

**WRITTEN COMMENTS ON EXPROPRIATION BILL [B16-2008]**

**SUBMITTED ON BEHALF OF FORESTRY SOUTH AFRICA**

**TO THE PORTFOLIO COMMITTEE ON PUBLIC WORKS**

**(NATIONAL ASSEMBLY)**

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1. **INTRODUCTION**

1.1 Forestry South Africa (FSA) accepts the following propositions in the Draft Policy on the Expropriation Bill<sup>1</sup> :

1.1.1 the debate about expropriation in South Africa must occur against the backdrop of many centuries of systematic deprivation of land rights of historically disadvantaged people in South Africa;

1.1.2 the plethora of procedures and regulations in the existing legislative framework for expropriations in South Africa, including the Expropriation Act, No. 63 of 1975, do not comply with the requirements of the Constitution of the Republic of South Africa, 1996;

1.1.3 there is accordingly a need to create a legislative framework for expropriation which is consistent with the Constitution;

1.1.4 to this end, new legislation must **inter alia** :

1.1.4.1 recognise and permit expropriation for the purposes of land reform, restitution and

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<sup>1</sup> General Notice 1654 of 2007, 13 November 2007

redistribution in order to facilitate greater access to land and to other natural resources;

1.1.4.2 provide for compensation for the expropriation of all rights in property.

1.2 However, FSA also accepts the proposition in the Draft Policy that expropriation ought to be regulated by the constitutional right to administrative action that is lawful, reasonable and procedurally fair.<sup>2</sup>

1.3 Also important is that everyone has the right to have any legal dispute, including a dispute arising out of expropriation, decided in a fair public hearing before a court or similar tribunal.<sup>3</sup>

1.4 FSA contends that the Expropriation Bill is objectionable mainly because of ó

1.4.1 its failure to provide for expropriation which is procedurally fair, and

1.4.2 its denial of proper access to the courts for the resolution of disputes, particularly disputes about compensation,

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<sup>2</sup> Section 33(1) of the Constitution, 1996  
<sup>3</sup> Section 34 of the Constitution, 1996

notwithstanding that one of the stated goals of the Bill is to ensure respect for the rights of everyone, including these specific rights.

1.5 To this FSA adds an objection that the Bill infringes the right to privacy<sup>4</sup> and the associated right to human dignity.<sup>5</sup>

1.6 FSA deals with these objections in the order in which they arise in the Bill.

## 2. **POWERS OF INVESTIGATION**

2.1 Clause 10 of the Bill provides for an expropriating authority and Expropriation Advisory Boards to conduct certain investigations. The powers of a Board when it conducts an investigation and of persons who conduct investigations on behalf of an expropriating authority or a Board are set out in Clauses 10(3) to (6).

2.2 FSA's first objection to these provisions is that they make no allowance for an owner or the holder of registered or

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<sup>4</sup> Section 14 of the Constitution, 1996  
<sup>5</sup> Section 10 of the Constitution, 1996

unregistered rights to influence the outcome of such investigations and the recommendations made by a Board to the expropriating authority. A decision to conduct an investigation is administrative action. Affected property right holders are entitled to procedural fairness<sup>6</sup>, which should include a right to be heard by a Board before it makes any recommendations.

2.3 The right to privacy<sup>7</sup> and the associated right to human dignity<sup>8</sup> are also infringed by the powers conferred on investigators **inter alia** to enter upon property, survey and dig into it, and to require access to documents and make copies thereof. Such provisions can only be justified with reference to the limitation clauses in Section 36 of the Constitution, which requires, **inter alia**, that the limitation on the rights must be ðreasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.ö FSA contends that, at least to the extent that the powers of investigation provided for in clause 10(5) of the Bill allow for the right holder to be forced to provide private

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<sup>6</sup> Section 33(1) of the Constitution, 1996, read with Section 3 of the Promotion of Administrative Justice Act, No. 3 of 2000 (“PAJA”)

<sup>7</sup> Section 14 of the Constitution provides as follows :  
“Everyone has the right to privacy, which includes the right not to have-  
(a) their person or homes searched; or  
(b) their properties searched; or  
(c) their possessions seized; or  
(d) the privacy of their communications infringed.”

