
PROKUREURS · ATTORNEYS

THE PARLIAMENTARY PORTFOLIO COMMITTEE
DEPARTMENT OF PUBLIC WORKS
WORK STATION 3/076

Ons verw / Our ref
SDJ SDJ 89 / 2008 - T3631 / hl

U Verw / Your ref
MS. AKONA BUSAKWE

BY FAX: 0866 643 859
BY EMAIL: abusakwe@parliament.gov.za

3 JUNE 2008

Dear Sirs,

Re: EXPROPRIATION BILL

1. We refer to the abovementioned matter as well as the submissions which our office made on behalf of our client, the TAU SA on Tuesday the 27th of May 2008 at Modimolle.
2. We would like to thank the Portfolio Committee on behalf of our client for the opportunity to submit our submissions in this regard.
3. We attach hereto for record sake a copy of the submissions that where made by us and confirm that some of the committee members did receive a copy of these submissions on Tuesday.

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4. During our submissions on the 27th of May 2008 we reserved the right to raise further submissions that we wish to do herewith. Regarding the proposed Section 15(3)(a)(iv) in terms of which the compensation will be determined, all relevant factors has to be taken into consideration including any subsidy received by the land owner from the state.
5. The effect hereof will be that in valuating a property, the amounts that have been paid to a land owner in terms of a subsidy will be deducted from the value of the property.
6. Our clients strongly object to this as the subsidies were paid in terms of legislation by the then Department of Agriculture through the various subsidy schemes that were in place. Our client therefore objects to the notion that any subsidies paid must be taken into account when determining the compensation.
7. A further point that needs some attention is the contention in Section 24 that the Chief Justice as well as Judges President must perform certain actions. This cannot be dealt with unless the Minister of Justice has input into this Bill as the definition clause only refers to the Minister responsible for Public Works. As the Bill now stands the Minister of Public Works will oversea actions of the Chief Justice and the Judges President which is under the current situation impossible.
8. If any more information is needed, please do not hesitate to contact writer.

Yours Faithfully,
ROSS & JACOBSZ INC.

Per: **SD JACOBS**

**SUBMISSIONS AND REPRESENTATIONS BY THE TRANSVAAL
AGRICULTURAL UNION – SOUTH AFRICA IN RESPECT OF THE
PROPOSED EXPROPRIATION BILL**

INTRODUCTION:

1.

The Transvaal Agricultural Union – South Africa (hereinafter “TAU”) recognises the fact that under certain circumstances the State has the right and/or the duty to expropriate property for a public purpose or in public interest and does therefore not object to the principle an/or the whole of the proposed Expropriation Bill.

2.

The TAU welcomes the fact that most of the applicable principles pertaining to expropriation, are contained in the proposed Expropriation Bill rather than in the present Expropriation Act and subsequent

regulations.

3.

The TAU, however, contends that some sections of the proposed Expropriation Bill are in conflict with the Constitution of the Republic of South Africa, Act 108 of 1996 (as amended) (hereinafter “the Constitution”), and are therefore unconstitutional and infringing on the rights afforded by the Constitution.

**THE CONSTITUTIONALITY OF CHAPTER 6 OF THE PROPOSED
EXPROPRIATION BILL:**

The provisions of section 25 of the Constitution:

4.

Section 25 of the Constitution provides as follows:

“(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 be 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 interest 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 the direct state investment and subsidy
in the acquisition and beneficial capital improvement
of the property; and*

(e) *the purpose of the expropriation.*" (own emphasis)

5.

It is clear from section 25(2)(b) of the Constitution (underlined hereabove) that the words "*decided or approved*" are both governed by the words "*by a court*".

6.

There is simply no room for an argument that someone else than a court may "*decide*" the amount of compensation nor for the argument that if a statute provides that the amount of compensation is to be approved by a court, that it can be decided by the executive arm of the State.

7.

This is so because the word “*must*” governs both alternatives, i.e. “*decided or approved*”.

8.

Section 25(2) therefore requires that the compensation to be decided by the court ought to be approved by the court and it excludes an expropriating authority from deciding it, as section 25(3) is clearly peremptory with respect to who must decide the compensation.

9.

In terms of section 25(3) of the Constitution, it is the court and the court alone who must decide the compensation.

The provisions of Chapter 6 of the proposed Expropriation Bill:

10.

