15/013PC Public Works

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Public Works
REPUBLIC OF SOUTH AFRICA

EXPROPRIATION BILL [B4-2015]

Meaning of "arbitrarily" in Clause 2(1)

During the Portfolio Committee on Public Works' deliberations on the Expropriation Bill [B4-2015] on 08 September 2015, Mr Walters, MP (DA) proposed that the meaning of "*arbitrarily*" in clause 2(1) be amplified through the inclusion of the phrase "*or without sufficient evidence*", or one similarly worded, after the word "*arbitrarily*".

1. There is considerable constitutional jurisprudence on the meaning of **arbitrariness**. In *Pharmaceutical Manufacturers*[1] the Constitutional Court held:

> "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement."[2]

2. From this it follows that an arbitrary decision would also be an irrational one. For a decision to be non-arbitrary, it must at its core be rational.

3. The Constitutional Court has identified two aspects of rationality, namely: (i) rationality of process; and (ii) rationality of outcome.[3] Rationality review is, in essence, the evaluation of the relationship between process and outcome.[4] The mode of analysis for assessing rationality was explained as follows:

> 'The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking the decision, constitutes means towards the attainment of the purpose for which the power was conferred.
>
> We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.'[5]

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[1] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

[2] Id at para 85.

[3] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at paras 33-4.

[4] Id at paras 32 and 36.

[5] Id at paras 36-7.

4. If a decision fails the rationality test, as set out in the above dictum, it would be arbitrary.

5. In *FNB*,[6] however, the Constitutional Court held that *"arbitrary"* as used in section 25 is not limited to non-rational deprivations in the sense of there being no rational connection between means and ends. Instead it –

   5.1. refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality; but

   5.2. is a narrower and less intrusive concept than that of the proportionality evaluation required under the general limitations clause (section 36).[7]

6. The constitutive elements of arbitrariness in respect of the property right, were identified in *FNB* as follows:

   > "[A] deprivation of property is 'arbitrary' as meant by section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair."[8] [emphasis added]

7. The Court held that sufficient reason was to be established as follows:[9]

   7.1. It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.

   7.2. A complexity of relationships has to be considered.

   7.3. In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

   7.4. In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

   7.5. Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive.

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[6] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) (*FNB*) at para 100.

[7] Id at para 65. On the distinction between rationality and reasonableness, which lies at the heart of the proportionality enquiry in section 36, see *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) at para 24.

[8] *FNB* above n 6 at para 100.

[9] Id.

7.6. Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

7.7. Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

7.8. Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under section 25.

8. The Constitutional Court held that procedural fairness in the context of section 25(1) is a flexible concept. The requirements that must be satisfied to render an action or a law procedurally fair depend on all the circumstances.[10]

Conclusion:

9. Turning to Mr Walters, MP's proposal in the light of the above discussion, while the absence of sufficient evidence may render a decision to expropriate assailable, this is but one instance of arbitrariness. The basis of its impeachability would be that the decision was arbitrary.[11]

10. In the Department's view, it is unnecessary and in fact undesirable to identify a specific instance of arbitrary decision-making in addition to the broader concept of arbitrariness, as understood in the context of section 25. An attempt to create a partial definition of **arbitrariness** is unnecessary and may lead to unanticipated consequences.

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[10] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) at para 65.

[11] The decision would fail the 'sufficient reason' aspect of the section 25 arbitrariness test.

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Expropriation Bill [B4-2015]

Mediation

1. During the Portfolio Committee on Public Works' deliberations on the Expropriation Bill [B4-2015] on 08 September 2015, Mr Walters, MP (DA) proposed that the Bill should empower the parties to mediate any dispute arising out of the application of the Bill, including matters connected with the decision to expropriate – both before and after that decision has been taken.

2. It was mooted that clause 2(2) make reference to mediation as a potential mode of "*reach[ing] an agreement with the owner or holder of an unregistered right*".[1]

3. Mr Dlamini, MP (EFF) and Dr Groenewald, MP (FF+) also recommended that mediation be permitted in respect of a decision to expropriate, by amending clause 21(1) accordingly.

4. In this regard, the Department comments as follows.

Mediation generally

5. Mediation is an inherently flexible, alternative dispute-resolution process, in which a neutral person actively assists the parties to the dispute to work towards a negotiated settlement. The parties remain in control of the process, the decision to settle and the terms of the settlement. The process is conducted confidentially on a without prejudice basis.[2]

6. Mediation is usually based on agreement. Parties do not need the authority of a statute in order to attempt to resolve a dispute through mediation. The continuation of the process generally depends on the voluntary cooperation of the parties.[3]

7. Given the self-directed and consensual nature of mediation, the expropriating authority and potential expropriatee already have the right and power to agree to mediate any issue that is capable of mediation, at any stage of the process. The real question is whether the law should enable a potential expropriatee to <u>compel</u> the expropriating authority to mediate.

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[1] The definition of 'owner' includes the holder of a registered right in property.

[2] D'Oliveira 'Arbitration' 2(3ed) *LAWSA* 2015 at para 87.

[3] Id.