<sup>8</sup> Section 10 of the Constitution provides as follows:  
“Everyone has inherent dignity and the right to have their dignity respected and protected.”

documentary and other information, they do not represent a reasonable limitation.

2.5 An attempt has been made in Clauses 10(4) to (6) of the Bill to limit the ambit of infringement by requiring either the consent of the owner or holder of rights or that the person conducting an investigation be authorised to do so in writing by the expropriating authority or the Board. However, since the expropriating authority and the Board have vested interests, these provisions are inadequate. The norm, especially in post-constitutional legislation, is to require any infringement of the rights of privacy and dignity to be authorised by the prior issue of a warrant by a judicial authority on the basis of evidence placed before him or her on oath. In the absence of consent, this could easily be achieved before a Magistrate.

2.6 For these reasons, Clause 10 of the Bill is unconstitutional to the extent referred to above.

3. **NOTICES OF INTENTION TO EXPROPRIATE**

3.1 Clause 11(1) of the Bill provides that “if an expropriating authority **intends** to expropriate property” (emphasis added) it must publish and serve a notice to that effect. FSA notes that the previous draft of the Bill made provision for such a notice if an expropriating authority “contemplated” expropriating a property. The use of the word “intends” suggests that an expropriating authority has already formed an intention to expropriate by the time that it publishes and serves the notice.

3.2 Since no provision is made in the Bill for an owner or holder to be heard and make representations before such an intention is formed, these provisions offend against the requirements of procedural fairness. The word “contemplated” should therefore be retained.

3.3 Once a notice of intention to expropriate has been published and served, no express provision is made for a right of objection. Such a right is merely to be inferred from the provision in Clause 11(3)(e)(i) that a notice must contain **inter alia** an invitation to lodge within 21 days in writing “any objections against the intended expropriation”. The right to object should not have to be inferred; it should be spelled out expressly.

3.4 The right to object is in any event restricted by the provision that it must be lodged within 21 days after publication or service. An objection (or any submissions) would have to be detailed and supported by evidence, especially because an objector may be invited to enter into negotiations<sup>9</sup>, after which an expropriating authority must make a decision within a further 21 days.<sup>10</sup> The period of 21 days within which to lodge an objection is accordingly too short. Furthermore, no provision is made for the extension of the period and administrative officials would not have the power to grant condonation for the late lodging of an objection.

3.5 The right to be heard is further restricted in that provision is only made for the lodging of written objections and the making of written submissions. This is in conflict with the requirement that a decision-taker must have a discretion to allow a person whose rights are materially and adversely affected **inter alia** to obtain legal representation and present oral argument.<sup>11</sup>

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<sup>9</sup> Section 11(4)(b)

<sup>10</sup> Section 11(5)

<sup>11</sup> Section 3(3) of PAJA provides as follows :

**“In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to –**

**(a) obtain assistance and, in serious or complex cases, legal representation;**  
**(b) present and dispute information and arguments;**  
**(c) appear in person.”**

3.6 Serious or complex cases illustrate the problem. It is inconceivable that in such cases an expropriating authority should be permitted to take a decision whether or not to expropriate without having an obligation, or at least a discretion, to hear oral evidence and argument from persons whose fundamental rights are affected (or their legal representatives).

3.7 The previous draft of the Bill required that the expropriating authority "give full consideration to all objections and submissions timeously received in taking a decision whether to expropriate or not".<sup>12</sup> There is no similar provision in the present Bill. While it may be inferred that an expropriating authority must consider objections received, no necessary inference can be drawn in relation to submissions. Furthermore, the time limits imposed in Clauses 11(4)(b) and (5) of the Bill are onerous and no provision is made for them to be extended. The Bill accordingly does not provide sufficient opportunity for either negotiation or proper consideration of objections and submissions prior to making a decision. If the provision for negotiation, which is welcome, is to succeed, there should be provision for the negotiations to be without prejudice.<sup>13</sup>

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<sup>12</sup>

**Section 11(4)**

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Essentially meaning that they would be off the record.

