

JOHANNESBURG ATTORNEYS ASSOCIATION SUBMISSION ON AMENDING S25 OF THE CONSTITUTION

INTRODUCTION

The Johannesburg Attorneys Association (JAA) has a proud eighty six-year history as South Africa's largest voluntary attorneys' association. It represents the interests of some 2 500 plus attorneys practising in the greater Johannesburg area, as well as the interests of the general public in certain legal matters.

As it will appear from the below, the issue of expropriation of land without compensation affects not only those expropriated and the State, but every person in South Africa. The JAA has accordingly considered the issue of whether section 25 should be amended (in relation to expropriation of land without compensation), and has obtained counsel opinion in relation to same. This submission contains the most important aspects of the issue as understood by counsel for the JAA and the JAA Executive Committee.

This submission will address four issues. First, the scope of the enquiry before the Joint Constitutional Review Committee ("the committee"). Second, the State's current powers in terms of S25 of the Constitution to expropriate land without compensation. Third, the international law obligation on the State to pay appropriate compensation in cases of expropriation. Fourth, reasons not to amend the Constitution.

SCOPE OF THE ENQUIRY

The committee has invited the public to make "submissions on the review of section 25 of the Constitution and other sections where necessary, to make it possible for the state to expropriate **land** in the public interest without compensation."

S25 of the Constitution sets out the parameters for State expropriation of **property**. Land and property are not synonymous. Land is a type of property, but it has been confirmed by our Constitutional Court that the term property refers to a range of other assets which include (amongst others); immovables

(flats and houses), movables (cars and laptops), intellectual property (authors and artists' rights), shares held on the stock exchange, rights conferred by law (liquor licences) and contractual rights (construction or management contracts).

Given the narrow scope of the enquiry before the committee it would be impermissible for it to recommend any changes to S25 of the Constitution that would alter the State's current powers and obligations regarding the broad category of **property**. If any changes to S25 are recommended by the committee they could only be regarding **land**.

S25 OF THE CONSTITUTION

The relevant sections of the constitutional property clause state:

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application-

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -

(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.

In the case of *Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs*¹ the court held that:

The equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require.

In the case of *Khumalo and others v Potgieter and others*² the court set out a two-stage process to determine the amount of compensation that was fair and equitable in terms of S25 of the Constitution.

In the first stage, it was determined what the market value of the property was by examining comparable sales. In this process the court endorsed the "*Pointe Gourde*" principle. According to this principle in the assessment of the market value of land acquired in an expropriation, no regard shall be had to any increase or decrease in value of the land, which is attributable to the scheme underlying the acquisition.

In the second stage, the other four factors set out in S25(3) of the Constitution are utilised to adjust the market value price up or down.

The learned authors of The Bill of Rights Handbook state that:

Section 25 requires compensation for an expropriation to be fair and equitable in amount, timing and manner of payment. Compensation not meeting this requirement will be unfair and inequitable and can hardly be considered reasonable and justifiable.³

There will be situations where no compensation is due after expropriation. For example, if the land in question has no market value, or where the amount paid by the state to subsidise the initial acquisition of the land was equal to or greater than the market value. However, as a general rule the Constitution

¹ [2000] 2 All SA 26 (LCC) in para [35] at 40e – f.

² [2000] 2 All SA 456 (LCC).

³ Currie and De Waal, *The Bill of Rights Handbook*, 5th ed, at page 562.

does require the payment of some compensation that is just and equitable and it will only be in a narrow set of situations that no compensation will be due.

INTERNATIONAL LAW AND EXPROPRIATION

Constitutional Obligation to Consider International Law

S39. (1)(b) of the Constitution states that “when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.”

International Laws

The Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) of 1962 (of the United Nations, of which South Africa is a founding member and has been since 1945) states that:

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

Article 2(2)(c) of The Charter of Economic Rights and Duties of States Resolution 3281 (XXIX) of 1974 states that:

Each State has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

In terms of international law, a State has the power to expropriate, but this power is accompanied by a duty to pay appropriate compensation. There may be circumstances where it is appropriate to pay no compensation, but each case will have to be determined on its own merits.

REASONS NOT TO AMEND THE CONSTITUTION

Land Restitution Claims

South Africa has a dark history of land theft. Justice requires that the wrongs of the past are addressed by awarding compensation to the victims of land dispossession. Between 1995 and 2014 over 1.8 million individuals have received compensation either in the form of land or money. This was achieved without the need to expropriate land without compensation and the strong inference is that the remainder of land claims can also be resolved without interfering with the Constitution.