Section 24 (Chapter 6) of the proposed Expropriation Bill provides as follows:

- “(1) The compensation to be paid for any property expropriated by an expropriating authority and the time and manner of payment must, in the absence of agreement between the expropriated owner or the expropriated holder and the expropriating authority and subject to section 25 of the Constitution, be determined by the expropriating authority.*

- (2) The taking of a decision to expropriate for a public purpose or in the public interest in terms of this Act constitutes an administrative action as defined in section 1 of the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000), and, subject to subsection (5), is subject to review by a court in*

accordance with that Act.

(3)(a) Any party to an expropriation may request the court, subject to subsection (5), to approve any of the following actions undertaken in terms of this Act:

(i) any final determination of compensation contemplated in section 18(4);

(ii) the determination of the time of payment of compensation; or

(iii) the determination of the manner of payment of compensation.

(b) In deciding any action contemplated in paragraph (a), the court must have regard to the factors set out in section 15.

(c) If a court, having considered the factors referred to in paragraph (b), is of the opinion that it cannot approve any of the actions referred to in paragraph

(a), it must enter the reasons for its decision in the record of proceedings.

(d) Any party may appeal the findings of a court if that court, having considered the factors referred to in paragraph (b) approved any of the actions referred to in paragraph (a).

(e) If a court, in accordance with paragraph (c) did not approve of any of the actions referred to in paragraph (a) and the expropriating authority has not appealed against such finding, the matter must be referred back to the expropriating authority to reconsider any of the actions referred to in paragraph (a) in accordance with the reasons stipulated by the court in terms of paragraph (c).

(f) If, after an expropriating authority has reconsidered any action contemplated in paragraph (e) and there is still no agreement between the parties, then any party can then again approach the court in accordance with this subsection.

(4)(a) In the interest of giving effect to the property rights contemplated in section 25 of the Constitution, court proceedings arising from the application of this Act must be dealt with on an urgent basis and must be concluded without unreasonable delay.

(b) Rules of court must be developed to give effect to the court proceedings contemplated in paragraph (a).

(5) A court reviewing an administration action referred to in subsection (2) or approving any action referred to in subsection (3), must be presided over by a judge whose name appears on the list referred to in subsection (6).

(6)(a) The Chief Justice must, after consultation with the Judge President, enter the name of judges –

*(i) who have the appropriate experience or expertise in the field of expropriation matters;
or*

(ii) *who have successfully completed a prescribed training course in expropriation matters at prescribed institutions;*

and a list of judges for the hearing of matters referred to in subsection (5).

(b) *The cabinet members responsible for the administration of justice must cause the list referred to in paragraph (a) as well as any changes thereto, to be published in the **Gazette**.*

Effect of the last offer by the expropriating authority:

11.

In terms of section 18(4) of the proposed Expropriation Bill, the last offer by the expropriating authority "*must be regarded as final*".

12.

Section 24(3)(a)(i) of the proposed Expropriation Bill apparently regards the provisions of section 18(4) as a "*final determination of compensation*" whilst sections 15(2) and 15(3)(b) read with section 24(1) refer to a determination by the expropriating authority of the compensation.

13.

When section 24(1) of the proposed Expropriation Bill provides that, subject to section 25 of the Constitution, the compensation and the time and manner of payment must in the absence of agreement between the expropriated owner or the expropriated holder and the expropriating authority be determined by the expropriating authority, that determination is the making of the last offer contemplated in section 18(4) and made either in terms of section 18(1)(a) or section 18(2) of the proposed Expropriation Bill.

14.

Apart from submitting a claim, there is therefore no procedure whereby the expropriatee is afforded a hearing before the final determination of compensation by the expropriating authority.

15.

The proposed Expropriation Bill therefore does not provide for a negotiation system or period with respect to compensation as:

- 15.1 the expropriating authority offers compensation in the notice of expropriation in terms of section 12(4);
- 15.2 the expropriatee is then afforded only 21 days (as to the previous 60 days) to consider the offer and to deliver a claim in terms of sections 17(1) and 17(2) of the proposed Expropriation Bill;
- 15.3 if the claim for compensation is not acceptable, the expropriating authority makes a further offer within 21 days

of delivery of the statement in terms of section 18 of the proposed Expropriation Bill;

- 15.4 the second offer is then, in terms of section 18(4) of the proposed Expropriation Bill, to be "*regarded as final*" and constitutes a determination by the expropriating authority (with specific reference to sections 24(1) read with section 24(3)(a)(i) of the proposed Expropriation Bill). This determination of compensation is a "*final determination*", but is subject to section 24(3) whereby a party to an expropriation may request a court to "*approve*" any final determination of compensation contemplated in section 18(4).