3.8 Lastly, Clause 11(6)(a) authorises an expropriating authority to depart from the provisions of subclauses (1) to (4) (relating **inter alia** to notice and objections) where it is reasonable and justifiable to do so. Clause 11(6)(b) sets out some of the factors to be taken into account in determining whether such a departure and the extent thereof is reasonable and justifiable.

3.9 We have already submitted that the provisions of Clauses 11(1) to (4) are inadequate. To depart from them to any extent exacerbates the problem. Any further limitation on the right to procedural fairness would have to be justified in accordance with the provisions of Section 36 of the Constitution and Sections 3(4) and (5) of PAJA. However, the factors set out in Clause 11(6)(b) of the Bill are inconsistent with these provisions. To the extent of that inconsistency, the Bill is either unconstitutional or superfluous. At the very least, it gives rise to great uncertainty because of the inconsistency with PAJA.

#### 4. **COMPENSATION**

4.1 The basis on which compensation is to be determined is set out in Clause 15 of the Bill. The Clause assumes that the body

which ultimately determines compensation is the expropriating authority and not a court. This is consistent with the approach in Clause 24 of the Bill. For the reasons set out below, that approach is in conflict with section 25(2) of the Constitution. Clause 15 should therefore be redrafted so as to ó

4.1.1 be silent as to the body which determines the compensation; or

4.1.2 refer to the courts as the body which determines the compensation.

4.2 Clause 15(3)(b) provides that an expropriating authority may determine an amount of compensation that is below the market value of the property. This can certainly be read to mean that a court may not determine that just and equitable compensation requires more than market value compensation. This is incorrect. That possibility was recognised in **Haakdoornbult Boerdery CC & Others v Mphela & Others**.<sup>14</sup> That case involved an African community who were subject to a forced removal under apartheid at market value compensation. However the evidence showed that the negative impact of the forced removal on the community meant that they were entitled to substantially more than market value compensation. If they

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<sup>14</sup> 2007 (5) SA 596 (SCA).

were only entitled to market value compensation, they would have lost their land claim. Poor communities may still be expropriated for projects such as dams and other major infrastructure projects. They should be entitled to more than market value compensation where appropriate, as should any other person who is expropriated and can show that additional compensation is justified. FSA therefore suggests that the clause be amended to read:

**“Subject to subsections (2) and (3), an expropriating authority may determine an amount of compensation that is below or above the market value of the property.”**

5. **CLAIMS FOR COMPENSATION**

5.1 If an owner or holder of rights is not satisfied with the offer of compensation contained in a notice of expropriation, such owner or holder has 21 days within which to deliver a written statement setting out **inter alia** the amount claimed as compensation.<sup>15</sup> In terms of Clause 17(3)(a) of the Bill, the expropriating authority may extend the period of 21 days but, in terms of Clause 17(3)(b), if the expropriated owner or holder requests the extension of the period of 21 days in writing before the expiry of

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<sup>15</sup> Sections 17(1) and (2) of the Bill

that period, the expropriating authority must extend such period by a further 21 days.

- 5.2 FSA submits that the period of 21 days is far too short. TWIG notes that provision was made for a 60-day period in earlier drafts of the Bill and this is the period currently provided in the Expropriation Act. In this connection, we point out that an expropriated owner would have to set out not only the amount claimed as compensation but full particulars as to how such amount is made up, including a copy of any valuation or other professional report, if any, that forms the basis of the compensation claimed.<sup>16</sup> Obtaining such particulars, valuations and professional reports takes a considerable amount of time and a period of 21 days, even if extended for a further 21 days, is inadequate. Experience shows that even the period of 60 days which currently applies is often difficult to meet. The expropriating authority will face the same difficulty with the 21 day period in clause 18(1). This comment is based on practical experience.

