**Select Committee Economic Development**

Expropriation Bill [B4-2015]

Minority Report submission by Democratic Alliance

11 May 2016

It is our duty to submit a Minority Report on behalf of the Democratic Alliance on the Expropriation Bill [B4-2015] in terms of NCOP Rule 102(4) to reflect our minority views in the Select Committee report.

One of the NCOP’s main functions is to have an oversight role over legislation in terms of sections 68 and 70(2) of the Constitution. Further the NCOP has a duty to facilitate public involvement in the legislative and other processes of the Council and its committees in terms of s 72(1)(a) of the Constitution.

This Bill in its current form is inconsistent with the Constitution and is also flawed in other ways. It is important not to repeat the unfortunate submission of the Minerals and Petroleum Development Amendment Bill in the Fourth Parliament, which the President had to refer back as it didn’t muster the test of Constitutionality.

Homeownership is a major issue in South Africa and we have to take cognisance of the fact that about 7.6m black people own their own homes, around 1m ‘coloured’ and Indian people and roughly 1.1m white people. Black landowners have also purchased their own agricultural land, comprising around 2 million hectares, without any state intervention. All these properties will be subject to the Expropriation Bill and its intended and unintended consequences.

**1.      The unconstitutionality of various provisions of the Bill**

      Any search or seizure of property has to be authorised by a prior court order, as a fundamental principle of liberty under the common law. Under the Bill, no person may thus enter property for purposes of investigation without the consent of the owner or a prior court order. According to the Bill, the extension of an emergency expropriation also requires a court order – but the Bill assumes that an expropriation notice can be issued without a prior court order. This is inconsistent with the Constitution.

      It is not sufficient to seek a court order authorizing the eviction of a person from his or her home only after he or she has already lost the right to possess it under an expropriation notice. The necessary court permission, under Section 26(3) of the Constitution, must be obtained before the right to possession passes under the notice of expropriation. This permission should be obtained, given the factors described above, before the notice of expropriation is issued.

In addition, the definition of expropriation is narrower than that envisaged in Section 25 (the property clause) and is thus also inconsistent with the Constitution, while the Bill contradicts various other guaranteed rights in the Constitution.

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**2.      The likely economic damage and risks to property owners**

      The Bill will deter foreign and local investment in property in South Africa. It does not comply with various provisions of the Constitution, including Section 25 and Section26 (3) and allows the taking of ownership and possession without a prior court order confirming the validity of the expropriation. Without secure property rights, no foreign or domestic individual or company can risk acquiring property or making other investments in South Africa when their rights therein are not secure.

      The expropriation of equity and other assets from businesses is likely to affect both existing businesses and their South African BBBEE partners, especially as the definition of property is very broad and is not limited to land.

      Compensation for property expropriated from the holders of either registered or unregistered rights, whether bonded or not, will generally be less than full market value and is unlikely to include compensation for direct financial losses The determination of compensation may often require litigation against the State. This too will ultimately leave the owners / objector in a financially disadvantaged position, given the high cost of litigation.

      Owners or holders, who are in a financially credible position prior to expropriation, will be compromised commercially thereafter as they are unlikely to be placed in a similar financial position. This will make it difficult for them to continue their businesses, or to purchase other properties of a similar kind.

      The date of payment is of major importance because the owner must be in the same position after the expropriation as before, and delayed payments will severely prejudice expropriated owners or holders.

      In terms of the affordability of litigation, it appears that the normal assessment of indigence and legal aid will be determined as to whether the owners will receive Legal Aid support. If the property owner does not comply with the requirements of Legal Aid he or she will not be afforded it, furthermore if the property owner is not a person of means they may not be able to institute an action against the State in a court to have the determination of compensation or the validity of the expropriation ventilated therein. This would force the property owner to accept an invalid expropriation and/or a lower amount of compensation than is constitutionally mandated. This is likely to result in significant financial prejudice and is economically (and constitutionally) unacceptable.

In addition, the possibility of uncompensated takings by the State under the unconstitutional definition of expropriation now included in the Bill will have particularly negative economic ramifications. With South Africa standing on the cusp of recession and credit downgrades by international ratings agencies, this risk is one the country simply cannot afford.

**3.      The flawed process of public consultation**

      NA Process

o     The definition of expropriation was inserted into the Bill by the Portfolio Committee of Public Works in the final stages of the parliamentary process before the National Assembly. This was never discussed at the National Economic Development and Labour Council (Nedlac) or in any form of public participation at NA level.

o     Although the Deputy Minister stated that the Bill was discussed with the National House of Traditional Leaders, no documentation of this consultation by both the department and the NHTL have been submitted to date to the Select Committee as requested on 3 May 2016. There is therefore no proof of such communications or submissions.

      NCOP Processes

o    Introduction of the Bill

Although the Bill was supposed to be introduced to provinces during the week of 14 – 18 March 2016, some irregular variances need to be recorded:

  The Eastern Cape wrote to the House Chairperson: Committees on 17 March 2016 requesting a presentation of the Bill on 6 April. Proof of consent, if any was requested by the DA at the meeting of 3 May 2016, but it has not been provided to date. Furthermore, the legality of consent by the House Chairperson: Committees was questioned on 3 May as to whether consent is not required by the Chairperson of the NCOP as in the past.

      Provincial public participation

o   It is a known fact that provinces were late in introducing their schedules for public participation meetings in each province:

  The Eastern Cape was supposed to submit the schedule by 8 April, yet it was only submitted upon request, on 15 April when the meetings were scheduled for 18, 19 and 20 April. This is an unreasonable short notice and there is no proof of any proper advertisement or notice of public participation.