16.

There is a discrepancy in this procedure because:

- 16.1 the last offer made by the expropriator is deemed to be "*final*" and the cross reference in sections 24(3)(a)(i) to section 18(4) of the proposed Expropriation Bill makes it clear that this final offer is a final determination of

compensation itself;

16.2 in terms of section 19(3) of the proposed Expropriation Bill, the offer of compensation remains in force until the expropriating authority makes a final determination. If, however, the final determination is constituted by the final offer itself, the second offer is no offer at all but a determination of compensation;

16.3 it seems as though there is a step missing in the process and that the reference in section 24(3)(a)(i) to section 18(4) of the proposed Expropriation Bill as a final determination of compensation, is an incorrect reference and should be a reference to section 24(1);

16.4 section 18(4) would then have to be reformulated so as to make it clear that the intention is that of the last offer made in terms of section 18(1)(a) or section 18(2) will be regarded as a final offer.

Disputes between the expropriation authority and the expropriatee and the ousting of the court's jurisdiction in respect thereof:

17.

Once an offer has been made but rejected and a claim instituted which the expropriating authority is not prepared to pay, there exists a dispute between the expropriating authority and the expropriatee, which can be decided by the application of law.

18.

Section 24(1) of the proposed Expropriation Bill is unconstitutional in that property will be expropriated by the expropriating authority without compensation "*decided or approved by a court*" as contemplated in section 25(2) of the Constitution.

19.

Furthermore, section 25(2) of the Constitution has to be read with section 34 of the Constitution which provides:

“Every one has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

20.

Once an offer has been made but rejected and a claim instituted which the expropriating authority is not prepared to pay, there exists a dispute between the expropriating authority and the expropriatee, which can be decided, in the words of section 34 of the Constitution by the application of law.

21.

This dispute has to be decided in a fair public hearing before a court where appropriate one another *“independent”* and *“impartial”* tribunal of forum.

22.

The power which the proposed Expropriation Bill seeks to afford to the expropriating authority in terms of section 24(1) read with section 18(4), namely to determine the amount of compensation where it is not agreed upon between the expropriating authority and the expropriatee, is clearly a judicial function "*traditionally fulfilled by a court*" and involves the judicial determination of the merits of a dispute as to what the just and equitable compensation is to which an expropriatee is entitled in terms of section 25(3) of the Constitution.

23.

The fact that the power to determine the dispute is granted the expropriating authority and couching the determination of the dispute in administrative law terms, do not change the fact that it is judicial in nature and that the result of the determination would be "*decisive*" for "*private rights*" and for "*constitutional rights*".

24.

A review court would have limited jurisdiction after the final determination of compensation by the expropriating authority in reconsideration of the matter.

25.

A review court does not have "*full jurisdiction*" to hear evidence on the merits of the case and to decide on evidence tested by cross-examination.

26.

The individual is therefore deprived from the benefits of a fair trial.

27.

The fact that a court has review control over the decision of the expropriating authority is therefore irrelevant as it will only pertain to the procedure followed and not to the merits of the dispute.

28.

Neither section 24(3) of the proposed Expropriation Bill nor the Promotion of Administrative Justice Act confers "*full jurisdiction*" on the High Court and section 24 of the proposed Expropriation Bill therefore not adequately provide a claimant with the rights entrenched in section 34.

29.

Furthermore, it is not appropriate that the merits of the amount of compensation be determined by the expropriating authority (at least on the basis that the disputes involves the constitutional matter) and the proposed Expropriation Bill thus does not meet the requirement of "*appropriateness*" in section 34 of the Constitution.

30.

The fact that the expropriating authority has to decide the claims against the very expropriating authority, implies that the expropriating authority cannot be impartial and independent in deciding the claim as provided

for in section 34 of the Constitution or will there be a fair public hearing. The expropriating authority is not institutionally independent and could hardly be perceived as being independent.

31.

No powerful considerations exist for the limitation of the right to access to the court (which is a basic incident of the rule of law which underlies our democratic order) and it is therefore submitted that there is no justification for the limitation of the right to access to the court by the proposed Expropriation Bill.

32.

Furthermore, insofar as the expropriating authority exercises judicial functions, section 174(1) of the Constitution requires it to be appropriately qualified, but there is no statutory requirement in the proposed Expropriation Bill that the decision-makers be legally trained and qualified persons and as such it appears to be unconstitutional.

Approval of the determination of compensation:

33.