- 5.3 Furthermore, the provisions of Clauses 17(3)(a) and (b) may be construed to mean that the maximum extension of the period of 21 days is a further 21 days, and then only in the event that the

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<sup>16</sup> Section 17(1)(b) of the Bill

request for an extension is made in writing before the expiry of the initial 21 days. Again, administrative officials would not have authority to condone extensions of time not authorised by the Statute.

6. **APPROVAL OF COMPENSATION BY A COURT**

6.1 In terms of Section 25(2)(b) of the Constitution, the amount of compensation and the time and manner of payment thereof must either be agreed to by those affected or "decided or approved by a court". The Bill makes provision for neither, as is explained more fully below.

6.2 FSA submits that, properly construed, Section 25(2) of the Constitution confers upon a person affected by an expropriation an entitlement to have the amount of compensation and the time and manner of payment thereof determined by a court, whether the process is by way of a decision or by way of an approval. To the extent that the Bill makes no such provision, it is unconstitutional.

6.2 The rationale for excluding any provision for a court to "decide" such matters appears to be that the words "decided or approved"

must be construed *disjunctively*.<sup>17</sup> In fact, if the words are to be construed *disjunctively* as the draft policy suggests they must, then a court must be involved whether the process is approval or decision. The approach in the Bill is to construe the words *disjunctively*. There is no justification for this interpretation. The section must be interpreted consistently with the other rights in the Constitution, including the right of access to the courts. That approach to the interpretation of section 25(2) of the Constitution supports the courts being involved both where the process is one of decision and where the process is one of approval.

6.3 Much of the difficulty with the Bill stems from a failure to distinguish between an appeal and a review. The role of the courts is limited in the Bill to a review of the process by which compensation was decided by the expropriating authority and an appeal against the outcome of such a review. In the Memorandum on the Objects of the Expropriation Bill, 2008, which accompanied its publication, this is stated to be one of its objects.<sup>18</sup> Nowhere is it stated in the Memorandum that one of the objects of the Bill was to afford an expropriatee access to the

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<sup>17</sup> **Draft Policy on the Expropriation Bill, General Notice 1654 of 2007, 13 November 2007, paragraph 20**

<sup>18</sup> **Paragraph 2(f)**

courts in order to have the merits of a claim for compensation decided. This apparent policy shortfall has given rise to the Bill's unconstitutionality in this respect.

6.4 FSA also submits that the procedures provided for in Clause 24 of the Bill ó

6.4.1 for securing 'approval' of 'actions undertaken in terms of this Act' do not amount to approval by a court of compensation as envisaged in section 25(2) of the Constitution and are therefore in conflict with the Constitution; and

6.4.2 are in numerous other respects problematic and unconstitutional.

6.5 These may be summarised as follows:

6.5.1 In terms of Clause 24(3)(a) of the Bill, 'any' party to an expropriation may 'request' a court to 'approve' an action undertaken in terms of [the] Act whereby an expropriating authority made any final determination of compensation, determined the time of payment or determined the manner of payment of compensation. Despite the reference to 'any' party, only the expropriating authority is likely to seek approval of

these actions. No provision is made for an expropriatee to seek disapproval. While such a provision may be read in, it would certainly be preferable if it were spelled out expressly.

6.4.2 Clause 24(3) does not allow the court to approve or disapprove the compensation itself, or the time or manner of payment thereof. The Clause refers repeatedly to approval of the actions undertaken in terms of the Act in the making of a determination. This only allows the court, in effect, to review the decision-making process of the administrative authority. Such a review is limited **inter alia** to a consideration of whether the process was procedurally fair and whether the decision was reasonable and rationally connected to the purpose for which it was taken.<sup>19</sup> In review proceedings, a court may not normally substitute its own decision for that of the administrative authority. This excludes the court from both the decision on the amount (and other aspects) of compensation and from any approval of the compensation.

