



Private Bag X 802, Pretoria, 0001 Tel: (+27 12) 334 4972 Fax: (+27 12) 326 4478
Private Bag X 9123, CAPE TOWN, 8000 Tel: (+27 21) 462 1441 Fax: (+27 21) 461 0851

Enquiries: Mr. Abram Sithole Tel: 012 336 5853 Cell: 071 224 2543 Email: SitholeaM@cogta.gov.za

The Speaker of Parliament
Ms Thandi Modise
P.O. Box 15
CAPE TOWN
8000

By Email: panyamza@parliament.gov.za

THE NATIONAL HOUSE OF TRADITIONAL LEADERS COMMENTS ON THE EXPROPRIATION BILL, 2020

INTRODUCTION

The National Assembly resolved that the Expropriation Bill be referred to the National House of Traditional Leaders for comment, in accordance with section 18(1) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).

This submission is made by the National House of Traditional Leaders, a statutory body, established in terms of the National House of Traditional Leaders Act, 2009 (Act No. 22 of 2009). The role of the National House of Traditional Leaders is to promote the role of traditional leadership within a democratic constitutional dispensation. Its main objective is to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law.

BACKGROUND

Property rights, that is, rights of individuals to own land, houses and assets are important to democratic rights as enshrined in the Constitution under the Bill of Rights. Traditional communities with traditional land use rights could be expropriated and their land turned over for other purposes by organs of states, with no redress for the loss of their property. If the Bill is passed into law in its current form, communal land is likely to become expropriated.

COMMENTS

Preamble

Clause 25(3) (c) provides for the amount of compensation and the time and manner of payment to 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 amongst others, the **market value of the property**.

The House is of the view that it should be ascertained as to how the property was acquired by the current holder in the first instance. If the acquisition was unlawful as a result of dispossession, what justifies the prerequisite for the market value of the property for compensation, it may be argued as to what compensation is for.

If we talk about just and equitable compensation, we should bear in mind of the past access and unlimited use of natural resources such as water, land, soil, and vegetation that has enriched the previously and currently advantaged individuals. Therefore, just and equitable compensation should take into account the fact that the previously advantaged individuals benefited freely from the resources at hand.

Just and equitable compensation should also take into account the previously disadvantaged individuals or HDIs, who are currently under the employment of whatever nature or survive from the activities of the property holder. This could be farm workers or any other beneficiaries of the property holder who should undoubtedly be considered for an equitable share of the compensation.

Emphasis is hereby placed on clause 25(4)(a), (6) and (7) of the Preamble which are very important in as far as this Bill is concerned.

Clause1: Definitions

The Bill defines “**Property**” as property contemplated in section 25 of the Constitution.

The National House recommend that property, which may be expropriated must be defined clearly in the Bill. In terms of the Bill, property is not limited to land and includes a right in such property. This definition can include mining rights, movable property, and unregistered customary and other land use rights. The Minister has powers to expropriate any property anywhere and approve the purchase price thereof. It therefore means that the Minister will have the right to expropriate any item or property such as a house or a car and then determine the price as long as the correct procedures are followed. The Bill must clearly state that communal land, that is, land owned by the community under traditional leadership is exempted from expropriation.

“**Unregistered rights**” means a right in property, including a right to occupy or use land, which is recognized and protected by law, but is neither registered nor required to be registered. These include the rights of tenants to occupy properties under lease agreements, the rights of farmers and also the communal land use rights held by people living on land in traditional communities. The House is of the view that expropriation of third party rights must comply with the Constitution.

Clause 2: Application of the Act

Clause 2(2) states that the power to expropriate property may not be exercised unless the expropriating authority has attempted to reach an agreement with the owner or the holder of an unregistered right in property for the acquisition.

The National House does acknowledge the fact that there must be an agreement for expropriation but is worried that it would appear an agreement is highly emphasized

as a prerequisite for expropriation. The fundamental question to be asked is why the necessity to expropriate? What happened to the willing buyer willing seller approach?

Clause 2(3)

The Bill gives powers to the Minister of Public Works to expropriate property, but the powers are extended to the expropriating authority, which means organs of state and any person empowered by this Act can expropriate property.

The National House is of the view that only the Minister should have the power to expropriate property and that the definition of expropriating authority should exclude organs of state, since municipalities, government departments will be able to use the Bill to further their own interests.

Clause 3: Powers of Minister of Public Works to expropriate

Clause 3(5) (d) provides that all costs incurred by the Minister in the performance of his or her functions on behalf of an organ of state must be refunded by the relevant organ of state.