Mediation prior to a decision to expropriate

8. Clause 2(2) sets a necessary precondition for the exercise of the power to expropriate by an expropriating authority. It requires the expropriating authority to attempt to reach agreement with a potential expropriatee to acquire his or her property. It prevents the power from being exercised unless and until those attempts at agreement have failed.

9. Clause 2(2) is, therefore, concerned with the process in the Bill that leads up to, but excludes, that which is contemplated in clause 8. It relates to the pre-expropriation phase, and precedes any decision to expropriate. The process would include attempts at concluding a voluntary sale with the owner.

10. The present wording of clause 2(2) permits mediation as a means of dispute-resolution at this stage. Mediation is one of several mechanisms which may be used to attempt to reach agreement.

11. The Department, however, cautions against making an express statement that mediation at the pre-expropriation phase is a potential means through which dispute about a potential decision to expropriate can be resolved:

    11.1. Expropriation is the prerogative of the state, which it may exercise only in accordance with law.

    11.2. The very nature of the Bill is to establish a process for proper information-gathering on the property and engagement with the owner and other directly affected persons, including an opportunity to invite and consider objections to the proposed expropriation.

    11.3. It would be unwise to encourage alternative dispute resolution on a possible decision to expropriate before the investigative and evaluative process has run its course. Mediation would be premature at that stage.

    11.4. A premature attempt to mediate could forestall the investigative and information-gathering process. This would be wholly undesirable from the perspective of the state's interests, and would result in the mediation not being properly informed by pertinent evidence.

12. While it would not be incompetent to permit mediation of a dispute based on a potential expropriation, in the Department's view:

    12.1. Any such mediation should not be convened prematurely, before as much relevant information as possible has been gathered;

    12.2. Express reference to 'mediation' in clause 2(2) may well have the effect of encouraging premature attempts to engage the expropriating authority in that process.

    12.3. It is, in any event, unnecessary to mention it, as it is included in the words "*attempted to reach agreement*" in clause 2(2);

12.4. Care should be taken not to confer on the potential expropriatee the right to compel the expropriating authority to mediate. Mediation can be a lengthy process, and it will usually not be difficult for one of the parties to string it out for an extended period. This will become a mechanism which can easily be used to delay the expropriation indefinitely, and frustrate the state in the exercise of its power under the Constitution to expropriate property in the public interest and for public purposes.

Mediation following a decision to expropriate

13. A decision to expropriate is administrative action.

14. The general position in law is that once an administrative decision-maker has publicised his or her decision or otherwise conveyed it to the affected persons, the decision becomes final and irrevocable.[4] In those circumstances, the decision-maker is said to have discharged his/her office or is *functus officio*.[5]

15. Considerations of certainty, fairness and lawfulness underpin the *functus officio* doctrine. It protects individuals by allowing them to rely on administrative decisions. It also entails that all administrative decisions—whether to do or to undo something—must be authorised by law.[6]

16. The *functus officio* doctrine is, however, not absolute, and the law recognises that an administrator may be justified in varying or revoking a decision in certain circumstances.

17. In relation to decisions that have permanent effect like expropriations,[7] the variation or revocation of a decision can pose a serious threat to individuals whose rights are dependent upon administrative acts; yet it might be necessary in the public interest that a public authority should take amending action.[8]

18. Principles of permissible variation and revocation have developed along the following lines:

    18.1. An administrator may vary or revoke his or her decision if the enabling legislation expressly provides for such a power.[9] An express power to vary or revoke a decision must, of course, respect the rule of law and natural justice, including procedural fairness.[10]

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[4] See *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para 44 and *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC), in relation the exercise of executive powers by the President, which we submit find equal application to administrative decisions.

[5] Baxter *Administrative Law* (1984, Juta & Co : Cape Town) at 372.

[6] Hoexter *Administrative Law in South Africa* 2ed (2012, Juta & Co: Cape Town) at 277.

[7] Baxter at 371.

[8] Id at 372.

[9] See *Fuel Retailers of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC).

[10] Hoexter at 278-9.

18.2. There is disagreement as to whether the decision-maker retains a power to vary or revoke his or her decision where a valid decision produces an unfavourable outcome to an affected person (for instance, his or her property is expropriated).[11] Because it is unlikely that an affected person will challenge the reversal of an unfavourable decision, there is a paucity of case law in this regard.

18.3. Where a valid decision produces a favourable outcome, there is authority for the proposition that a favourable decision may be revoked (or altered) with the beneficiary's consent.[12] One might consider an expropriatee who has received generous compensation to be in a position of that kind.

18.4. In the case of an invalid decision, there is authority for the proposition that an administrator may revoke a decision taken without the power to take it,[13] or entailing a complete failure of natural justice.[14] Decisions induced by fraud are also regarded as revocable.[15]

18.5. However, an administrator may not vary or revoke a decision that: (i) has been taken on internal appeal or judicial review;[16] or (ii) has vested rights in the subject.[17]

19. Whether a decision to expropriate renders the expropriating authority *functus officio* will therefore depend on the circumstances of each case. In general the functionary will be *functus officio*, but there are exceptions to that rule.[18]

20. If it is not possible for an expropriating authority to vary or revoke its decision to expropriate because it is *functus officio*, which will usually be the case, then little purpose would be served by attempting to mediate with a view to reaching a different outcome.