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<sup>19</sup> The grounds of a review are set out in Section 6(2) of PAJA

6.4.3 That the Bill seeks to confine the courts to a review-type function and to exclude them from the determination of compensation is confirmed by the provisions of Clause 24(3)(e), which provides that, if a court does not approve of the action of the expropriating authority in determining compensation or the time and manner of payment, the matter must be referred back to the expropriating authority for a decision. The court cannot make its own determination of compensation.

6.4.4 This is manifestly not what was intended by Section 25(2) of the Constitution. That provision clearly envisages that the court will itself decide on just and equitable compensation (and the time and manner of payment) and itself approve the just and equitable compensation (and the time and manner of payment). There is no warrant in Section 25(2) of the Constitution for the review model which has been set up in the Bill, which amounts to an attempt to amend the Constitution by way of an ordinary Act of Parliament.

6.4.5 The review model is also unconstitutional in that it deprives the expropriatee of the right to have the matter of just and equitable compensation considered by an independent and impartial judicial authority. Expropriatees have a right in terms of Section 34 of the Constitution to have their claim decided in a fair public hearing before a court. The role of the courts in deciding such a dispute has been usurped by the expropriating authority, which is clearly not an impartial player. The review model is accordingly also unconstitutional on the grounds that :

6.4.5.1 it does not allow for procedurally fair, impartial decision-making and is therefore in breach of Section 33(1) of the Constitution; and

6.4.5.2 it infringes upon the doctrine of separation of powers by assuming a function which is constitutionally reserved for the courts.

6.4.6 In fact, the role of the courts is relegated to that of a mere administrative tribunal. This is evident from the use of the word "request" in Clause 24(3)(a), the

specification of the factors to which the court must have regard<sup>20</sup> and the requirement that, if it cannot approve the actions of the expropriating authority, it must enter the reasons for its decision in the record of proceedings.<sup>21</sup> In other words, the Bill envisages a court acting in a quasi-administrative capacity, which again is a breach of the principle of separation of powers and is unconstitutional. The proper determination of compensation by a court of law is a judicial function. The Bill attempts to convert what should be a judicial function to an administrative action subject only to review.

6.4.7 The fact that, in terms of Clause 24(2) of the Bill, the taking of a decision to expropriate constitutes an administrative action which is subject to review in terms of PAJA is of small comfort. PAJA is applicable irrespective of the provisions of the Bill. Again, it is apparent that one of the objects of the Bill is to limit the jurisdiction of the courts in matters of expropriation to reviews only.

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<sup>20</sup> Section 24(3)(b)  
<sup>21</sup> Section 24(3)(c)

6.5 Lastly, Clauses 24(5) and (6) refer to a list of judges who may preside in any matter reviewing an administrative action referred to in subclause (2) or approving an action referred to in subclause (3). The names of the judges are determined by the Chief Justice, after consultation with the Judge President. If such judges do not have appropriate experience or expertise in the field of expropriation matters, they must have successfully completed a prescribed training course in expropriation matters at a prescribed institution.<sup>22</sup> The term "prescribed" is defined in Clause 1 to mean "prescribed by regulation in terms of Clause 31". It is accordingly clear that the training course in expropriation matters will be laid down by the Minister of Public Works by regulation. This too amounts to an unconstitutional infringement of the doctrine of separation of powers which requires an independent judiciary. The same can be said of the statutory attempt to regulate a purely judicial function, namely by determining the selection of Judges to hear cases. This role is ordinarily reserved for Judges President and Deputy Judges President in the various provincial divisions of the High Court.

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**Section 24(6)(a)(ii)**

7. **CONCLUSION**

7.1 The Bill in its present form is unconstitutional in certain respects and defective in other respects, as set out above.

7.2 It ought to be amended to make provision for procedures which recognise and give effect to the fundamental rights of expropriatees where they are infringed in the respects set out above.

7.3 FSA requests the opportunity to make oral submissions in support of these representations.

7.4 FSA takes this opportunity of thanking the Committee for affording the opportunity to make these representations.

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