



CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

Patron: The Hon Mr Justice Ian G Farlam

15 February 2021

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA
90 Plein Street
Cape Town
8000
Email: expropriationbill@parliament.gov.za

Att: PUBLIC WORKS AND INFRASTRUCTURE COMMITTEE

Re: SUBMISSION: EXPROPRIATION BILL 23-2020

Honourable Members of the Committee,

[1] THE FW DE KLERK FOUNDATION

[1.1] The FW de Klerk Foundation was established in 1999 to protect and promote the Constitution of the Republic of South Africa, as the most important legacy of its founder, former President FW de Klerk.

[1.2] The Foundation promotes and preserves FW de Klerk's presidential heritage by supporting the causes for which he worked during his presidency. The Foundation supports and promotes the Bill of Rights and promotes unity in diversity in South Africa by working for cordial inter-community relations and national unity.

[1.3] The Foundation also supports charities that care for disabled and disadvantaged children and provides information on FW de Klerk's presidency and the factors that led to South Africa's transition to a non-racial constitutional democracy.

[1.4] The Centre for Constitutional Rights (CFCR) is a unit of the FW de Klerk Foundation which supports and promotes the Constitution, the Bill of Rights and the rule of law.

[2] EXECUTIVE SUMMARY

[2.1] The CFR's position is that land reform and the expansion of property rights to all South Africans is of the utmost significance – it remains an emotive issue and is underscored by its continued relevance in the national discourse.

[2.2] The CFR's primary submission regarding the Expropriation Bill is that it is unconstitutional insofar as it seeks to introduce expropriation without compensation (EWC) and should be

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abandoned together with all initiatives and actions aimed at amending section 25 of the Constitution that seek to allow EWC.

The reasons for the above are as follows:

[2.3] The present formulation of section 25 of the Constitution¹ constitutes a proper legislative framework and should be used to speed up the land reform process and extend property rights to all;

[2.4] In the CFCR's view the failure of land reform thus far may instead be ascribed primarily to the incapability of the government departments involved in the administration of land reform as well as corruption;

[2.5] The CFCR's view has also been confirmed and reiterated by the 2017 High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (the "High Level Panel Report") which was chaired by former president Kgalema Motlanthe;²

[2.6] It is the CFCR's view that section 25 has not been properly utilized to effect land reform and property rights for all - in this, the CFCR supports the recommendations of the High Level Panel Report;

[2.7] The CFCR is concerned about the politicized and incorrect notion that EWC is needed (and thus section 25 of the Constitution should be amended) to speed up land reform because little has been done (in terms of the section) to redress South Africa's history and right the wrongs of apartheid;

[2.8] The CFCR submits that the above is factually incorrect – section 25 in its current format deals specifically with land reform and places a positive obligation on the government to indeed take positive action in expanding and entrenching property rights for all South Africans – including the previously disadvantaged. The CFCR is concerned that a fallacious narrative has been created which inaccurately advocates that section 25, in its current form, serves as an impediment to accelerated land reform in South Africa and for this reason, EWC is needed as encapsulated in the Expropriation Bill;

[2.9] Blaming the Constitution (specifically section 25 in its current format) and seeking to introduce EWC through the Expropriation Bill as redress for the failures of government is inappropriate as success with land reform, as a constitutional project, depends on not only compliance but also adherence by government.³

In amplification of the above the CFCR further submits:

[2.10] That the Bill and/or an amendment of section 25 to allow EWC would have extremely negative political implications for the country - including political instability and all but destroy the national accord reached in 1994 and 1996;

¹ Constitution of the Republic of South Africa 108 of 1996

² [HLP report.pdf \(parliament.gov.za\)](#)

³ Security of Property Rights in South Africa – A Critical Response to Expropriation Without Compensation, FMF, 2020

[2.11] *That the Bill and/or an amendment to section 25 to allow EWC will harm agricultural production and food security, as well as future investment and other sectors of the economy;*

[2.12] *That there is a need for policy coherence and a proper legislative framework for land reform/redistribution, that excludes EWC, and within the existing ambit and framework of section 25 of the Constitution;*

[2.13] *That tenure reform laws provide inadequate legal protection and need to be further developed to give effect to section 25 of the Constitution;*

[2.14] *That there remains a need for secure informal land rights in both urban and rural areas (including redistributed and restored land);*

[2.15] *That there remains a continued, urgent need for a national, full-scale and accurate land audit; and*

[2.16] *That a special purpose vehicle (SPV) must be established to extend property rights to all South Africans effectively within the parameters of the existing framework of section 25 of the Constitution.*

[3] BACKGROUND: EXISTING CONSTITUTIONAL FRAMEWORK & THE EXPROPRIATION BILL

BACKGROUND

[3.1] The land reform debate in South Africa has always been not only controversial but also contentious. In February 2018 Parliament of South Africa committed to the idea of adopting an amendment of the Constitution that would allow government to expropriate private property without being required to pay compensation.

