

Ad Hoc Committee on section 25 meets to discuss draft wording

On the 6 and 7 November the Ad Hoc Committee on amending section 25 of the Constitution hosted a dialogue facilitated by former Judge Johann van der Westhuizen. The dialogue appeared to kick off on a difficult note as there was a great deal of debate regarding the scope and mandate of the committee. The debate mostly ranged about whether or not the committee had the mandate to deliberate on the merits of amending the Constitution or whether the committee merely had the task of formulating draft wording for an amendment. In the end, the committee affirmed that its limited mandate was to deliberate on wording which would "make explicit what is implicit" in the Constitution.

Parliament's legal adviser presented two proposals to the house whilst an EFF member of Parliament presented a third option. The legal adviser's proposals sought to make a distinction between all property and land by including an express provision that it may be just and equitable for the latter to be expropriated at no compensation. The first proposals recommend that a proviso be added to section 25 (2) (b) which reads as follows:

Option 1:

"25 (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;

provided that a court may determine that no compensation is payable in the event of expropriation of land for the purposes of land reform."

The second proposal seeks to achieve a similar outcome but entails the insertion of a new subsection. The proposed insertion reads as follows:

"(4A) Notwithstanding the requirement for compensation contemplated in section 25 (2), (3) and (4), land may be expropriated without the payment of any compensation as a legitimate option for land reform in order to redress the results of past racial discrimination."

Although the proposals would still be debated on by the committee in a closed session, inputs were heard from experts and affected parties. A constitutional property law expert from the North-West University proposed that 'nil compensation' be used as opposed to 'no compensation' as this would still allow an expropriated owner the ability to argue in favour of compensation'. Stated differently, if the proposal is accepted that 'no compensation' is payable for land, a land owner or bond holder will have no standing to argue that it would be just and equitable to pay some compensation under the circumstances. Alternative wording aimed at 'nil compensation' would allow R0 to be paid if the circumstances warranted it, however it would still leave the door open for an affected party to argue that R0 compensation is not just and equitable in the circumstances.

Finally, the EFF MP proposed wording that would amount to all property being eligible for expropriation without compensation but with the added rider that it must remain the property of the state as custodian. This amendment differs from that proposed by Parliament's legal advisor as it amounts to the nationalisation of land.

The committee will meet again to discuss the proposals and resolved to draft an Amendment Bill in December 2019. However, so as to allow the public an opportunity to comment on the Bill, it was proposed that public comments on the Bill only be sought in January 2020 after the festive period.