21. It is possible for the law to confer on the expropriating authority the express power to vary or revoke its decision. This is not recommended. It would not only create uncertainty; it would also encourage and enable dissatisfied expropriatees repeatedly to demand reconsideration of the decision, for example on the basis of supposedly new information.

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[11] Compare Burns *Administrative Law* 4ed (2013, LexisNexis: Cape Town) at 228; Baxter at 373; and Hoexter at 280-1, who strongly opposes the view that the common law permits an administrator, as a general exception, to revoke his own unfavourable decision.

[12] *Cape Coast Exploration Ltd v Scholtz* 1933 AD 56 at 65-7, cited in Baxter at 374.

[13] See authorities cited fn 182 of Hoexter at 280.

[14] Id.

[15] Per Lord Denning in *Lazarus Estates Ltd v Beasley* [1956] 1 All ER 341 (CA) at 345c; and *Bronkhortstspruit Liquor Licensing Board v Rayton Bottle Store* 1950 (3) SA 598 (T) at 601 at 610F-G.

[16] *Metal & Allied Workers Union of SA v National Panasonic Co (Parow Factory)* 1991 (2) SA 527 (C).

[17] *Thompson t/a Maharaj & Sons v Chief Constable Durban* 1965 (4) SA 662 (D).

[18] We have not attempted to list the exceptions exhaustively.

22. In terms of the definition in section 1 of PAJA, a failure to take a decision constitutes "*administrative action*". The result is that an expropriating authority could find itself required to reconsider a particular matter repeatedly, and then having its failure to decide the matter (or to decide it within a reasonable time)[19] taken to court on review.

23. In general, and absent a specific provision authorising variation and revocation, it is only where an expropriating authority is not *functus officio* that mediation on the decision to expropriate, after the expropriation, could be feasible. As this is a fact-specific question, it is not possible to define with clarity the cases in which this would apply. The result would be further uncertainty as to whether the decision can in law be varied or revoked.

Conclusion:

24. For the reasons discussed in relation to clause 2(2), the Department does not recommend that the Bill expressly provide for mediation on issues other than the question of compensation. It is likely to encourage delay, and it may well lead to a paradoxical proliferation of litigation about mediation.

25. It is always open to the parties to mediate of their own accord, where the decision-maker is not *functus officio*. That can always be undertaken by agreement between the parties.

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[19] Section 6(3)(a) of PAJA.

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EXPROPRIATION BILL [B4-2015]

Applications for security for costs in terms of Rule 62 of the *Magistrates' Courts' Rules* and Rule 47 of the *Uniform Rules of Court* applicable to the High Court

1. During the Portfolio Committee on Public Works' deliberations on the Expropriation Bill [B4-2015] on 08 September 2015, Mr Filtane, MP (UDM) proposed that Clause 21 be amended to prohibit an expropriating authority from claiming security for costs from a disputing party during court proceedings.

Discussion:

2. A person domiciled within the area of jurisdiction of a particular court is referred to as an *incola* of that court. A person domiciled outside the area of jurisdiction of the court is a *peregrinus* of that court. In most instances, the disputing party will be an *incola* of the court, but this is not necessarily the case (e.g. foreign investors may own property in South Africa, while they are domiciled abroad).

3. In general, *peregrini* are obliged to provide security for costs in litigation in which they are engaged, while *incola* are not so obliged.[1] However, an *incola* may be compelled to furnish security for costs where "*the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse.*"[2]

4. The Supreme Court of Appeal has endorsed the following dicta in explaining the instances in which compelling an *incola* to furnish security for costs might be appropriate:

> "According to Nicholas J in *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1339E - F:
>
> > 'In its legal sense vexatious means frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant 21 (Shorter Oxford English Dictionary). Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; abuse connotes a misuse, an improper use, a use mala fide, a use for an ulterior motive.'

[1] Joubert 'Security for costs' 3(2) *LAWSA* 1997 at para 328.

[2] Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) at para 16.

In *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D - E Holmes JA observed:

> 'An action is vexatious and an abuse of the process of court inter alia if it is obviously unsustainable. This must appear as a certainty, and not merely on a preponderance of probability. *Ravden v Beeten* 1935 CPD 269 at p 276; *Burnham v Fakheer* 1938 NPD 63.'

[18] *African Farms and Townships* was concerned with an application to strike out a claim. Since the common law is reluctant to limit access to court, an application for security for costs would seem to require a less stringent test than one for the stay of vexatious proceedings."[3]

Conclusion:

5. There may well be instances in which an expropriating authority has to litigate against a disputing party whose claim is frivolous, vexations or legally unsustainable. The Department is therefore of the view that the Expropriation Bill should not prohibit an expropriating authority from claiming security for costs, as there may well be instances in which such a claim may be justified.

6. Security for costs is not claimed, or ordered, lightly. The standard for satisfying a court that security ought to be ordered is relatively high. Protection against an expropriating authority abusing its right to claim security, is already contained in the common law, as developed by the courts.

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[3] Id at paras 17-8.