[3.2] The above signaled an unambiguous government intention to pursue a policy of expropriation of private property without compensation that might include, and indeed require, an amendment to section 25 of the Constitution.

[3.3] This process ultimately resulted in the publication of the draft Expropriation Bill (2018), the draft Constitution Eighteenth Amendment Bill (2019) as well as the Expropriation Bill 23-2020 – which forms the basis for this submission.

[3.4] The Expropriation Bill was introduced, *inter alia*, to provide for the expropriation of property for a public purpose or in the public interest; to provide for certain instances where expropriation with **nil compensation may be appropriate** in the public interest and to provide for matters connected therewith.

[3.5] The CFRP regards this question as being of central importance to the future of South Africa - not only with regard to the essential requirement for a successful process of land reform, but also for the future of property rights and hence the future prospects for the economy, as well as for the future of race relations in South Africa. To expand on this:

[3.5.1] Freely held title and property -specifically the security of private property and ownership – is a cornerstone of almost all the economies in the world. Diluting the security of ownership will further weaken South Africa’s economy and diminish the State’s ability to effect a more equal distribution of wealth; and

[3.5.2] EWC is an abstract and failed socialist goal that cannot be implemented without ruining South Africa’s economy.

EXISTING CONSTITUTIONAL FRAMEWORK & THE EXPROPRIATION BILL

[3.6] Existing Constitutional Framework

[A] Republic of South Africa

1. *The Republic of South Africa is one, sovereign, democratic state founded on the following values:*

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

[B] Supremacy of Constitution

2. *This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.*

[C] Property

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.

(4) For the purposes of this section—

- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and*
- (b) property is not limited to land.*

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results Chapter 2: Bill of Rights 11 of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6)

[D] Just administrative action

33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
- (c) promote an efficient administration.*

[E] Limitation of rights

36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.*

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[F] Interpretation of Bill of Rights

39(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

[3.7] The Expropriation Bill

[3.7.1] The Bill makes provision for a number of matters related to expropriation, including that it will be enacted to ‘enable expropriation in accordance with the Constitution’.

[3.7.2] The Foundation submits that, among other areas, the most problematic area of the Bill is presented by section 12(3) regarding the determination of compensation where expropriation takes place. The section determines that (underlining own emphasis):

It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to—

(a) where the land is not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;

(b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;

(c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;

(d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and

(e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property.

[3.7.3] Section 12(4) of the Bill also stipulates that:

When a court or arbitrator determines the amount of compensation in terms of section 23 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances.

[3.8] The CFR wishes to point out a number of **specific** issues regarding the Expropriation Bill that must also be considered against the Foundation's **broader** submissions against EWC as set out in the rest of this document:

[3.8.1] The CFR reiterates that the Bill, insofar as it seeks to allow for EWC, is unconstitutional and should be abandoned together with all initiatives and actions aimed at undermining section 25 of the Constitution that seek to allow expropriation without compensation (EWC);

[3.8.2] The CFR is concerned about the vagueness of section 12(3) of the Bill – It indicates that it may be just and equitable for 'nil' compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including **but not limited to** the four examples listed in 12(3)(a) – (e). The words 'but not limited to' is cause for concern as it indicates that EWC may also be utilized in other circumstances, thus extending beyond those envisaged in section 12(3);

[3.8.3] It is trite that land invasions are on the increase in South Africa and constitute an endemic problem affecting municipalities and metros across the country, particularly in the major metros which are witnessing growing levels of urbanization. The Foundation is concerned about section 12(3) of the Bill as it has the potential to provide impetus to this phenomenon – particularly against the backdrop of increasing populist statements calling for land to be 'taken' and invaded illegally.⁴ It is submitted that the Bill would, effectively, contribute to further erosion of the rule of law and public order in South Africa;