Traditional Councils or structures of Traditional Leadership are an organ of state which are seriously underfunded. They will therefore be unable to refund the Minister for the costs incurred in cases where they benefit out of expropriation, which is probable considering history. It is suggested that the Minister must hold that property for the Traditional Councils or any structure of Traditional Leadership until such time that particular entity is financially viable to refund and thereafter become the registered owner of the property. In such instances, it is further proposed that such a structure be awarded rights equivalent to those possessed by owners to enable the structure to exercise such rights with appropriate limitations.

Clause 5: Investigation and gathering of information for purposes of expropriation

Clause 5(2)(a) provides for the expropriating authority to authorize any person if the property is land, to enter upon the property at all reasonable times as may be agreed to by the owner or occupier of the property.

The National House submit that the protection of some sort is a necessity or a prerequisite for any person authorized to enter and access properties in order to perform duties associated with this act. If this matter is left as it is, it may be a danger to those who will be performing such duties.

Clause 5(5)(a) gives powers to the expropriating authority to call persons, by written notice, to furnish in writing within 20 days from delivery of the notice, the names and addresses of persons holding unregistered rights in the property.

The National House is of the view that the 20 days period to submit the required information by persons holding unregistered rights may be too short. It is therefore suggested that sufficient time, three months period, be provided for such a purpose.

Clause 7: Notice on Intention to expropriate

Clause 7(4)(a) states that an owner or holder of an unregistered right must within 30 days of the service of the notice or if the notice had not been served on him or her, within 30 days of the publication, deliver to the expropriating authority a written statement indicating the amount claimed by him/her as just and equitable compensation should the property be expropriated and furnishing full particulars as to how the amount is made up.

The National House suggest that the sentence should read as follows: "The amount claimed by him or her as just and equitable compensation and furnishing all particulars as to how the amount is made up, as well as to whether he or she benefited from the property, for how long and in what monetary terms."

Clause 7(7)(b)(iii) states that the expropriating authority may decide not to proceed with the expropriation of the property.

The House is wondering why it would be that the expropriating authority may decide not to proceed with expropriation of the property. Even if there may not be an immediate need to warrant expropriation, expropriation should still take place as a means of transformation and therefore, the expropriated property should be held by Government/ Minister and lease it, perhaps back to the former holder. Expropriation should be understood broadly as a process of transformation to redress the legacy of the past.

Clause 8 and 21: Notice of Expropriation and Determination by Court

The Bill gives powers to the state to take property by serving a notice on the owner, and it also gives powers to the owner to contest for compensation up to a court of law. It further allows the courts to adjudicate only on the compensation offered by the state and not on the validity of the expropriation.

Property rights as contained in section 25 of the Bill of Rights in the Constitution of the Republic of South Africa is clear, section 25(2) (b) of the Constitution specifically determines that property may be expropriated, 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.

The Bill further says the state may give expropriated owners 60 days in which to sue for more compensation, failing which they will be deemed to have accepted the offer. People who do not have the means to sue within the time period will not have their dispute over compensation decided by the courts.

Clause 9: Vesting and possession of expropriated property

Clause 9(3)(b) authorizes the expropriating authority to recover the amount of depreciation from the owner or holder of the expropriated property if the owner or holder of the expropriated property willfully or negligently fails to maintain the property and as a result the property depreciates in value.

The National House proposes that there should be a way of determining and recording the status of the property upfront so as to avoid willful or negligence on the part of the owner or holder of the expropriated to maintain the property or to intentionally appreciate the property to justify high compensation.

Clause 12: Compensation for Expropriation

Clause 12(1)(c) provides for the amount of compensation to be paid to an expropriated owner or holder to be just and equitable and **having regard the market value of the property.**

This clause imply that in determining compensation, it should also be taken into account the market value of the property. The National House submits that it should also take into account the property benefits the expropriated holder enjoyed over time as well as his or her current standing. The free usage of natural resources by the selected few is considerable.

Clause 12(2)(d) states that in determining the amount of compensation to be paid, the expropriating authority must not, unless there are special circumstances in which it would be just and equitable to do so, take into account the interests of other persons which may be affected by the relief ordered.

The National House submits that this may be a deliberate attempt for enrichment and therefore cautions against it.

Clause 21: Mediation and Determination by Court

Clause 21(4) provides for a court to make such order as it considers just and equitable if a provision of this Act has not been complied with.

The National House is of the view that the courts of law are going to be burdened with expropriation and it would appear that the process may be dragged for long

unnecessarily. The House submits that the Office of the Chief Justice should be approached to dedicate courts for this process.

This also talks to clause 22 (7)(a) which provides for the expropriating authority to approach the court for an extension of the period of temporary usage beyond 12 months, if the owner or holder of an unregistered right whose right in property has been taken does not agree. These also justifies the need for dedicated courts.

Kind regards

A handwritten signature in black ink, appearing to be 'SE Mahlangu', written in a cursive style.

Inkosi SE Mahlangu

Chairperson: National House of Traditional Leaders

Date: 23 November 2020