  In the Free State the schedule was published in only English papers and the venues were changed subsequently without notice.

  In Gauteng the advertisements were not in line with the meetings and venues. In many cases the town or suburb date was indicated, but not the venue and it is these venue changes that were misleading and not published widely.

  The Northern Cape public complained that they were informed at very short notice of public meetings which put them in a compromising position to attend and participate.

      Negotiating Mandates

  The Select Committee debate transgressed in allowing negotiation mandates after 25 April, where 26 April was scheduled as the date of deliberation of the Select Committee.

  In the meeting of the Select Committee of 3 May the State Law Advisor claimed that negotiating mandates submitted late did not hold the same limitations as final mandates in terms of deadlines. This is not a valid statement because, technically, if the Select Committee deliberated on the morning of 26 April, late submissions could not be discussed or negotiated. In fact if less than 5 provinces submitted negotiating mandates, the Bill could not be proceeded with.

  Legality of the Negotiation Mandates

    Eastern Cape: Although the date of deliberation was recorded as 26 April; the document was only faxed to the NCOP on 28 April. ***This submission is therefore not procedurally compliant.***

    Free State: The negotiating mandate was in order but the process leading up to the negotiating mandate flawed the entire mandate in terms of the proper public participation process. A comprehensive submission of the timelines, which followed in the province, was submitted, but not recorded in the province or at the NCOP. Date of deliberation was 21 April 2016. ***This submission is therefore not procedurally compliant.***

    Gauteng: The negotiating mandate was not submitted by the Select Committee (SC) secretary together with the other negotiating mandates to the SC on 29 April 2016. A document containing the recommendations was handed out in hard copy format at the meeting held on 3 May, but there was no copy of the prescribed format of a negotiating mandate in terms of the Mandating Procedures of Provinces Act 52 of 2008. ***This submission is therefore not procedurally compliant.***

    KwaZulu-Natal: The date of deliberation on the negotiating mandate is recorded on the document as 29 April 2016, which is past the deadline of 26 April. ***This submission is therefore not procedurally compliant.***

    Limpopo: Valid negotiating mandate was dated 22 April 2016.

    Mpumalanga: Date of deliberation recorded on the negotiating mandate was 28 April 2016. ***This submission is therefore not procedurally compliant.***

    Northern Cape: Date of deliberation was 21 April 2016. Valid submission.

    North West: Date of deliberation was 22 April 2016. Valid submission.

    Western Cape: The date of deliberation is recorded as 25 April 2016, which is compliant with the deadlines set by the NCOP for the negotiating mandates.

  ***With 5 negotiating mandates not being procedurally compliant, the Bill could therefore not be proceeded with in the SC. The example of a precedent is the Traditional Courts Bill process in the NCOP.***

  Provinces submitted their negotiating mandates as with the following conditions:

* Eastern Cape: “… negotiate in favour of the Bill and negotiate within the following parameters …” The extension of time in s9(3)(b) was called for.
* Free State: “… proposes the following amendments…” and “… votes in favour of the Bill…”
* Gauteng: No formal Negotiating Mandate document was submitted to the SC to indicate how the mandate was delegated.
* KZN: “… to support the Bill provided that the above concerns are considered and consolidated in the Bill…”
* Limpopo: “… negotiate in favour of the Bill taking into consideration the input mentioned in the Report…”
* Mpumalanga: “…votes in favour of the Bill without any amendments…”
* Northern Cape: “… the committee supports the Expropriation Bill B4B-2015…”
* North West: “…voting in favour of the Bill taking into account the attached recommendations and annexures…”
* Western Cape: “…to support the Bill with attached amendments…”
* Negotiating the recommendations made in terms of the mandates submitted. In all cases the SC disregarded the recommendations and queries in terms of constitutionality and legal compliance were brushed aside and considered covered in the Bill. The Democratic Alliance objects to the SC not applying its mind to properly consider the recommendations and steam rolling the Bill.

  Credibility of the Minutes of 3 May 2016.

 The Democratic Alliance objects to the credibility of the Minutes of the meeting held on 3 May 2016 to consider the negotiating mandates. Hopefully the necessary corrections will be recorded on 10 May 2016. If this is not done, it further emphasizes the steamrolling of the negotiations on the Bill.

  Provinces claimed they were not given sufficient time to properly roll out public participation, especially the Royal Bafokeng and the Ratau Owners and Heirs in their submission which was included with the North West negotiating mandate.

      Final Mandates

  On Monday 9 May Final Mandates were circulated by the SC secretary issued by:

    KZN

    Northern Cape

    Western Cape

  Additional final mandates were submitted, but these will only be recorded during the meeting.

    Eastern Cape: Not tabled in the legislature. Only before ordinary PC meeting on Thursday. House only sits on 1 June.

    Free State: Have not had sitting so the Bill has not been approved. The next PC meeting the will be held on 12 May to consider a voting mandate serving before the House on 17 May for ratification.

    Gauteng: Not approved in House yet. Now going to PC and then to House at the end of the month.

    Limpopo: Not approved in House yet. Only referred to PC and today conferring the Final Mandate at 14:00.

    Mpumalanga: Not approved in House yet. Only referred to PC. Sitting on Friday 13 May, but the Bill is not on the order paper

    North West: The final mandate was not debated, approved or even on the order paper of the province and is therefore not compliant.

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4.     Concerns and required amendments to the Bill

The Democratic Alliance submits the attached document Schedule 1 as the official objections, as amendments to be made in the Expropriation Bill [B4B-2015].