[3.8.4] The CFR submits further that the wording of the Bill, in numerous places, is vague and subject, if passed, to abuse and multiple interpretations to different expropriating authorities – an example of this vagueness can be found in section 12(3)(c) of the Bill, relating to land which has been 'abandoned' by an owner who 'is failing to exercise control over it.' Who will determine this, and using which parameters? Certainly this creates the possibility that different officials will most likely interpret this provision to have different meanings which leads to legal uncertainty rendering it incompatible with section 1 of the Constitution, because a core element of the rule of law is legal certainty. A similar example can be found in section 12(3)(b) of the Bill - which seems to imply that one organ of state should be empowered to expropriate land held by another organ of state. If so, it is illogical, because all organs of state represent the same legal subject: the state. The only difference lies in the authority of the respective organs of state to administer the state property concerned.

[3.8.5] The CFR supports the view that the notion of indirect custodial takings under the Bill will be hugely problematic, considering the Bill's definition of expropriation.⁶ Further to this:

⁴ <https://www.thesouthafrican.com/news/malema-makes-fresh-calls-for-citizens-to-invade-land/>

⁵ [Malema's calls for land occupation could lead to anarchy, NPA tells court \(dispatchlive.co.za\)](https://www.dispatchlive.co.za/news/malema-calls-for-land-occupation-could-lead-to-anarchy-npa-tells-court/)

⁶ Dr Anthea Jeffrey, Expropriation without compensation without amending the Constitution, Institute of Race Relations, 2020

“It (the Bill) is likely to allow ‘nil’ compensation for a host of ‘indirect’ expropriations – ones in which the state does not take ownership, but people nevertheless suffer major losses. The difference between ‘direct’ and ‘indirect’ expropriation needs to be unpacked. A ‘direct’ expropriation arises where the state takes ownership of property. An ‘indirect’ expropriation does not involve the acquisition of ownership by the state, and could take the form of either a ‘custodial’ taking or a ‘regulatory’ expropriation. If no compensation need be paid for custodial takings, this will encourage the state to take custodianship of all rural land, as the Preservation and Development of Agricultural Land Framework Bill of 2014 envisaged.”⁷

[3.8.6] The CFR further supports the view that the notion of indirect regulatory takings under the Bill will be hugely problematic, similarly, considering the Bill’s definition of expropriation.⁸ Further to this:

“Under the bill’s definition of ‘expropriation’ regulatory takings would not be considered as expropriations. Regulatory takings are likely to extend beyond land as both the Bill and section 25 of the Constitution define property as ‘not limited to land’.”⁹

The CFR is concerned that the above could suggest any form of property – from land, a liquor license, shares, pension funds or mining rights.¹⁰

[3.8.7] Lastly on this point, the CFR is similarly concerned about a number of other provisions envisaged in the Bill, aside from the Foundation’s main contention against EWC:

[3.8.7.1] Time allocations for expropriation in the Bill were not sufficient for consultation between the state, land owners, communal groups and those who have unregistered rights to the land - such as farm labourers and people living in informal settlements;

[3.8.7.2] In terms of the Bill expropriation is separate from the compensation process – Consequently if an owner chooses to dispute the compensation (if same is not expropriated at ‘nil’ compensation) it does not stop the process of expropriation from going ahead administratively;

[3.8.7.3] The state could use its expropriation powers in terms of the Bill arbitrarily against the interests of not only ‘poor’ people but also most South Africans in general, who will have to eventually litigate against the government if they dispute any stage, procedure or compensation of the expropriation process; and

[3.8.7.4] The CFR is concerned about the Bill introducing the concept of ‘urgent expropriation’ and the vagueness thereof in the Bill – who decides this, and measured against which parameters?

[4] THE IMPORTANCE OF SECURE PROPERTY RIGHTS & LAND TENURE

⁷ *Ibid.*

⁸ Dr Anthea Jeffrey, *Expropriation without compensation without amending the Constitution*, Institute of Race Relations, 2020

⁹ *Ibid.*

¹⁰ See *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, environmental Affairs and Tourism, Eastern Cape & Others CCT/216/14 [2015]*

[4.1] Private property rights are absolutely essential for a society to flourish – especially in a constitutional democracy, and where the Rule of law constitutes one of the core pillars of such a democracy.

[4.2] Where property rights are secure, there is more incentive to spend hours investing labor, knowing that the fruits of the labour, and investment, will not be in jeopardy, at risk or arbitrarily taken away – especially without compensation.