Land restitution claims and settlements by province, 1995-2014

Province	Amount of land restored (hectares)	Total number of households involved	Total number of beneficiaries	Outstanding claims ²⁰¹⁴	Total settlements ²⁰¹⁴ as at March 2014	Total valid claims ²⁰¹⁴
Eastern Cape	136 752	67 579	257 049	462	16 465	16 716
Free State	54 058	7 619	49 022	10	2 685	2 682
Gauteng	17 189	14 157	64 432	-3	13 327	13 158
KwaZulu-Natal	771 022	85 477	499 722	1 323	15 171	16 398
Limpopo	639 287	50 731	256 489	163	3 655	3 489
Mpumalanga	473 673	53 832	257 597	621	2 847	3 400
North West	407 057	40 476	202 932	184	3 740	3 902
Northern Cape	575 732	22 656	120 270	145	3 719	3 852
Western Cape	4 178	28 613	131 439	562	16 001	16 099
South Africa	3 078 948	371 140	1 838 952	3 467	77 610	79 696

Source: Department of Rural Development and Land Reform, *End of Term Report: 2009-2014*; 3 Sept 2014, p22.

When land claim cases are resolved, claimants are given the choice of receiving land or financial compensation. In 92% of cases, people choose money over land.⁴ This shouldn't come as much of a surprise, because money translates into freedom. Beneficiaries can use that money to start businesses, pay off debts or invest in the market.

Lack of Demand for Land Distribution

The Institute of Race Relations has polled South Africans to determine what they perceive to be the country's most serious unresolved problems. Almost

⁴ Dr Anthea Jeffery, *Pressing Hunger for Land? The Stats Show Something Different*.

40% identify unemployment, 33% raise a lack of service delivery, while less than 1% are concerned about land distribution.⁵

Table 1, 2016 IRR field survey

Most serious unresolved problems	Total	Black	Coloured	Indian	White
Unemployment	39.7%	42.0%	36.8%	30.7%	25.8%
Service delivery/water/electricity/roads	33.6%	37.4%	15.5%	22.5%	23.1%
Lack of housing	18.2%	19.8%	17.3%	8.3%	9.6%
Crime	14.9%	10.8%	24.5%	40.3%	31.3%
Education (cost, quality, access)	14.7%	15.8%	14.5%	8.7%	9.1%
Corruption/nepotism	8.5%	6.7%	6.9%	27.5%	19.0%
Poverty	6.9%	5.7%	12.7%	11.1%	10.4%
Racism (including inequality, xenophobia)	6.4%	6.0%	4.5%	11.8%	10.4%
Racism (alone)	3.2%	2.4%	3.0%	7.2%	9.0%
Land distribution	0.6%	0.5%	0.9%	0.0%	1.3%

Farming is a Technical Job

Government spent over R1.4 billion buying farms in the Eastern Cape to redistribute to aspirant farmers. Of the 265 farms purchased, only 26 remain viable.⁶ In 90% of those cases, once thriving farms that produced food and employment are now in ruin. Being a farmer is not easy. It's a technical job that requires an enormous amount of time, expertise, and money as well as a lot of support and training if you have no background in farming. Providing someone with the land to farm is no guarantee that the farm will be successful.

Damage to the Economy

Life involves trade-offs, you can't remove property rights and have a flourishing economy. Foreign investors won't risk having their land confiscated in South Africa when they can pick any number of other nations that will protect their investments.

When Zimbabwe implemented a policy of expropriation without compensation it led to the world's worst case of hyperinflation. It wasn't just the original land owners that were hurt, the average man on the street was left destitute after the economy was annihilated.

⁵ Institute for Race Relations, Reasons for Hope 2017, at page 3.

⁶ Bongani Fuzile, IN CASE YOU MISSED IT: 90% government farms failed, Daily Dispatch, 21 April 2018

A floundering economy would have a negative impact on the amount of tax revenue that can be collected to assist the poor. If the State wants to acquire more land for the benefit of the poor and dispossessed it can do so by utilizing funds from the annual budget. In the current financial year, R5.7 billion has been budgeted for land reform and restitution, which is only 0.3% of the total budgeted expenditure of R1.67 trillion.⁷

CONCLUSION

The committee is constrained in its enquiry to the issue of expropriation of **land** without compensation and it would be impermissible to alter the portions of S25 of the Constitution that relate to the broader category of property.

In its current form, the Constitution allows for expropriation without compensation in particular circumstances. However, as a general rule, the Constitution and international law create an obligation to pay compensation when land is expropriated.

We have an internationally lauded Constitution premised on freedom, dignity, and equality. We have never altered our Bill of Rights and the evidence shows that there is no reason to do so now.

Counsel for the JAA

Mark Oppenheimer

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⁷ National Treasury Estimates of National Expenditure 2018