by agreement or by the court before expropriation. Generally the determination of compensation, in accordance with the provisions of s 25(3), before expropriation will be just and equitable. In those cases where compensation must be determined after expropriation, this must be done as soon as reasonably possible, in accordance with the provisions of s 25(3).

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[69] Id at para 60.

[70] Gildenhuys *Onteieningsreg* (2 ed, Butterworths, Durban, 2001) p 65 and see the Roman-Dutch law authorities cited at fn 40.

[71] 2011 (6) SA 134 (CC) (*"Haffejee"*) at para 43.

46. If the determination of compensation is not a general prerequisite under the Constitution for a valid expropriation, then plainly payment of compensation is not a general prerequisite.

Protracted timetable

47. A striking feature of the SAIRR's draft is the protracted timetable for effecting an expropriation. Leaving aside the indeterminate periods for conducting investigations on property, and the time taken by litigation and by the preparation of the judgment or the completion of any appeals, the SAIRR's draft contemplates no fewer than 435 days for a successful expropriation procedure.

48. Objectively assessed, the SAIRR's draft is designed to delay.

49. This conclusion is underlined by the fact that there is nothing in the SAIRR's draft that permits deviation from the prescribed timetable in the case of urgency, or for condonation by the court for truncating any of the stipulated periods.

50. The Constitutional Court recognised in *Haffejee*[72] that there are circumstances in which urgent expropriations may be necessary. These may occur in the face of natural disasters or even war. The SAIRR draft would disempower the state from exercising necessary powers in the public interest.

[72] Id at para 39.

51. We have referred above to the Court's dictum in *De Lange v Smuts NO and Others* on the need to avoid diffusing power so completely as to render government unable to take timely measures in the public interest.

Legislative duplication

52. The SAIRR's draft endeavours to incorporate aspects of the provisions of the Prevention of Illegal Occupation of and Unlawful Eviction from Land Act[73] (the PIE Act). In our view this is an unnecessary duplication.

53. The PIE Act regulates the circumstances under which an occupier may be evicted. We can see no reason to repeat certain of its provisions in the expropriation legislation.

54. The SAIRR's draft goes further than the PIE Act in at least one respect: it suggests that if an owner's home is the subject matter of the proposed expropriation, this is sufficient to require suitable alternative accommodation to be provided to him/her and affected persons.

55. It is difficult to understand why alternative accommodation should be provided if the owner is guaranteed just and equitable compensation, and the expropriation would not result in his/her homelessness or the homelessness of other affected persons - for instance, if they already have alternative accommodation of their own, or have other access to alternative accommodation.

[73] 19 of 1998.

Identity of the expropriating authority

56. In terms of the definitions in the SAIRR's draft, 'expropriating authority' means the Minister of Public Works "*or any organ of state*". The latter term is unqualified.

57. It is not clear to us whether this broad empowerment was intended. The term *"organ of state"* is defined in section 239 of the Constitution. It means any department of state or administration in the national, provincial or local sphere of government; any functionary or institution exercising a power or performing a function under the Constitution or a provincial constitution; and any functionary or institution exercising a public power or performing a public function in terms of any legislation. The last part of the definition is extremely broad.[74]

58. We doubt that this consequence is in fact intended by the SAIRR.

Expropriation as acquisition of ownership only

59. The SAIRR's draft does not cater for temporary expropriations.

60. One can readily conceive of situations where property may be required in the public interest or for a public purposes for only a period of time rather than permanently. For example, a private hall may be needed for use as a

[74] In *M&G Media Ltd and others v 2010 FIFA World Cup Organising Committee South Africa Ltd and another* 2011 (5) SA 163 (GSJ), the FIFA World Cup Organising Committee was held to be a "public body" in terms of the equivalent definition of the Promotion of Administrative Justice Act. On this basis, under the SAIRR draft it would have had the power to expropriate property.

temporary hospital or shelter during a flood or other crisis. Privately owned motor vehicles may be needed to transport supplies during war.

61. Section 25 of the Constitution in our view countenances the temporary expropriation of property. The SAIRR's draft categorically does not permit this. It would therefore hamper the state in (for example) carrying out its constitutional obligation to take reasonable legislative and other measures to fulfil the social and economic rights in the Constitution, and particularly its obligation to respond to the needs of those in crisis situations.[75]

Indirect expropriation

62. In the definition of 'expropriation' in clause 1 of the SAIRR's draft, reference is made to 'indirect expropriation'. No further meaning is ascribed to the latter term.

63. Indirect expropriation is sometimes classed as 'regulatory' expropriation or 'constructive' expropriation.[76]

64. Unlike direct expropriations, constructive expropriations do not constitute a targeted taking of particular property through an administrative decision. Instead, they are usually the indirect results of the coming into effect of, or change in, a regulatory scheme that has the effect of depriving owners of rights, and which arguably justifies compensation.[77]

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[75] *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) at para 52.

[76] Van der Walt at 480 fn 477.

[77] See Id at 376-384.

65. The Constitutional Court has expressed the view that it is doubtful whether the doctrine of constructive expropriation forms, or should form, part of our law.[78]

66. Recent cases appear to favour a conceptually sharper approach to ascertaining whether deprivation rises to the level of expropriation.[79] The criterion now favoured as the distinguishing feature is acquisition by the state of the property concerned. Absent acquisition, there is no expropriation.[80]

67. Regulatory takings may not necessarily lead to acquisition by the state, even if an argument can credibly be made that they ought to attract compensation. What was lost must be sufficiently congruous with what was gained in order to constitute acquisition.[81]

68. The processes proposed by the SAIRR draft do not cater at all for regulatory takings or indirect expropriation. Their focus is evidently entirely on direct expropriations. It is therefore difficult to conceive how an 'indirect expropriation' could take place in accordance with the scheme which it proposes.

Prospective supremacy over other Acts of Parliament

69. The Constitution vests in Parliament the plenary power to legislate on any matter, with the exception of matters referred to in Schedule 5 of the Constitution.

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[78] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Words, Gauteng Provincial Government, and Anothe*r 2009 (6) SA 391 (CC) at para 65.

[79] *AgriSA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

[80] Id at para 58 and 67.

[81] Id at para 58.

70. Parliament's plenary power to legislate includes the power to amend or repeal any law through a subsequent legislative enactment.

71. The SAIRR's draft, however, provides that the Act will enjoy prospective supremacy over future Acts of Parliament, with the exception of an amendment to the Constitution or the Act itself.

72. By so doing, it purports to fetter the plenary powers conferred on Parliament by the Constitution. This is constitutionally incompetent.

CONCLUSION

73. In our view, the SAIRR draft is inconsistent with the approach to property which is reflected in the Constitution, and certain provisions are defective for other reasons.

74. We advise accordingly.

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