[4.3] Ownership must be protected to encourage the investment of labour - an economic decision that benefits the productive output of specifically the agricultural sector but also, ultimately, the nation.

[4.4] The functional significance of clearly defined and enforced private property rights for the economic calculation of alternative investment opportunities cannot be overstated - clearly defined and enforced private property rights establish a clear understanding of the institutional basis for exchange which in turn allow monetary prices and exchange relationships to be formed on the market.¹¹

[4.5] Monetary prices also allow a person to compare and contrast prospective allocations of scarce resources, guided by profit and loss information, leading to adjustments to resource use, market efficiencies and increased productivity.

[4.6] Private property rights are also crucially important as a basis for economic development and sustainability. The reason for this is four-fold:

[4.6.1] *Recognized private property rights provide the legal certainty necessary for individuals to commit resources to ventures:* The threat of confiscation, by either private individuals or public officials, undermines confidence in market activity and limits investment possibilities;

[4.6.2] *Clear property rights tend to make decision makers pay close attention to resource use and the discounted value of the future employment of scarce resources:* Absent private property rights and economic actors will tend to be short-sighted in their decision making and not conserve resources over time;

[4.6.3] *Property rights are the basis of economic exchange:* The extension of ownership to capital goods provides the basis for the development of financial markets that are essential for economic growth and development; and

[4.6.4] *Secure private property rights form the basis for limited and civilized government:* The elimination of arbitrary confiscation and the establishment of regular taxation at announced rates enables merchants to calculate the present value of investment decisions and pass judgment on alternative allocations of capital.¹²

¹¹ Peter Boettke, Ph.D., Professor of Economics and Philosophy, George Mason University, [Virginia Institute for Public Policy](#)

¹² *ibid.*

[4.7] Secure property rights are also crucial as a pillar to effective Rule of Law. In this regard the Foundation wishes to point to the annual *Index of Economic Freedom*¹³ published by *The Wall Street Journal* and *The Heritage Foundation*.

[4.8] The above Index analyzes the relationship between economic freedom and prosperity across the world. Of the 186 countries analyzed each year, the data point to the same conclusion: Countries with the most economic freedom also have higher rates of long-term economic growth and their citizens are better off - at all income levels.

[4.9] Most crucially, the Index uses *property rights* as one of 12 key measurements of a country's economic freedom. The data indicates that improved scores in property rights, along with government integrity and judicial effectiveness -together constituting "the rule of law" - are associated with improved economic performance and improvement in these components is strongly associated with greater *per capita* gross domestic product (GDP).

[4.10] The Index ranked South Africa at number 106 (out of 186) in 2020, with the following indication on property rights and land:

"Property rights are relatively well protected, and contracts are generally secure, but economic growth and food security are threatened by a highly charged land reform debate and proposals to redistribute land"¹⁴

[4.11] Considering the above, the importance of secure property rights is not just a concept on its own – it is a key pillar central to the rule of law. One of the founding provisions of South Africa's constitution is *supremacy of the Constitution and the Rule of Law*.¹⁵

[4.12] The CFR is of the view that if the Amendment Bill is passed in its current format – thus allowing for EWC – Rule of Law in South Africa, as a founding provision of our democracy and the Constitution, will effectively fall away.

[4.13] The CFR firmly supports the view, and submits, that one of the determining factors of the prosperity of a country is the respect and protection it accords to the property rights of its citizens. Property rights allow people to be entrepreneurial and enterprise allows people to create wealth and prosper. A crucial component to this is security of property that allows people to pursue their enterprise. A farmer, for instance, would not grow crops, or further develop his land, if he/she knows that his/her land faces the threat of being seized by the government. A businessman/woman would not expand his/her business if he/she perceives a credible threat of his business being taken over by the state.¹⁶

[4.14] Individuals would not undertake risks, or make investments in land improvements, if they feel that their ownership can be challenged.¹⁷ In the absence of a secure system of property rights, enterprise is throttled and the CFR submits that this will be one of the aftershocks to enterprise in South Africa if the Amendment Bill is passed and EWC is allowed.