Section 24(3) of the proposed Expropriation Bill seeks to use the wording of section 25(2) of the Constitution in respect of the “*approval*” of the determination of compensation by the expropriating authority.

34.

Here again there is a discrepancy in the proposed Expropriation Bill for the following reasons:

34.1 When an expropriatee is of the opinion that the amount of compensation determined by the Minister is less than the amount to be paid in terms of section 25(3) of the Constitution, then the expropriatee will not be asking for the “*approval*” of the determination of compensation, but for the “*disapproval*” thereof;

34.2 As formulated, only the expropriating authority will be

authorised to request the court in terms of section 24(3)(a) of the proposed Expropriation Bill to “*approve*” the amount of compensation, simply because the expropriatee is not entitled to go to the court for the “*disapproval*” of the compensation.

35.

This illustrates the ridiculous interpretation which is attached to section 25(2) of the Constitution by having the expropriating authority decide the amount of compensation and having the court “*approve*” thereof.

36.

Section 24(3)(a) of the proposed Expropriation Bill cannot be reformulated so as to grant to the expropriatee the right to apply to court for the “*disapproval*” of the amount of compensation, as that would not fit with the wording of section 25(3) of the Constitution.

The ousting of the court's jurisdiction in respect of constitutional matters
by the proposed Expropriation Bill:

37.

The right to decide on constitutional questions are reserved for the jurisdiction of the High Court and the Constitutional Court.

38.

In this regard, section 169 of the Constitution provides:

"A High Court may decide –

(a) any constitutional matter except a matter that –

(i) only the Constitutional Court may decide; or

*(ii) is assigned by an act of parliament to another
court of a status similar to a High Court,"*

39.

Section 15(1) of the proposed Expropriation Bill provides that every expropriated owner and every expropriated holder is entitled to compensation contemplated in section 25(3) of the Constitution.

40.

The application of section 25(3) of the Constitution is thus a constitutional matter.

41.

The legislature may not oust the jurisdiction of the High Court to consider a constitutional matter unless it assigned that jurisdiction to a court of similar status, even if at the same time it confers a similar, though not exclusive jurisdiction upon another tribunal or forum.

42.

The proposed Expropriation Bill seeks to oust the jurisdiction of the High

Court and assign it to the expropriating authority who must decide the amount of compensation, which is a "*constitutional matter*".

43.

The expropriating authority is not a court of a status similar to a High Court (it is in fact no court at all) and could therefore not decide constitutional disputes.

44.

The fact that the High Court has jurisdiction to review the determination of compensation by the expropriating authority, does not cure this defect, because a power to review is not a power to determine a dispute, but merely a power to correct irregularities in a previous process.

45.

In the present instance, the expropriating authority is no court at all and the jurisdiction of the High Court to decide the constitutional matter of the amount of compensation in terms of section 25(3) of the Constitution

is ousted in favour of the executive and cannot be lawfully and constitutionally done.

46.

Every citizen adversely affected by an expropriation and a dispute with respect to the amount thereof, is entitled to the protection of the courts.

47.

Objectively seen, the offer of compensation may simply be unconstitutional because it is not the result of a correct application of section 25(3) of the Constitution.

48.

Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled.

49.

It follows that every citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the courts and no parliament, no official and no institution is immune from judicial scrutiny in such circumstances.

Interference with the court procedures:

50.

Section 24(4)(a) declares that the court proceedings contemplated in section 24 of the proposed Expropriation Bill and arising from the application of the proposed Expropriation Bill, to be urgent enough for a provision that the courts must treat these proceedings as urgent.

51.

This is an unwarranted interference with the function of the court system, as these proceedings may or may not be urgent in specific circumstances.

52.

Furthermore, special judges are to be selected for hearing the cases and they have to have “*appropriate experience or expertise*” in the field of expropriation or must have successfully completed the prescribed training course in expropriation matters at a prescribed institution.

53.

It is not clear who this prescribed institution is and what the contents of the “*training course*” must be. This provision is an unnecessary and unwarranted inference with the judiciary and the determination of compensation in terms of section 25(3) of the Constitution is a matter of application of law to the facts, for which ordinary legal training suffices.

CONCLUSION:

54.

Chapter 6 of the proposed Expropriation Bill is for the abovementioned reasons unconstitutional and it is submitted that chapter 6 must be

substituted with the principles contained in section 14 of the existing Expropriation Act, Act 63 of 1976.

55.

No valid reason exists why the provisions of sections 14 and 15 of the existing Expropriation Act have not been incorporated with the necessary changes in the proposed Expropriation Bill.