¹³ <https://www.heritage.org/index/>

¹⁴ <https://www.heritage.org/index/country/southafrica?version=719>

¹⁵ Section 1(c) of the Constitution

¹⁶ The India Property Rights Alliance, [Importance Of Property Rights | India Property Rights](#)

¹⁷ *Ibid.*

[4.15] Considering the above, the CFCR respectfully submits:

[4.15.1] That South Africa should not, **at any stage**, move towards a scenario where EWC becomes law -

[4.15.2] That South Africa **now in particular**, with its weakened economy coupled to the devastating economic effects of the Covid-19 pandemic and its aftermath, cannot afford a scenario where EWC becomes law -

as EWC in either of the above scenarios will result in further political uncertainty and strongly deter any investment in South Africa as investors might fear that they might not be in a position to enjoy the various gains accorded to their investment expenditure.

[4.16] The CFCR finds support for the above assertion considering South Africa's rank on the World Economic Forum's *Global Competitiveness Index*: South Africa fell 14 places from 47th position for the 2016 – 2017 period to the 61st position for the 2017 - 2018 period. One of the main reasons cited for this was that:

“Political uncertainty has decreased the confidence of South African business leaders.”¹⁸

[4.17] In summary on this particular point the CFCR submits that the proposed Bill, and the principle of EWC, is fundamentally anti-democratic, rooted in obsolete theoretical and dogmatic socialism, anti-constitutional and undermines the basic tenets of South Africa's democracy: Protected property rights stand central to South Africa's constitutional framework and that is why it is entrenched in the Bill of Rights in section 25 –

“The fact that section 25 was eventually included in the Constitution is an indication that the negotiators intended to protect property rights more effectively than they are protected by normal private law and other mechanisms.”¹⁹

[5] COMPENSATION & PROPERTY RIGHTS: BEST CONSTITUTIONAL PRACTICE

[5.1] According to van Staden (commenting on the draft Constitution Eighteenth Amendment Bill):

“The Amendment Bill does not, and does not purport to, abolish property rights – it simply allows for the possibility of compensation being ‘nil’ – meaning nothing – and bestows this discretion in part, on Parliament. In other words, protection for property rights is being weakened.”²⁰

[5.2] Considering the above, coupled to the severe ramifications of EWC, the CFCR submits that cognizance must be taken of constitutional best practice in other jurisdictions open and democratic societies when the Expropriation Bill is evaluated as well as the question of compensation, expropriation and/or EWC:

¹⁸ [The Global Competitiveness Report 2018 - Reports - World Economic Forum \(weforum.org\)](https://www.weforum.org/reports/global-competitiveness-report-2018)

¹⁹ P Badenhorst & R Malherbe: The constitutionality of the Mineral Development Draft Bill 2000 (part 2), *Journal of South African Law* 765 (2001).

²⁰ Property Rights and the Basic Structure of the Constitution: The Case of the Draft Constitution Eighteenth Amendment Bill, *Pretoria Student Law Review*, 2020, 14(2)

[5.2.1] **MOZAMBIQUE**

Article 82(2) of the Constitution of Mozambique provides that ‘fair compensation’ is a requirement when government expropriates property.

[5.2.2] **ESWATINI**

Section 19(2)(b)(i) of the Constitution of Eswatini requires that any compulsory taking of property must be accompanied by ‘the prompt payment of fair and adequate compensation.’

[5.2.3] **LESOTHO**

Section 17(1)(c) of the Constitution of Lesotho requires law to make provision for ‘prompt payment of full compensation’ upon the compulsory acquisition of property.

[5.2.4] **BOTSWANA**

Section 8(1)(b)(i) of the Constitution of Botswana provides that law must make provision for the ‘prompt payment of adequate compensation’ upon compulsory acquisition.

[5.2.5] **NAMIBIA**

Article 16(2) of the Constitution of Namibia provides that ‘just compensation’ must be paid upon expropriation in accordance with law.

[5.2.6] **KENYA**

Section 3(b)(i) of the Kenyan Constitution does not allow acquisition of property by government unless it ‘is for a public purpose or in the public interest and is carried out in accordance with the Constitution and any Act of Parliament that requires prompt payment in full, of just compensation to the person.’

[5.2.7] **UNITED STATES OF AMERICA**

The Fifth Amendment to the Constitution of the United States provides that private property shall not ‘be taken for public use without just compensation.’

[5.3] Van Staden also points out the following important factor:

“In those countries that do not have constitutional guarantees of compensation, like **Canada** or the **United Kingdom**, the legislation that provides for expropriation itself guarantees compensation. For example, section 25(1) of the Canadian Expropriation Act of 1985 contains a provision titled ‘right to compensation’ and obliges government to pay compensation to the ‘owner or holder of an estate, interest or right in the land to the extent of their expropriated interest or right.’ In the United Kingdom section 7 of the Compulsory Purchase Act of 1965

provides that when compensation is determined for expropriated land the value of the land and the damage done to the land in the course of the expropriation must be factored in.”²¹

[5.4] The CFR submits that expropriation cannot take place without compensation (which effectively amounts to nothing more than ‘confiscation’): Compensation, in the case of expropriation, is necessary as it ensures that the individual who has been forced by law to contribute property to some common improvement is not wiped out in the process.²²

[5.5] Also, and crucially, the compensation-requirement assures that the state’s option to compensate can never be exercised at a ‘zero’ price but only at fair market value. This, in turn, ensures that no one gets hurt and any social improvements remain. ²³

[5.6] Adding to the above, and for balance but without elaborating into a deeper analysis of that country, the Foundation wishes to point to the situation in Zimbabwe where EWC was allowed and pursued: Section 72(3)(a) of the Zimbabwean Constitution provides that ‘no compensation is payable where agricultural land is expropriated, except for improvements.’ The CFR respectfully submits that similar examples of this can be gleaned from the situation in Venezuela where EWC was pursued.

[5.7] The CFR also wishes to point out that the payment of compensation, where nationalization, expropriation or acquisition takes place, must follow accepted customary international law, norms and standards:

[5.7.1] ***The Resolution on Permanent Sovereignty Over Natural Resources***²⁴ determines that:

“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.”^{25 26}

[5.7.2] ***The Charter of Economic Rights and Duties of States Resolution***²⁷ 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.”

[5.8] The ***European Court of Human Rights*** (ECHR) has also held that expropriation without market-related compensation falls short of international human rights standards. In the matter of

²¹ Property Rights and the Basic Structure of the Constitution: The Case of the Draft Constitution Eighteenth Amendment Bill, Pretoria Student Law Review, 2020, 14(2)

²² RA Epstein ‘The common law foundations of the Takings Clause: The disconnect between public and private law’ (2014) 30 *Touro Law Review* 274

²³ *Ibid.*

²⁴ United Nations, 1803 (XVII) of 1962

²⁵ International Court of Justice, *Texas Overseas Petroleum v Libya* 1979 53 ILR 487

²⁶ See further *State of Kuwait v The American Independent Oil Company* 1982 21 ILM 976

²⁷ United Nations, 3281 (XXIX) of 1974

*Pincova and Pinc v Czech Republic*²⁸ the Court held that any measure which interferes with the right to peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights.

[5.9] The applicants in the *Pincova*-matter were Czech nationals whose property (private residence, barn and cowshed) was expropriated and were reimbursed the purchase price they paid to the State in 1967 – representing more or less 1/50th of their home's market value at the time (2002). The ECHR held that a person deprived of his property must in principle obtain compensation "reasonably related to its value" and even though "legitimate objectives of public interest may call for less reimbursement of the full market value."²⁹

[5.10] In closing on this issue the CFR submits it is clear that EWC is an unsound concept and practice completely out of keep with, and contrary to, established international constitutional best practice, customary law, norms and standards.

[6] LEGAL IMPLICATIONS OF THE EXPROPRIATION BILL (OR/AND AN AMENDMENT TO SECTION 25) TO ALLOW EWC

[6.1] Breach and limitation of rights in terms of section 36 of the Constitution:

If one replaces 'just and equitable compensation' in terms of section 25(2) of the Constitution with the Bill that provides for EWC (making provision for 'nil' compensation) the Bill is a breach and limitation of the existing right to receive compensation for property that has been expropriated.

The limitation clause states that in limiting any rights, such limitation is permitted only when it is reasonable and justifiable in an open, democratic, society that is based on human dignity, equality and freedom. In this sense the Foundation supports the following view:

"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."³⁰

[6.2] Erosion of South Africa's foundational values and Rule of Law in South Africa:

Should the Bill allow for EWC it infringes upon the foundational values of the Constitution, which establish South Africa as a nation based on the Rule of Law. Taking away the just and equitable requirement detracts from the principles of legality, which undergird the Rule of Law.

[6.3] EWC runs contrary to accepted customary international law, norms, standards and best constitutional practice and breaches section 39 of the Constitution:

As argued above, EWC runs contrary to established international legal norms, standards and constitutional best practice. This could constitute a breach in terms of section 39 of the Constitution which stipulates that:

²⁸ Application No 36548/97 2002 (3) ECHR 712

²⁹ *Ibid.*

³⁰ Currie and De Waal, *The Bill of Rights Handbook*, 5th Ed

When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

[7] SUMMARY & CONCLUSION

SUMMARY

[7.1] The CFR's position is that land reform and the expansion of wealth to all South Africans are of the utmost importance.

[7.2] Together with numerous respected jurists, including the late Arthur Chaskalson CJ, and the High Level Panel, the CFR believes that EWC is not needed in general or as suggested by the Expropriation Bill. It is also not necessary to amend section 25 of the Constitution to effect land reform and extend access to property to all South Africans.

There are a number of reasons for this view:

[7.2.1] Contrary to the view that EWC is needed to speed up land reform in South Africa, current policy instruments - including the willing seller policy - and other provisions of section 25 of the Constitution have not been the main factors hindering effective land reform. According to the High Level Panel Report, the failure of land reform thus far may instead be ascribed primarily to the inefficiency of the government departments involved and to corruption;

[7.2.2] The CFR submits that the present wording of section 25 and a proper legislative framework which does not allow EWC can, and should, be used to speed up the land reform process and extend access to property to all South Africans;

[7.2.3] The CFR believes that EWC, the Expropriation Bill (and possibly an amendment of section 25 to allow EWC) would have extremely negative political implications for the country - including political, economic and social instability that could all but destroy the national accord expressed in the constitutional texts of 1993 and 1996;

[7.2.4] The CFR believes that EWC, the Expropriation Bill (and possibly an amendment of section 25 to allow EWC) will harm agricultural production and food security as well as future investment and other sectors of the country's already weakened economy – which now stands aggravated by the devastating effects and aftermath of the Covid-19 pandemic.

[7.3] In addition, we would like to take the opportunity to make certain general remarks, pertaining to agricultural land reform and urban land reform and in light of EWC as envisaged in the Bill:

[7.3.1] The CFR believes that expropriation should be the last option that the State should consider in achieving effective agricultural land reform, as millions of hectares of government-owned land are available for redistribution and 20 000 commercial farms are up for sale;

[7.3.2] The average age of commercial farmers is over 60. Thousands of farmers are leaving South Africa because of farm murders, recurrent droughts and uncertainty caused by land reform and the ill-considered drive for EWC. Some of our best young farmers are emigrating to countries where their skills are eagerly sought. The governing party's real challenge may in future be to keep farmers - of all races - with proven food-producing abilities on the land;

[7.3.3] There are other promising approaches to land reform. Organised agriculture has repeatedly - but without any effective response - made practical proposals for the development of a prosperous black agricultural sector, and land reform schemes in the Western Cape have met with considerable success;

[7.3.4] Putting millions of new farmers onto small farms that they do not own is not the solution to South Africa's economic or agricultural problems. Agriculture contributes only 2.7% to GDP and more than 75% of all our food is produced by approximately 100 mega-farms. According to a World Economic Forum report in 2015, just 3% of South Africa's farmers produce 95% of the country's formal sector food. The other 5% is produced by 220 000 emerging farmers and two million subsistence farmers;

[7.3.5] The acquisition of suitable urban land for housing should be the primary objective of urban land reform efforts, as there is enormous demand for urban land to house the millions of people who have poured into cities in recent years; and

[7.3.6] Government should also consider the adoption of legislation to enable the fast-tracking of the provision of title deeds to the 7.5 million black South Africans who own their own homes. It is estimated that the value currently locked up in these homes may be approximately R1.5 trillion. This is five times the value of all the agricultural land in South Africa.

CONCLUSION

[7.4] Our strong views in this regard do not mean that we support the status *quo* on property rights and land reform. The CFR's position is that land reform and the increase of access to property to all South Africans is of the utmost importance and needs to be addressed urgently and effectively.

[7.5] The CFR submits that the Expropriation Bill is unconstitutional and should be abandoned together with all initiatives and actions aimed at amending section 25 of the Constitution that seeks to allow expropriation without compensation (EWC).

[7.6] The present formulation of section 25 constitutes a proper legislative framework for real and workable land reform and should be used to speed up the land reform process and improve access to property to all through legislative processes disallowing EWC.

[7.7] The CFCR thanks the Portfolio Committee for the opportunity to partake in this process and the Centre remains at the Committee's disposal to assist herein – the CFCR would specifically welcome the opportunity to make verbal presentations, if invited to do so.

Most Respectfully,



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